

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

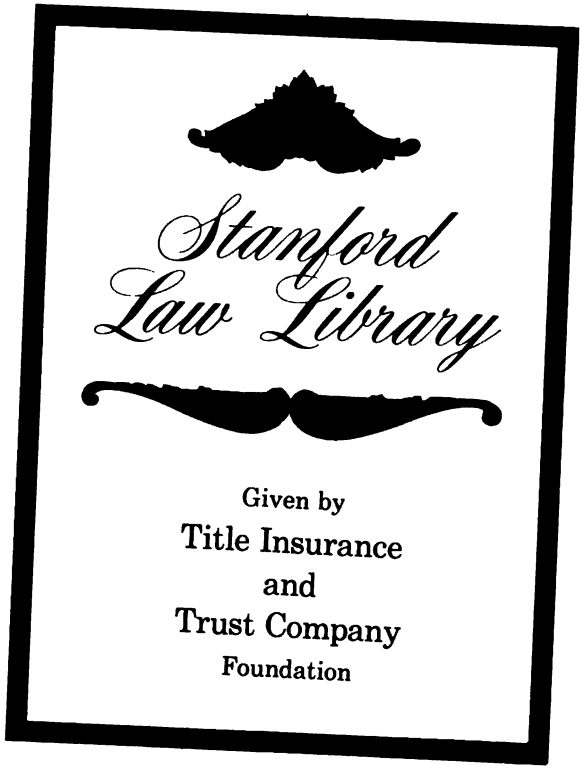
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`



Jos. M. Mitchell Co.
Law Books
Philadelphia 43, Pa.

AB
ACP
1N 19
v. 1

THE

FIRST PART

OF THE

Institutes of the Laws of England;

OR, A

COMMENTARY UPON LITTLETON.

NOT THE NAME OF THE AUTHOR ONLY, BUT OF THE LAW ITSELF.

Quid te vana juvant miseræ ludibria chartæ?
Hoc lege, quod possis dicere jure,—meum est. MART.

Major hæreditas venit unicuique nostrum à jure et legibus, quàm à parentibus. CICERO.

HÆC EGO GRANDÆVUS POSUI TIBI, CANDIDE LECTOR,

Authore EDWARDO COKE, Milite.

REVISED AND CORRECTED,

With Additions of NOTES, REFERENCES, and PROPER TABLES,

By FRANCIS HARGRAVE and CHARLES BUTLER, Esqrs. of Lincoln's Inn,

INCLUDING ALSO

The NOTES of Lord Chief Justice HALE and Lord Chancellor NOTTINGHAM;

AND

An ANALYSIS OF LITTLETON, written by an unknown Hand in 1658-9.

By CHARLES BUTLER ESQ. one of His Majesty's Counsel.

FIRST AMERICAN,

From the Nineteenth London Edition, corrected.

IN TWO VOLUMES.

VOL. I.

PHILADELPHIA:

ROBERT H. SMALL, MINOR STREET.

1853.

KITE & WALTON, PRINTERS.

ADVERTISEMENT

TO THE

NINETEENTH EDITION.

THIS Edition of Sir EDWARD COKE'S Commentary upon Littleton is printed from the last Edition by Mr. BUTLER, with the corrections and insertions in Mr. HARGRAVE'S Notes from his own copy; and also with some additional *Notes by Mr.* BUTLER.

ADVERTISEMENT.

A SEVENTEENTH EDITION of this Work being called for, the latter Editor has endeavoured to render it as perfect as it was in his power. He is indebted to Mr. THOMAS CANNING, of Lincoln's Inn, for the elaborate Index to the Notes, which accompanies the present Edition, and several observations, interspersed in the additions to the notes: and to Mr. RITSO'S *Introduction to the Science of the Law*, for many useful remarks, both on the literal accuracy and learning of the text.

It appearing to be the universal wish of the Profession that the Notes should be printed under the Text, and the whole Work comprised in Two Volumes, this has been effected in the present Edition; but with a necessary sacrifice of the ancient Norman-French of the Text of Littleton. The Editor submitted the more easily to this sacrifice, as it enabled him to adopt a regular system of paging and reference, the want of which, in the former octavo editions, was much felt, and generally complained of; and as Lord Coke's version has long been considered an authentic representation of the text.

Lincoln's-Inn.

This mark ☞ *is placed in the text, at the beginning of each half page or folio in the Thirteenth Edition, the paging of which is always preserved in the margin, and noted at the top of every page of the present edition.*

MR. HARGRAVE'S

FIRST ADDRESS TO THE PUBLIC.

THE very high and advanced price, at which the *twelfth* edition of *Sir Edward Coke's First Institute*, or *Commentary upon Littleton*, has been sold for a long time past, is a proof that a *new* edition is now wanted in order to supply the Public demand. This of itself may be thought a sufficient reason for offering a *new* edition; but another and more cogent motive concurs in inducing to such a proposal; for, notwithstanding the advantages, which may have been given to the *tenth*, *eleventh*, and *twelfth* editions, there still remains an ample field for further improvements. It is not intended, by this observation, in the least to derogate from the merit of those three editions; of which the *tenth* and *eleventh* are particularly thought by some to deserve commendation, as well on account of the care and industry exerted in correcting the errors of former impressions, as on account of the knowledge and judgment shown in the additional notes and references. But a work like Sir Edward Coke's Commentary, so crowded with references to other books and authorities, will ever leave room for corrections; and being written on a subject so dependant, as the law necessarily is, on the opinions of the time *present*, and so frequently undergoing changes by acts of the legislature, will *continually* call for additions. These considerations may suffice to evince the propriety of attempting a *new* edition; but something further is requisite to recommend *that* now offered to the Public; and therefore the editor will explain the plan on which he proposes to conduct it.

Littleton's Tenures and *Sir Edward Coke's Commentary* will be printed from the *second* edition, that being generally esteemed the most correct one of the Commentary; but it will be occasionally compared with the *first* and *other* editions, *all* of which have been procured for that purpose. Also the text of Littleton will be collated with the *Rohan* edition, which was that preferred by Sir Edward Coke, and a still *earlier* one by *Lettou* and *Mechlinia*, which was printed in the life-time of Littleton, or within a year after his death, and has *never yet* been made use of in any edition of the Commentary.

Commentary. For the use of these two most curious and scarce editions of Littleton, the editor is indebted to the kindness of one, whose name he should think it an honour to be at liberty to mention. The editor is also provided with the curious editions of Littleton by *Pynson* and *Redman*, which are the next in date to the *Rohan* edition. He is possessed too of an edition in 1534 by Rastell, and of *most* of the *other* editions of Littleton, which are very numerous; but these latter, not being of so great authority, will seldom be consulted. It is proper to add, that the editor proposes to give the various readings of *four* or *five* of the earliest editions of Littleton, which has never been attempted before. But no various readings will be given, except where they appear to the editor *substantially* to affect the sense of the author*; and therefore the reader will not find *any* in the *first* section; the difference of the several editions, so far as regards that section, being apparently quite *immaterial*. As to *references*, those in the *first*, *second* and *other* editions of Sir Edward Coke's Commentary before the *tenth*, having been made by Sir Edward Coke himself, will be *wholly* retained, with such corrections only of apparent mistakes as shall occur to the editor. Many of the additional references in the *tenth*, *eleventh*, and *twelfth* editions will also be retained; it being intended only to omit such as the editor shall discover to be plainly foreign to the purpose. The editor is aware, that even some of Sir Edward Coke's own references have been complained of as not pertinent; which, when the prodigious number of them, and the great variety of public and private affairs which commanded his attention through life, are considered, may be accounted for, without any great reflection on his care and accuracy. But the editor would deem it a presumption in

* This may seem not quite consistent with *sometimes* giving the word *Nota* as a various reading; but the reason of it is, that Littleton is thought by Sir Edward Coke to use the word *Nota* in a sense peculiarly significant. See Co. Litt. 22. a. The various readings of Littleton, taken from the edition by *Lettou* and *Mechlinia*, will be distinguished by *L.* and *M.* those from the *Rohan* edition by *Roh.* those from *Pynson's* edition by *P.* and those from *Redman's* edition by *Red.* and if a reading should be taken from any *other* edition, it will be particularly mentioned. In *Redman's* edition there are references to cases in some of the more ancient Year Books, which it was once intended to have given as part of the various readings from Redman; but on re-consideration they do not appear of sufficient consequence to be taken notice of.

in him to *omit any* part of the *original* work; though, in respect to the references, such a liberty is in very numerous instances taken in the *twelfth* edition *; and besides, he would by no means be understood to engage for an examination of *every* reference with the book cited, which is a task far greater than his other avocations will allow him to engage in †. Further, it is proposed by the editor, to give some additional references, particularly to the reports published since the *twelfth* edition; and some notes; but he avoids promising a *great* number of either, lest he should undertake more than he may hereafter be able to accomplish. However, in order to make amends for the smallness of the number of new notes and references ‡, great care shall be taken, in the choice of them: and they shall be so expressed, as clearly to show whether they tend to confirm, to question, to contradict, or to illustrate the doctrine advanced

---

* The editor has not yet found such a liberty taken in any edition, except the *twelfth*; but in *that* the omission of Lord Coke's references is very frequent indeed, and he doubts whether many pages can be found without instances of it. In several pages he finds *twenty* or *thirty* references omitted, and in some *forty* or *fifty*. The truth of this will appear by examining fol. 4. b. and 5. a. of the *twelfth* edition with the same folios in any preceding one. The editor would not be so *early* in making this observation, if it was not with a view to show, how unaccountable it is, that notwithstanding this *suppression* of a great part of the authorities, on which lord Coke founds his opinions, the *twelfth* edition should sell for *six pounds*, whilst the price of some of the more early editions, though they contain the *whole* of the original work, and therefore are *infinitely* more valuable, is scarcely as many *shillings*.

† It is necessary to mention this, lest the *continuation* of those mistaken references by lord Coke, which are to be found in all the former editions, should be imputed to the inattention of the editor of the present edition, and as a negligence not consistent with his engagements to the public. The editor may add, that many of the mistakes are of such a kind, that to correct them, and to refer to the books or authorities intended, would exceed his utmost diligence and power.

‡ At first the editor doubted, whether it would be in his power to give the time necessary for writing *many* notes and references; but this first number of the work, he hopes, will convince his readers, how anxious he is to furnish a great number; and he will exert himself to the utmost in order to continue the work on the same enlarged plan. Having engaged in the undertaking, he is resolved at all events to make great sacrifices, rather than suffer it to languish in his hands.

advanced in the text; a distinction very requisite for the convenience and information of the reader, though in new editions of law-books too frequently neglected. In the *eleventh* and *twelfth* editions, the *new* references are not distinguished from Sir Edward Coke's; but in this present edition it is thought proper to acquaint the reader, which belong to him and which to his respective editors; and for that purpose, the additional references taken from the *tenth*, *eleventh*, and *twelfth* editions will be enclosed between *parentheses;* and those, with the notes by the editor of this edition, with the various readings of Littleton, will be referred to by figures, and placed at the bottom of the page. Such a discrimination is a justice due to those from whom the references proceed, particularly to Sir Edward Coke; and, at the same time, must be a satisfaction to the reader.—The *eleventh* and *twelfth* editions contain some notes and additions, showing the alterations in the laws since the time of Sir Edward Coke, which were printed separately at the end of the work. This has been found inconvenient; and therefore, in the present edition, they will be placed in the margin of the book where they respectively apply; except such of them as the editor shall find improper to be retained, or such as shall consist of extracts from acts of parliament, which, being too long for marginal insertion, will be omitted; and it is hoped, that the omission of those extracts will not be disapproved of, as a short reference to the statutes themselves, with an intimation that they have altered the law, will be substituted, which will equally answer the purpose of apprizing the reader *.—In all the former editions, the French text of Littleton's Tenures, and the whole of Sir Edward Coke's Commentary, were printed in the *black* letter; but in this edition only *Roman* and *Italic* letters will be used, which, it is presumed, will be both an agreeable and useful alteration in the printing; the *black* letter being generally deemed less pleasing, and more fatiguing to the sight, than either of the others.—In respect to the *Index* to the First Institute, it is at present intended that it shall be the same as in the *eleventh* and *twelfth* editions; the editor thinking that having

* The notes added in the 11th and 12th editions, exclusive of extracts from acts of parliaments, are so *few*, that all put together scarcely amount to so much as the additional matter given by the editor of the present edition in his first number: and he is now doubtful, whether he shall retain any of them in their original form. However, if he should, they shall be distinguished in the manner above mentioned.

having already undertaken so much, it would be imprudent to pledge himself still further, by entering into any engagement for making additions to the Index.

To the *ninth* and *subsequent* editions were added Sir Edward Coke's *Readings* on the *Statute of Fines*, and on *Bail* and *Main-prize;* to the *tenth, eleventh* and *twelfth* was added his *Copyholder;* and to the latter the *Treatise* of the *Old Tenures* was also added. All these tracts will be given in the present edition; but with this difference, that the *Reading* on the *Statute of Fines* will be in *English*, and the *Treatise* of *Old Tenures*, instead of being in French only, will be accompanied with the *Old English* translation, as printed at the end of the *first* edition of the *Terms of the Law.* The *original French* of the *Old Tenures* is continued on account of the great antiquity of the book; but in the printing, the *black* letter will not be used*.

Besides Sir Edward Coke's *Tracts* and the *Old Tenures*, the present edition will have an *Analysis* of *Littleton*, from a manuscript, dated 1658–9, which has never yet been printed. This *Analysis* is a methodical summary of Littleton, containing not only a *general* view of the *whole* work, but also a *particular* one of *each* chapter. It accidentally fell into the hands of the editor. He is not informed who was the author; but it appears to him to be judiciously and ingeniously executed, and worthy of publication; and he hopes that it will not be deemed an improper addition, more especially as it will neither occasion the suppression of any other matter, or increase the price of the work to the purchasers.

To the whole will be prefixed a new *Preface*, by the editor of the present edition. In this Preface, he proposes, in the *first* place, to consider the merit of *Littleton's Tenures* and *Sir Edward Coke's Commentary*, and to point out the excellencies of each; in the *next* place, to give a *particular* account of the several editions of both; and *lastly*, to explain how this will differ from the former editions.

Such is the edition of Sir Edward Coke's First Institute, now submitted as a candidate for the public favour and encouragement; nor shall any exertion within the power of the editor be wanting to deserve.

---

* [*Towards the conclusion of this work it was found advisable wholly to omit the republication of these tracts, being already printed in a separate octavo volume.*]

deserve them. He foresees that *great pains* and labour will be necessary to the effecting a due performance of his engagements, and that *little fame* can be expected from the most successful execution of an undertaking so humble as scarce to exceed that of a *mere editor*. But still he looks forward with pleasure. His veneration for the name of Littleton and Coke; his admiration of their writings; his persuasion that an attentive contemplation of them by the improvement it must produce, will be its own reward; and his zeal to be instrumental in exhibiting them to the public eye, pure, genuine, and undisguised, and with as many advantages as a faithful and industrious editor can bestow; these were the considerations which *chiefly* prompted him to commence the undertaking; and these, he trusts, will continue to animate him till it is completed. If by perseverance and an unremitting ardour, the editor should succeed in his endeavours, he will then have the pleasing satisfaction of reflecting, that his labours have been useful, instructive, and agreeable to himself, and, at the same time, not wholly unprofitable or unacceptable to the community.

FRA. HARGRAVE.

ADDRESS

FROM

MR. HARGRAVE,

ANNOUNCING HIS RELINQUISHMENT OF THIS WORK, &c.

MR. HARGRAVE, the editor of so much of the NEW EDITION of COKE UPON LITTLETON as has been published, at length finds his relinquishment of the undertaking in an unfinished state quite unavoidable. Numerous and severe are the sacrifices, which he has heretofore made in order to accomplish the original proposals in their fullest extent. To this moment he feels the effect of those sacrifices; nor is he likely ever to conquer wholly the disadvantage already incurred from them. But it might be improper and disgusting to enter into particulars upon this head, which in its nature is too personal to the editor to be interesting to others. He will therefore be content with generally declaring, that his situation is become such, as to render him unequal to any longer sustaining the weight of those labours, which he has ever found incident to the work upon the extended plan of annotation adopted by him from the commencement of the edition, though certainly not belonging to it from the very limited professions and terms originally held out to the Public. It is from personal considerations, and in his own defence, that he thus adverts to having passed the bounds of the first undertaking in the actual *execution: because, as* he feels himself open to censure, from those indisposed to yield to indulgent construction, for having done LESS than he promised, he too plainly sees the necessity of striving to soften such censure by the recollection of his having also done MORE. In truth, had he not rashly exceeded the limits first prescribed, by wandering into the wide field of annotation, it is most probable, that the WHOLE of the edition would have been finished long ago, and consequently that the editor would not now have to mortify himself by apologizing for executing only ONE HALF OF IT*.

This

* The Coke upon LITTLETON, exclusive of the Preface and Index, consists of 393 folios, or 786 pages. Mr. HARGRAVE has proceeded in the new edition, and actually published to the end of folio 190 or page 380, which is exactly 13 pages short of one half of the work.

This to be sure is the most favourable point of view for the editor; its tendency being to show, that his excess of zeal to render the edition VALUABLE has been one cause of his finally leaving it IMPERFECT. If it shall be thought proper by others kindly to receive the editor's apology in this form, it will qualify his unhappiness at the painful and trying moment of separation from a very favourite work before its advancement into maturity. Should a less indulgent construction be applied to the editor, it will deeply wound feelings already enough exercised; but from a consciousness of being open to some degree of exception for what rigid observers may style an indefensible abandonment of a work so long promised to be completed, he must in that case kiss the rod, and submit himself to the severity of animadversion with a patient humility.

It is no small consolation to Mr. Hargrave to accompany this recital of his failure in the edition, with information of its having fallen into the hands of a professional gentleman* of such a description as to warrant expecting from him a quick and able execution of the remainder of the undertaking. As Mr. Hargrave understands, his successor is prompted to engage in the work by an extreme partiality for it, and having been in the habit of studying and annotating on the COKE UPON LITTLETON. He also possesses the important advantage of having long practised in the conveyancing line; to which, as Mr. Hargrave can speak from his own experience as a barrister in that branch of the law, a familiarity with the law of real property, and consequently with the writings of LITTLETON and COKE, is peculiarly essential. These and other considerations claim from Mr. Hargrave much beyond a hope, that the depending edition of COKE UPON LITTLETON will gain considerably by change of the editor; and that the new adventurer in this arduous undertaking will stamp the remainder of the edition with much greater value than could be reached by any efforts, however vigorous, from the original editor.

FRA. HARGRAVE.

Boswell-Court, 18 *Jan.* 1785.

* CHARLES BUTLER, of Lincoln's-Inn, Esquire.

MR. BUTLER'S PREFACE

TO THE

THIRTEENTH EDITION.

General Observations on Littleton's Tenures.

THE reputation of LITTLETON'S TREATISE on TENURES is too well established to require any mention of the praises which the most respectable writers of our country have bestowed on it. No work on our laws has been more warmly or generally applauded by them. But some foreign writers have spoken of it in very different terms. At the head of these is Hottoman, who, in his Treatise, "De verbis feudalibus, thus expresses himself: "Stephanus Pasquerius excellenti vir ingenio, et inter "Parisienses causidicos descendi facultate præstans, libellum mihi "Anglicanum Littletonium dedit, quod Feudorum Anglicorum Jura "exponuntur, ita inconditè, absurdè, et inconcinnè scriptum, ut "facilè appareat, verissimum esse, quod Polydorus Virgilius, in "Anglicâ Historiâ, de Jure Anglicano testatus est, stultitiam in eo "libro, cum malitiâ, et calumniandi studio, certare." This passage from *Hottoman is cited* without any disapprobation in the 6th edition of *Struvius's Bibliotheca Juris Selecta*; but in the 8th edition of that work (Jenæ 1756) it is qualified by the words "singularia "sed parum apta sunt, quæ Franciscus Hottomanus profert, &c." Gatzert, in his "Commentatio Juris exotici Historico-Literaria de "Jure communi Angliæ," (Gottingen 1765) gives the following account of Littleton and his works: "Æqualis huic, tempore, ast "doctrinâ famâ et meritis longe superior fuit, immortalitatem nomi- "nis apud posteros, si quis unquam merito consecutus, Thomas "Littleton; a quo juris studium inchoant hodie Angli, plane ut "suum olim, ab edicto Pratoris et XII Tabulis, Romani. Hic "igitur ICtus, absolutis disciplinis academicis jura patria mox cum "plausu in Interiori Templo Londinensi, quæ paulo ante ibidem "didicerat, aliquantum temporis professus, ab Henrico VI. ad "officium primo judicandi in curia Palatii vacatus est. Advocati "deinde

" deinde ac procuratoris regii (king's serjeant) muneri a° 1455 ad-
" motus, judexque porro ambulatorius factus provincialis, (justice of
" assizes) et tandem inter judicantes communium placitorum curiæ
" a° 1466 ab Edoardo IV. relatus, dignus habitus est, qui multum
" ampliori, quam solebat, stipendio odinisque adeo Balnei honori-
" bus a° 1475 donaretur. Vivere desiit a° 1533 *.—Unicum librum
" scripsit, sed qui plurium loco est, si spectas eruditionem et argu-
" mentum. In eo excusset doctrinam juris patrii difficillimam, gra-
" vissimam, usuque quotidiano maxime commendabilem; qualia
" nempe, eo quotuplicia sint feuda Angliæ, quænam eorum jura,
" obligationes, præstationes atque servitia, in usus quidem Ri-
" chardi filii, et aliorum quorundam ad explicanda illis capita ali-
" quot opusculi DE TENURIS ab incerto auctore Edoardi III. ævo
" conscripti. Gallice primo fuit compositus, mox Gallice deinde
" sæpius et Anglice, mox vero Gallice et Latine, typis excusus.
" Viginti quinque servitiorum feudalium genera statuit quæ tribus
" libris, in quos omne opus dispertitur, persecutus est. Titulum hunc
" esse voluit OF TENURES. In anne editiones originariæ a Cokio
" qui a° 1533 ponit dissentiunt, eamque circa a° 1477 non diu post
" inventam typographiæ artem prodiisse, valde vero similiter statu-
" unt Biographi Brit. vol. V. qui cum Nicolsono, p. 233, late etiam
" de argumento imprimis, et divisione libri agunt. Editio duode-
" cima 1788 lucem vidit. Cokius in præfatione sui ad Littletonum
" Commentarii, de quo mox disseram, inter plura quæ auctorem
" concernunt ejusque opus XV. ICtos nominis magni alios appel-
" lat, qui eodem tempore floruerunt. Exhibit præterea imaginem
" Littletonianam. Cæterùm liber ob methodi brevitatem, argumen-
" tandi subtilitatem, atque dictorum ordinem, laudem omnino me-
" retur; sed nec minus fatendum est, adeo sæpissime obscuritati
" bonum hominem studuisse, ut ænigmata legum maluisse, quam
" præcepta tradere videatur. Multa jam immutata esse, plura in-
" veterata atque obsoleta, non urgeo. Interim communis ICtorum
" Anglorum hæc vox est perfectissimum et absolutissimum hoc
" opus esse ex omnibus quæ unquam in ulla scientia humana scrip-
" ta sint quæ unquam proferre potuerit hominis ingenium; non
" intelligere qui culpent. Ita parum abest, quin credant, falli eum
" fuisse nescium !"

The English reader will probably be surprised at these accounts of Littleton. Hottoman has the reputation of great learning, and elegant

* This is a strange mistake, as Littleton died in 1482.

elegant writing; but he has been blamed very generally for the contemptuous language with which he speaks even of the writers of his own civil law.

Gravina, while he mentions his endowments, both natural and acquired, with admiration, censures his abuse of other judicial writers with great severity. Speaking of him, he says, "Non modo in "Accursianis et Bartolinis interpretibus reprehendendis, sed in ipso "Triboniano perpetuo exagitando, collectam totâ vitâ opinionem "verecundiæ atque modestiæ, prorsus amisit." Grav. lib. 1. § 179.

Cujas also was supposed to allude to him in a passage of his works, where having occasion to mention the writers who find fault with the disposition and arrangement of the civil law, he says, "Quam "illi sunt imperitissimi! nam neque quid ars sit sciunt; neque ar- "tem digestorum aut principia certa juris ulla perceperunt unquam; "suaves tamen ad ridendi materiam."

But Hottoman's general disposition to abuse is not the only circumstance by which his virulent censure of Littleton may be accounted for. Full of the doctrines of the feudal laws of his own country, he might expect to find doctrines of a similar nature in Littleton, without adverting that the greatest part of Littleton's work treats of the subordinate and practical part of the laws of England, which, like that of every other country, is in a great degree peculiar to itself, and bears but a remote analogy to those of other countries. It is allowed, that the feudal polity of the different countries of Europe is derived from the same origin; that there is a marked similitude in their principal *institutions*; and a singular uniformity in the history of their rise, perfection, decline, and fall. But the more we go from a view of their general constitutions and governments to a view of their laws and customs, the less this similitude and uniformity are discoverable.

Thus the history of every country where the feudal laws have prevailed, while it presents us, on the one hand, with an account of the many restraints imposed by them upon alienation, and of the many methods which have been taken to make property unalienable, presents us, on the other, with an account of the different arts which have been used to elude those restraints, and to make property free. This is as observable in the law of England, as it is in the law of any other country.

But the mode by which it has been effected in England is peculiar to England. In other countries, where a liberty of alienation, has been

been introduced, it has rested on a kind of compromise with the lord, by paying him a certain fine; and a kind of compromise with the relations of the feudatory, by allowing them a right of redemption, commonly called the "jus retractus." But the steps by which a free alienation of property has obtained ground in England are very different. In England an unlimited freedom of aliening socage and military land was soon allowed; the practice of sub-infeudation was soon abolished; the alienation of lands was restrained by the introduction of conditional fees, and afterwards by the introduction of estates tail; entails from their first establishment were greatly discountenanced by the courts of justice, and they were eluded by the doctrines of discontinuance and warranty. In the course of time, a fine was made a bar to the claims of the issue in tail, and a common recovery to the claims both of the issue and of those in remainder and reversion. Most of these circumstances are peculiar to the History of England. Hence an English reader, who opens the writings of the foreign feudists with an expectation of finding there something applicable to the practical parts of the law of his own country, respecting the alienation of landed property, will be greatly disappointed. He will find the most positive prohibition of aliening the fee without the consent of the lord; he will find very nice and subtle disquisitions of what amounts to an alienation; he will find that in some countries, the lord's consent still continues a favour; that in others it is a right, which the tenant may claim on rendering a certain fine. In short, he will find the works of foreign feudists filled with accounts of the "jus retractus," or "droit de rachat," the "retraite lignager," and the "droit des lods et des ventes;" but he will hardly find the words, or any thing equivalent to the words, conditional fee, estate tail, discontinuance, warranty, fine, or recovery, in the sense in which we use them.

The same may be observed on the doctrine of conditions. According to the strict principles of the feudal law, no conditions could be annexed to a fief, except the implied conditions to which every fief was subject, from the obligation of service on the part of the tenant, and the obligation of protection on the part of the lord. Every fief to which any express or conventionary condition was annexed, was, from that very circumstance, ranked among improper fiefs. But fiefs in England were at all times susceptible of every kind of condition.

It would be easy to pursue these observations through the subsequent chapters of Littleton's Treatise. If even we consider the subject on a more extensive scale, we shall find some circumstances peculiar

peculiar to the English law, which must necessarily occasion a very essential and marked difference between the constitution and forms of the government of England and the constitution and forms of the government of other countries. Such are the universal conversion of allodial lands into fiefs; the total abolition of sub-infeudation; the freedom of alienation of estates in fee-simple; and the limited and dependant situation of our nobility, when contrasted with the situation of the high nobility of foreign countries: all these are peculiar in a great measure to our laws. It follows, that our writers must be silent on many of the topics which fill the immense volumes of foreign feudists; and they from the same circumstance, must be equally silent on many of the subjects which are discussed by our writers. That this is so, will appear to every person conversant with the ancient writers on our laws, who will give a cursory look at the writers on the feudal laws of other countries. Nothing in this respect can be more different than those parts of the writings of Bracton, Britton, Fleta, Littleton, Sir Edward Coke, and Sir William Blackstone, which treat of landed property, and the books of the fiefs, Cujas's Commentary upon them, the various treatises on feudal matters collected in the 10th and 11th volumes of the "Tractatus "Tractatuum *," De Moulin's "Commentarii in priores tres Titulos "Consuetudinis Parisiensis †," or the more modern treatises of Monsieur Germain Antoine Guyot ‡, and Monsieur Hervé §.

These

* The title of this work is, "Oceanus Juris, sive Tractatus Tractatuum Juris *universi, duce et auspice* Gregorio 13, in unum congesti, "a Fr. Zilletti." There are two editions of this work, both printed at Venice; the first in 1548, the second in 1584. The first edition is in 16 tomes generally bound in 12 volumes; the second is in 18 tomes, generally bound in 29 volumes. The arrangement of this work is greatly admired; but it is not a work in great request, even in those countries which are governed by the civil law.

† This is usually the first treatise printed in the general collection of his works. An abridgment of it was published in 1773 by Mr. Henrion de Pensey, under the title of "Traité des Fiefs de du Moulin, Analysé "et Conferé avec les autres Feudistes."

‡ The title of this work is, "Traité des Matieres Feodales, tant pour le "Pays Coutumier que pour celuy du Droit ecrit, avec des Observations. "Par Germain Antoine Guyot." Paris, 1738, and Ann. Suiv. 7 vol. in 4to.

§ "Theorie des Matieres Feodales et Censuelles, ou l'on developpe la "Chaine de ces Matieres, dans un Ordre et sous un Aspect, qui en facilitent l'Intelligence, y repandent de nouvelles Lumieres, et menent a des "Definitions

These observations are offered with a view to account for the contemptuous manner in which the two foreign writers cited above, speak of Littleton. They may also account, in some measure, for a circumstance which has been a matter of some surprize, the total silence of sir Edward Coke on the general doctrine of fiefs. It is obvious, how extremely desirous his lordship is upon every occasion to give the reasons of the doctrines laid down by him; and what forced and sometimes even puerile reasons he assigns for them; yet though so much of our law is supposed to depend upon feudal principles, he never once mentions the feudal law.

"I do marvel many times," says sir Henry Spelman, "that my lord "Coke, adorning our law with so many flowers of antiquity and "foreign learning, hath not (as I suppose) turned aside into this "field, *i. e.* feudal learning, from whence so many roots of our law "have, of old, been taken and transplanted. I wish some worthy "would read them diligently, and show the several heads from "whence those of ours are taken. They beyond the seas are not "only diligent, but very curious in this kind; but we are all for "profit and 'lucrando pane,' taking what we find at market, with-"out inquiring whence it came." But this complaint is open to observation.

There is no doubt but our laws respecting landed property are susceptible of great illustration from a recurrence to the general history and principles of the feudal law. This is evident from the writing of lord chief baron Gilbert, particularly his treatise of Tenures, in which he has very successfully explained, by feudal principles, several of the leading points of the doctrines laid down in the works

---

"Definitions neuves des Contrats de Fiefs, & de Cens. Par Monsieur "Hervé. 1785. Paris, 6 vol. in 8vo." The first volume of this work contains an historical account of the rise, progress, and present state of fiefs in France. In 1756, Monsieur Boquet published one volume of a work, intituled, "Le Droit Public de la France." In his preface to it he promised to continue and complete it in two more volumes, but he is since dead, without having published any part of the continuation; a circumstance greatly to be regretted by the lovers of this kind of learning, as the first volume is executed in a most masterly manner. The English reader will perhaps find it the most interesting and instructive work that has yet appeared on the subject in the French language. If the reader wishes to pursue his researches on the subject, he will find some assistance from a small work printed at Frankfort in 1779, intituled, "Joannes "Adami Koppii Historia Juris Scientiæ Romanæ Feodalis Privatæ ac "Publicæ." 1 vol. 8vo.

works of Littleton and sir Edward Coke, and shown the real grounds of several of their distinctions, which otherwise appear to be merely arbitrary. By this he reduced them to a degree of system, of which till then they did not appear susceptible. His treatise, therefore, cannot be too much recommended to every person who wishes to make himself a complete master of the extensive and various learning contained in the works of those writers. The same may be said of the writings of sir William Blackstone. Much useful information may be derived also from other writers on these subjects.

But the reader, whose aim is to qualify himself for the practice of his profession, cannot be advised to extend his researches upon those subjects very far. The points of feudal learning, which serve to explain or illustrate the jurisprudence of England, are few in number, and may be found in the authors we have mentioned.

It is not impossible but further inquiries might lead to other interesting discoveries. But the knowledge absolutely necessary for every person to possess who is to practise the law with credit to himself and advantage to his clients, is of so very abstruse a nature, and comprehends such a variety of different matters, that the utmost time which the compass of a life allows for the study, is not more than sufficient for the acquisition of that branch of knowledge only; still less will it allow him to enter upon the immense field of foreign feudality. It were greatly to be wished that some gentleman, possessed of sufficient time, talents, and assiduity, would dedicate them to this study. Those who have read the late doctor GILBERT STEWART'S "*View of Society in* Europe, in its Progress from "Rudeness to Refinement," will lament that he did not pursue his researches. From such a writer, a work on this subject might be expected, at once entertaining, interesting, and instructive; but such a work is not to be expected from a practising lawyer. Whatever may be the energies of his mind, his industry, his application and activity, he will soon feel, that to gain an accurate and extensive knowledge of the law, as it is practised in our courts of justice, requires them all. Thus, on the one hand, the student will find an advantage in some degree of research into feudal learning; on the other, he will feel it necessary to bound his researches, and to leave, before he has made any great progress in them, the Book of Fiefs, and its, commentators, for Littleton's Tenures and sir Edward Coke's Commentary*. If

*In the fifteenth edition an attempt is made to continue Mr. Hargrave's inchoate

If it were proper to enter into a further defence of Littleton, it might be done by observing, that it must be a matter of great doubt, whether Hottoman ever saw, or Gatzert more than saw, the work they so severely censure. Hottoman, if he had read it, *might* think it inelegant and absurd; but he *could not* think it malicious, or indicative of a disposition to slander. Gatzert says Littleton specifies twenty-five kinds of feudal services. It is probable, that by services he meant tenures: if he did, it is obvious that he confounded those chapters of Littleton which treat of the nature of the feudal estate, with those chapters which treat of the nature of the feudal tenure: in every other sense the word Services, applied in this manner to Littleton's work, is without a meaning.—Besides, he mentions Latin editions of Littleton, when no edition in that language ever appeared.

In fact, were it not for the general observations to which they naturally give rise, neither the criticism of Hottoman nor that of Gatzert would have been noticed.

When doctor Cowell, in his Law Dictionary, cited the passage in question from Hottoman, it raised universal indignation, and he expunged it from the later editions of his book. It certainly was unjust to impute as a crime to doctor Cowell, that he inserted this citation in his work; but the manner in which it was received is a striking proof of the high estimation in which Littleton's Treatise was held.

General Observations on sir Edw. Coke's Commentary.

The reputation of SIR EDWARD COKE's COMMENTARY is not inferior to that of the work which is the subject of it. It is objected to it, that it is defective in method. But it should be observed, that a want of method was, in some respects, inseparable from the nature of the undertaking. During a long life of intense and unremitted application to the study of the laws of England, sir Edward Coke had treasured up an immensity of the most valuable common-law learning. This he wished to present to the public, and chose that mode of doing it, in which, without being obliged to dwell on those doctrines of the law which other authors might explain equally well, he might produce that profound and recondite learning which he felt himself to possess above all others. In adopting this plan, he appears to have judged rationally, and consequently

---

inchoate note on the Feudal Tenures, and to render it as useful as the nature of the subject admits to the practitioner and the student.

sequently ought not to be censured for a circumstance inseparable from it.

It must be allowed that the style of sir Edward Coke is strongly tinged with the quaintness of the times in which he wrote; but it is accurate, expressive, and clear. That it is sometimes difficult to comprehend his meaning, is owing generally speaking, to the abstruseness of his subject, not to the obscurity of his language.—It has also been objected to him, that the authorities he cites do not in many places come up to the doctrines they are brought to support. There appears to be some ground for this observation. Yet it should not be forgot, that the uncommon depth of his learning, and acuteness of his mind, might enable him to discover connections and consequences which escape a common observer.

It is sometimes said, that the perusal of his Commentary is now become useless, as many of the doctrines of law which his writings explain are become obsolete; and that every thing useful in him may be found more systematically and agreeably arranged in modern writers. It must be acknowledged, that when he treats of those parts of the law which have been altered since his time, his Commentary partakes, in a certain degree, of the obsoleteness of the subjects to which it is applied; but even where this is the case, it generally happens that the doctrines laid down by him serve to illustrate other parts of the law which are still in force. Thus,—there is no doubt but the cases which now come before the courts of equity, and the principles upon which they are determined, are extremely different in their nature from those which are the subject of sir Edward Coke's researches. Yet the great personages who have presided in those courts, have frequently recurred to the doctrines laid down by sir Edward Coke, to form, explain, and illustrate their decrees. Hence, though portions charged upon real estates, for the benefit of younger children, were not known in Littleton's time, and not much known in the time of sir Edward Coke; yet on the points which arise respecting the vesting and payment of portions, no writings in the law are more frequently or more successfully applied to than sir Edward Coke's Commentary on Littleton's Chapter of Conditions. It may also be observed, that notwithstanding the general tenor of the present business of our Courts, cases must frequently occur which depend upon the most abstruse and intricate parts of the ancient law. Thus the case of Jacob *v.* Wheate led to the discussion of escheats and uses as they stood before

before the statute of Henry VIII. and the case of Taylor *v.* Horde turned on the learning of disseisins.

But the most advantageous, and, perhaps, the most proper point of view in which the merit and ability of sir Edward Coke's writings can be placed, is by considering him as the centre of modern and ancient law.—The modern system of the law may be supposed to have taken its rise at the end of the reign of King Henry VII. and to have assumed something of a regular form about the latter end of the reign of king Charles II. The principal features of this alteration are, the introduction of recoveries; conveyances to uses; the testamentary disposition by wills; the abolition of military tenures; the statute of frauds and perjuries; the establishment of a regular system of equitable jurisdiction; the discontinuance of real actions; and the mode of trying titles to landed property by ejectment. There is no doubt, but, during the above period, a material alteration was effected in the jurisprudence of this country: but this alteration has been effected, not so much by superseding, as by giving a new direction to the principles of the old law, and applying them to new subjects. Hence a knowledge of ancient legal learning is absolutely necessary to a modern lawyer. Now sir Edward Coke's Commentary upon Littleton is an immense repository of every thing that is most interesting or useful in the legal learning of ancient times. Were it not for his writings, we should still have to search for it in the voluminous and chaotic compilation of cases contained in the Year-books; or in the dry, though valuable Abridgments of Statham, Fitzherbert, Brooke, and Rolle. Every person, who has attempted, must be sensible how very difficult and disgusting it is, to pursue a regular investigation of any point of law through those works. The writings of sir Edward Coke have considerably abridged, if not entirely taken away, the necessity of this labour.

But his writings are not only a repository of ancient learning; they also contain the outlines of the principal doctrines of modern law and equity. On the one hand, he delineates and explains the ancient system of law, as it stood at the accession of the Tudor line; on the other he points out the leading circumstances of the innovations which then began to take place. He shows the different restraints which our ancestors imposed on the alienation of landed property, the methods by which they were eluded, and the various modifications which property received after the free alienation

alienation of it was allowed. He shows, how the notorious and public transfer of property by livery of seisin, was superseded by the secret and refined made of transferring it, introduced in consequence of the statute of uses. We may trace in his works the beginning of the disuse of real actions; the tendency in the nation to convert the military into socage tenures; and the outlines of almost every other point of modern jurisprudence. Thus his writings stand between, and connect the ancient and modern parts of the law, and by showing their mutual relation and dependency, discover the many ways by which they resolve into, explain, and illustrate one another.

Account of the editions of Littleton without the Commentary.

It has not yet been settled, and perhaps cannot now be settled with any degree of precision, when the first EDITION of LITTLETON's work was printed. Sir Edward Coke's mistakes respecting the Rohan edition, are pointed out in the note taken from the 12th edition to that part of his Preface. Doctor Middleton, in his account of Printing in England, conjectures the edition by J. Lettou and W. Machlinia, to have been printed in 1481, and that it is the first edition. This makes the printing of the book to have been within six or seven years after Caxton's introduction of the art into England, and within twenty-four years after the first invention of it. Dr. Middleton's conjecture is supported by the concurrent circumstance of the time when those printers appear to have been in partnership; and no other edition bears evidence of a prior title to antiquity. Another edition, of nearly equal pretensions to precedence with the Lettou and Machlinia edition, has lately appeared from the library of the late William Bayntun, esq. It has remained hitherto undescribed, and was probably unknown to all who have undertaken to notice the several editions of this work. At the end it is said to be printed by Machlinia alone, then living near Fleet-bridge: from which, and other circumstances, it is clearly distinguishable from the former edition. The letter used in printing it is less rude, and more like the modern English black letter, than the letter used in the joint edition of Lettou and Machlinia, and the abbreviations are much less numerous. These circumstances afford some, though but a faint ground to suppose it posterior in date to the former. Mr. Hargrave has both these editions. In 1766, Mons. Houard, an Avocat in the Parliament of Normandy, and Conseiller Echevin of the town of Dieppe, published at Rouen, in two volumes, the text of Littleton, with a French interpretation, notes, a glossary, and Pieces Justificatives. Many editions

editions of Littleton in French and English only have been published in small, octavo, twelves, sixteens, and twenty-fours. They are all of them very inaccurate. The French edition in 1583 is the first it which the sections are numbered. An edition in French and English, in double columns, with a table of the principal matters, was printed in duodecimo in 1671. Considering the universal estimation in which Littleton's work is held, and that it generally is the first work put into a student's hand, it is very singular, that since the editions by Lettou and Machlinia, and the Rohan edition, no correct edition of it without the Commentary has yet been published. The reader will hear with pleasure, that Mr. Hargrave has it in contemplation to favour the public with such an edition, and to print it in such a manner as will make it a typographical curiosity.

Editions of Littleton, with Sir Edward Coke's Commentary.

The first EDITION of SIR EDWARD COKE'S COMMENTARY upon Littleton, was published in his life-time, in 1628; it is very incorrect. The second edition was printed in 1629 and, is supposed to have been revised by the author. The subsequent editions to the eighth inclusively, seem to have been printed from the second, without much variation. The ninth edition includes sir Edward Coke's Reading on Fines, and his Treatise on Bail and Mainprize. To the tenth edition are added, the complete Copyholder, with many references. In the eleventh edition the book intituled the Olde Tenures, is inserted. At the end, both of the edition of Littleton by Lettou and Machlinia, and of that by Machlinia only, Littleton's work is called the "Tenores Novelli," to distinguish it (is is presumed) from the Treatise of "Olde Tenures." The eleventh edition has also several notes and additions, tending principally to show the alteration of the law since the time of Littleton and his commentator. The twelfth and last edition was published in 1738. Some observations upon it may be found in Mr. Hargrave's Address to the Public on his undertaking the present edition. An Abridgment of sir Edward Coke's Commentary was published in 1714, by Mr. Serjeant Hawkins; short but pointed observations are occasionally introduced in it, to explain the principles of the old law, and the alterations made in it by subsequent statutes.

Present edition.

Mr. Hargrave began the PRESENT EDITION, by publishing it in numbers. Soon after his publication of the First Number, he was favoured with lord chief justice Hale's manuscript notes. By an advertisement prefixed to the Second Number, he informed the Public that they were very numerous, as far as the Chapter of Knight Service; that there were few on the subsequent parts of the work; that

that for the communication of them he was indebted to the liberal spirit of a noble lord *, who, he observed, had ever distinguished himself as a zealous encourager of undertakings having the least tendency to promote science and learning; that in the original, some of the notes were in Latin, but most of them in Law-French; and that it was thought most convenient to give the latter in a literal English translation. Upon the publication of the Second Number Mr. Hargrave received from sir William Jones an account of some few various readings from two English manscripts of Littleton's Tenures. By an advertisement prefixed to the Third Number he informed the Public, that both of these manuscripts were in the public library at Cambridge, being marked D d 11. 60, and M m 52; that the first was written on vellum, and was imperfect at the beginning, and in the Chapter of Warranty; and that the second, which seemed to be most valuable, was written on paper, and had only one leaf torn, and that its antiquity appeared from the following note in the first page:

Iste liber emptus fuit in cæmeterio Sti. Pauli
London, 27*th die* Julii, *anno regis E.* 4*ti.* 20*mo.* 10s. 6d.

that this date showed that the manuscript was of Littleton's time, July 20 E. 4. being in 1481, which was the year before Littleton's death; that in referring to the manuscripts, that in vellum would be distinguished by Vell. MS. and that in Paper by Paper MS. With these assistances Mr. Hargrave completed that part of the edition which is executed by him. He then relinquished the work, and by an Advertisement, (which immediately precedes this Preface) he informed the public of it, and of the present editor's undertaking to continue the work.

Soon after the publication of this Advertisement, the present editor, through the obliging interference of John Holliday, esq. of Lincoln's-Inn, with the executors of the will of the late sir Thomas Parker, was favoured with a copy of the notes of lord chancellor Nottingham and lord Hale upon this work. The following account is given of them in a note in sir Thomas Parker's own hand-writing:

"The notes to this book, in my hand-writing (except one note "in folio 26. b. and some modern cases,) were transcribed from a "copy of the lord chancellor Nottingham's manuscript notes, in "the margin of his lord Coke's Commentary upon Littleton, "which

* The present Earl of Hardwicke.

"which copy was made for the use of his son Heneage Finch, esq. "solicitor-general, afterwards earl of Aylesford, and is now in the "possession of the honourable Mr. Legge, to whose favour I am "indebted for these notes.

"The notes in a different hand-writing were transcribed from a "copy of lord chief justice Hale's MS. notes in the margin of "Coke upon Littleton, presented by lord Hale to the father of "Philip Gybbon, esq. which copy was made for the use of the "honourable Charles Yorke, esq. his Majesty's solicitor-general. "The book in which the notes are in the hand-writing of lord "Hale, is now in the possession of Mr. Gybbon; and the book from "which these notes were transcribed by the favour of Mr. Yorke, "is now in his possession.

"T. PARKER, 1758."

Under these circumstances the THIRTEENTH EDITION has been completed in its present from.

When it became generally known that Mr. Hargrave had relinquished the work, the present editor engaged in it; but he did not engage in it while there was the slightest probability of its being undertaken by any other person: and even then, he would not have engaged in it, if by doing so he incurred any obligation of completing Mr. Hargrave's undertaking in *all* its parts. He thought an *imperfect execution* of the remaining part of the work would be more agreeable to the public than *none*; that to present them with the remaining part of the text of Littleton, and his Commentator, with *some* references, and *some* notes, would be an acceptable offering to them. No other person appeared with any, and the present editor's performance does not prevent the exertions of any future adventurer.

LINCOLN'S-INN,
Nov. 4, 1787.

CHARLES BUTLER.

D E O,
P A T R I Æ,
T I B I,
Præmium.

OUR author, a gentleman of an ancient and a fair-descended family de Littleton, took his name of a town so called, as that famous chief-justice sir John de Markham, and divers of our profession, and others, have done. The name and degree of our author.

Thomas de Littleton, lord of Frankley, had issue Elizabeth his only child, and did bear the arms of his ancestors, viz. argent a chevron between three escalop-shells sable. The bearing hereof is very ancient and honourable; for the senators of Rome did wear bracelets of escalop-shells about their arms, and the knights of the honourable order of St. Michael in France do wear a collar of gold in the form of escalop-shells at this day. Hereof much more might be said, but it belongs unto others. His arms. Instituted by Lewis the Eleventh, king of France, 9 E. 4. 1469.

With this Elizabeth married Thomas Westcote, esquire, the king's servant in court, a gentleman anciently descended, who bare argent, a bend between two cotisses sable, a bordure engrayled gules, bezanty. Thomas Westcote.

But she being fair, and of a noble spirit, and having large possessions and inheritance from her ancestors de Littleton, and

and from her mother, the daughter and heir of Richard de Quatermeins, and other her ancestors (ready means in time to work her own desire), resolved to continue the honour of her name (as did the daughter and heir of Charleton, with one of the sons of Knightly, and divers others), and therefore prudently, whilst it was in her own power, provided by Westcote's assent before marriage, that her issue inheritable should be called by the name of de Littleton. These two had issue four sons, Thomas, Nicholas, Edmund, and Guy, and four daughters.

Our author bore his mother's surname.

Thomas the eldest was our author, who bare his father's christian name Thomas, and his mother's surname de Littleton, and the arms de Littleton also; and so doth his posterity bear both name and arms to this day.

Camden.
"The just shall "flourish like the "palm-tree, and "spread abroad "like the cedar "in Libanus." Psal. xcii. 12.

Camden, in his Britannia, saith thus: Thomas Littleton, alias Westcote, the famous lawyer, to whose Treatise of Tenures the students of the common law are no less beholden, than the civilians to Justinian's Institutes.

The dignity of this fair-descended family de Littleton hath grown up together and spread itself abroad by matches, with many other ancient and honourable families, to many worthy and fruitful branches, whose posterity flourish at this day, and quartereth many fair coats, and [*] enjoyeth fruitful and opulent inheritances thereby.

[*] The best kind of quartering of arms.

He was of the Inner Temple, and read learnedly upon the statute of *W.* 2. *De donis conditionalibus*, which we have. He was afterwards called *ad statum et grad' fervientis ad legem*, and was steward of the court of Marshalsey of the King's household, and for his worthiness was made by King *H.* 6. his serjeant, and rode justice of assise the Northern Circuit, which places he held under King *E.* 4. until he, in the sixth year

King's serjeant, Rot. Pat. 33 H. 6. part 1. m. 16. Mich. 34 H. 8. fol. 3. a.

year of his reign, constituted him one of the judges of the court of common pleas, and then rode Northamptonshire Circuit. The same king, in the 15th year of his reign, with the prince, and other nobles and gentlemen of ancient blood, honoured him with the knighthood of the Bath.

Judge of the Common Pleas, Rot. Pat. 6 E. 4. part 1. m. 15.

Knight of the Bath, 15 E. 4.

He compiled this book when he was judge, after the fourteenth year of the reign of King *E.* 4. but the certain time we cannot yet attain unto, but (as we conceive) it was not long before his death, because it wanted his last hand; "for "that tenant by *elegit*, statute-merchant, and staple, were in "the table of the first printed book, and yet he never wrote of them*."

When he wrote this book. 14 E. 4. tit. Garranty, 5.

Litt. Sect. 692. 729. & 740.

Our author, in composing this work, had great furtherance in that he flourished in the time of many famous and expert sages of the law. [*a*] Sir Richard Newton, [*b*] sir John Prisot, [*c*] sir Robert Danby, [*d*] Sir Thomas Brian, [*e*] sir Pierce Ardern, [*f*] sir Richard Choke, [*g*] Walter Moyle, [*h*] William Paston, [*i*] Robert Danvers, [*k*] William Ascough, and other justices of the court of common pleas: and of the king's bench, [*l*] sir John June, [*m*] sir John Hody, [*n*] sir John Fortescue, [*o*] sir John Markham, [*p*] sir Thomas Billing, and other excellent men flourished in his time.

The deceases of his contemporaries.
[*a*] He died 27 H. 6.
[*b*] He died 39 H. 6.
[*c*] Died 11 E. 4.
[*d*] Died 16 H. 7.
[*e*] Died 7 E. 4.
[*f*] Overlived our author.
[*g*] Survived him also.
[*h*] Died 23 H. 6.
[*i*] Survived our author.
[*k*] Died 33 H. 6.
[*l*] Died 18 H. 6.
[*m*] Died 20 H. 6.
[*n*] Removed 1 E. 4.
[*o*] Removed 8 E. 4.
[*p*] Died 21 E. 4.

And of worldly blessings I account it not the least, that in the beginning of my study of the laws of this realm, the courts of

* That Littleton did intend to write of those tenancies, is plain from the 291st and 324th Sections; but it may be justly questioned whether the fact alleged by my lord Coke, to support his opinion, be true; because in the copy of the Rohan edition, now in Lincoln's-Inn Library, and in that at this time in the booksellers custody, the Table mentions nothing concerning these tenancies; nor does it seem probable that there ever was any other table, both the copies appearing, on the nicest examination, to be complete. *Note to the 11th edition.—See also Note 1 to 163. a. of the present edition.*

of justice, both of equity and of law, were furnished with men of excellent judgment, gravity, and wisdom. As in the chancery, Sir Nicholas Bacon, and after him sir Thomas Bromley. In the exchequer-chamber, the lord Burghley, lord high treasurer of England, and sir Walter Mildmay, chancellor of the exchequer. In the king's bench, sir Christopher Wray, and after him sir John Popham. In the common pleas, sir James Dyer, and after him sir Edmund Anderson. In the court of exchequer, sir Edward Saunders, after him sir John Jeffery, and after him sir Roger Manwood, men famous (amongst many others) in their several places, and flourished, and were all honoured and preferred by that thrice noble and virtuous queen Elizabeth of ever blessed memory. Of these reverend judges, and others their associates, I must ingenuously confess, that in her reign I learnt many things, which in these Institutes I have published; and of this queen I may say, that as the rose is the queen of flowers, and smelleth more sweetly when it is plucked from the branch, so I may say and justify, that she by just desert was the queen of queens, and of kings also, for religion, piety, magnanimity, and justice; who now by remembrance thereof, since Almighty God gathered her to himself, is of greater honour and renown than when she was living in this world. You cannot question what rose I mean; for take the red or the white, she was not only by royal descent and inherent birth-right, but by roseal beauty also, heir to both.

Queen Elizabeth.

And though we wish by our labours (which are but *cunabula legis*, the cradles of the law) delight and profit to all the students of the law in their beginning of their study (to whom the First Part of the Institutes is intended), yet principally to my loving friends, the students of the honourable and worthy societies of the Inner Temple and Clifford's Inn, and of Lion's Inn also, where I was some time reader. And yet of

Inner-Temple.
Clifford's-Inn.
Lion's-Inn.

of them more particularly to such as have been of that famous university of Cambridge, *alma mea mater*. And to my much honoured and beloved allies and friends of the county of Norfold, my dear and native county: and to Suffolk, where I passed my middle age; and of Buckinghamshire, where in my old age I live. In which counties, we, out of former collections, compiled these Institutes. But now return we again to our author.

His marriage.

He married with Johan, one of the daughters and coheirs of William Burley, of Broomscrost castle, in the county of Salop, a gentleman of ancient discent, and bare the arms of his family, argent, a fess checkie or and azure, upon a lion rampant sable, armed gules; and by her had three sons, sir William, Richard the lawyer, and Thomas.

His issue.

The re-establishment of his posterity, by the matches of his three sons with virtue and good blood.

In his life-time, he, as a loving father and a wise man, provided matches for these three sons, in vertuous and ancient families, that is to say, for his son sir William, Ellen, daughter and coheir of Thomas Welsh esquire, who by her had issue Johan his only child, married to sir John Aston of Tixal, knight: and for the second wife of sir William, Mary the daughter of William Whittington esquire, whose posterity in Worcestershire flourish to this day. For Richard Littleton his second son, to whom he gave good possessions of inheritance, Alice, daugher and heir of William Winsbury of Pilleton Hall in the county of Stafford esquire, whose posterity prosper in Staffordshire to this day. And for Thomas his third son, to whom he gave good possessions of inheritance, Anne, daughter and heir of John Bottreaux esquire, whose posterity in Shropshire continue prosperously to this day. Thus advanced he his posterity, and his posterity, by imitation of his vertues, have honoured him.

He gave possessions of inheritance to his younger sons for their better advancement.

He

His last will. He made his last will and testament the 22d day of August in the twenty-first year of the reign of King Edward the fourth, whereof he made his three sons, a parson, a vicar, and a servant of his, executors: and constituted supervisor thereof his true and faithful friend, John Alcock, doctor of law, of the famous university of Cambridge, then bishop of Worcester; a man of singular piety, devotion, chastity, temperance, and holiness of life; who amongst other of his pious and charitable works, founded Jesus College in Cambridge; a fit and fast friend to our honourable and vertuous judge.

His executors; his supervisor.

His age. He left this life in his great and good age, on the 23d day of the month of August, in the said twenty-first year of the reign of king Edward the fourth: for it is observed for a special blessing of Almighty God, that few or none of that profession die *intestatus et improles*, without will, and without child; which last will was proved the 8th of November following, in the Prerogative Court of Canterbury, for that he had *bona notabilia* in divers diocesses. But yet our author liveth still *in ore omnium jurisprudentium.*

His departure.

1 H. 7. fol. 7. 21 H. 7. fol. 32. b. Littleton is named in 1 *H.* 7, and 21 *H.* 7. Some do hold, that it is no error either in the reporter or printer; but that it was Richard the son of our author, who in those days professed the law, and had read upon the statute of *W.* 2. *quia multi per malitiam*, and [*] unto whom his father dedicated his book: and this Richard died at Pilleton Hall in Staffordshire, in 9 *H.* 8.

W. 2. cap, 11.

[*] See Littleton, Sect. 749.

His sepulchre. The body of our author is honourably interred in the cathedral church of Worcester, under a fair tomb of marble, with his statue or portraiture upon it, together with his own match, and the matches of some of his ancestors, and with a memorial

rial of his principal titles; and out of the mouth of his statue proceedeth this prayer, *Fili Dei miserere mei*, which he himself caused to be made and finished in his life-time, and remaineth to this day. His wife Johan, Lady Littleton, survived him, and left a great inheritance of her father, and Ellen her mother, daughter and heir of John Grendon, esquire, and other her ancestors, to sir William Littleton her son.

When this work was published.

This work was not published in print, either by our author himself, or Richard his son, or any other, until after the deceases both of our author and of Richard his son. For I find it not cited in any book or report, before sir Anthony Fitzherbert cited him in his *Natura Brevium;* who published that book of his *Natura Brevium* in 26 *H.* 8. Which work of our author, in respect to the excellency thereof, by all probability should have been cited in the reports of the reigns of *E.* 5. *R.* 3. *H.* 7. or *H.* 8. or by St. Jermyn in his book of the Doctor and Student *, which he published in the three-and-twentieth year of *H.* 8. if in those days our author's book had been printed. And yet you shall observe, that time doth ever give greater authority to works and writings that are of great and profound learning, than at the first they had. The first impression, that I find of our author's book was at Roan in France, by William de Tailier (for that it was written in French) *ad instantiam Richardi Pinson*, at the instance of Richard Pinson, the printer of king *H.* 8. before the said book of *Natura Brevium* was published; and therefore upon these and other things that we have seen, we are of opinion, that it was first printed about the four-and-twentieth year of the reign of king *H.* 8. since which time he

F. N. B. 212. c.

Note.

When this work was first imprinted.

* This book appears to have been first published by J. Rastell, 1523. Ames.

he had been commonly cited, and (as he deserves) more and more highly esteemed*.

He

* This opinion of my lord Coke's concerning the time of the first impression of Littleton's Tenures, although it hath been followed by sir William Dugdale, in his *Origines Juridiciales*, and by bishop Nicholson, in his Historical Library, is certainly erroneous; for it appears by two copies now in the bookseller's custody, that they were printed twice at London in the year 1528, once by Richard Pinson, and again by Robert Redmayne; and that was the nineteenth year of the reign of *H.* 8. To determine certainly when the Rohan edition was published, is almost impossible; and before any conjectures can be offered on that subject, it will be necessary to consider how conclusive the arguments his lordship draws from our author's not being cited as authority in the books he mentions may be; it either proves what his lordship uses it for, or else that Littleton's authority was not then so well established as it is now (for which he gives us here a very good reason): and that this last is true, the aforesaid editions do sufficiently evince, for their titles and conclusions run thus: "Littleton's Tenures, newly and most truely corrected." And in the end, *Expliciunt Tenores Littletoni cum alterationibus eorundem et additionibus novis, necnon cum aliis non minus utilioribus:* nay, these very additions are incorporated into the book itself, nor are they distinguished by any mark from the original. The weakness of this argument will further appear, if it should be applied to the discovering the time my lord Coke's Commentary on Littleton was first published, for this was not cited as authority for some time after its publication. The old editions above mentioned, Pynson's and Le Talleur's name, and the manner Littleton is printed in at Rohan, seem to be the only means of discovering what we seek. From those editions we may collect, not only that the Rohan impression is older than the year 1528, but also by what occurs in the beginning and end of them, that there had been other impressions of our author. From Pynson's name at the end of the Rohan edition, it may be concluded that he would not have engaged his friend William Le Talleur to have printed Littleton at Rohan, had he ever before printed any books in French; and that he printed an Abridgment of the Statutes, part of which is in French, in the year 1499, appears by one of those books now in the same person's custody. Statham's Abridgment has his name to it, but there is no date, yet it being printed with the same types, and in the same manner, Littleton was at Rohan, and as it is a larger book, it is highly probable it was printed some time after the publication of Littleton's Tenures, and that Pynson's success in the lesser undertaking induced him to venture on the greater; which in those days was the work of two or three years.

William

He that is desirous to see his picture, may in the churches of Frankely and Hales Owen see the grave and reverend countenance of our author, the outward man; but he hath left this book, as a figure of that higher and nobler part, that is, of the excellent and rare endowments of his mind, especially in the profound knowledge of the fundamental laws of this realm. He that diligently reads this his excellent work, shall behold the child and figure of his mind, which the more often he beholds in the visual line, and well observes him, the more shall he justly admire the judgment of our author, and increase his own. This only is desired, that he had written of other parts of law, and especially of the rules of good pleading, (the heart-string of the common law), wherein he excelled; for of him him might the saying of our English poet be verified:

His picture.

The figure of his mind.

> Thereto he could indite and maken a thing;
> There was no wight could pinch at his writing: Chaucer.

so far from exception, as none could pinch at it. This skill of good pleading he highly in this work commended to his son, and under his name to all other students sons of his law. He was learned also in that art, which is so necessary to a complete lawyer; I mean of logick, as you shall perceive by reading of these Institutes, wherein are observed his syllogisms,

Good pleading.

Logick.

William Le Talleur printed a Chronicle of the Duchy of Normandy, as appears by his name and cipher at the end thereof, and the date in the beginning, in the year 1487. The book itself is printed without any title-page, initial letter of the chapters, number of the leaves or year, and in a character much resembling writing, and with such abbreviations as are used in manuscripts: all which it is well known to those who have seen many old books, are undoubted proofs of a book's being printed when that art was in its infancy. Upon the whole it may certainly be concluded, that the book was printed some years before 1487; because the above mentioned Chronicle, which hath not so much marks of antiquity, was printed in that year; and from what has been observed concerning the manner it is printed in, it will be thought by those who are versed in ancient books, to have been published ten years before that time. *Note to the 11th Edition.*

gisms, inductions, and other arguments; and his definitions, descriptions, divisions, etymologies, derivations, significations, and the like. Certain it is, that when a great learned man (who is long in making) dieth, much learning dieth with him.

Seneca.

The commendation of his work.

That which we have formerly written, that this book is the ornament of the common law, and the most perfect and absolute work that ever was written in any human science; and in another place, that which I affirmed and took upon me to maintain against all opposites whatsoever, that it is a work of as absolute perfection in its kind, and as free from error, as any book that I have known to be written of any human learning, shall to the diligent and observing reader of these Institutes be made manifest, and we by them (which is but a Commentary upon him) be deemed to have fully satisfied that, which we in former times have so confidently affirmed and assumed. His greatest commendation, because it is of greatest profit to us, is, that by this excellent work, which he had studiously learned of others, he had faithfully taught all the professors of the law in succeeding ages. The victory is not great to overthrow his opposites, for there never was any learned man in the law, that understood our author, but concurred with me in this commendation: *Habet enim justam venerationem quicquid excellit;* for whatsoever excelleth hath just honour due to it. Such as in words have endeavoured to offer him disgrace, never understood him, and therefore we leave them in their ignorance, and wish that by these our labours they may know the truth and be converted. But herein we will proceeed no farther, for *Stultum est absurdas opiniones accuratius refellere.* It is meer folly to confute absurd opinions with too much curiosity.

Cicero.

Aristotle.

And albeit our author in his Three Books cites not many authorities, yet he holdeth no opinion in any of them, but is proved

proved and approved by these two faithful witnesses in matter of law, authority and reason. Certain it is, when he raiseth any question, and sheweth the reason on both sides, the latter opinion is his own, and is consonant to law. We have known many of his cases drawn in question, but never could find any judgment given against any of them, which we cannot affirm of any other book or edition of our law. In the reign of our late sovereign lord king James of famous and ever blessed memory, it came in question upon a demurrer in law, Whether the release to one trespasser should be available or no to his companion? Sir Henry Hobart, that honourable judge and great sage of the law, and those reverend and learned judges, Warburton, Winch, and Nichols, his commpanions, gave judgement according to the opinion of our author, and openly said, that they owed so great reverence to Littleton, as they would not have his case disputed or questioned: and the like you may find in this part of the Institutes. Thus much (though not so much as his due) have we spoken of him; both to set out his life because, he is our author, and for the imitation of him by others of our profession.

Note.

Mich. 3 Jac. in communi banc. inter Cock & Ilnoura.

We have in these Institutes endeavoured to open the true sense of every of his particular cases, and the extext of every of the same, either in express words, or by implication; and where any of them are altered by any latter act of parliament, to observe the same, and wherein the alteration consisteth. Certain it is, that there is never a period, nor (for the most part) a word, nor an &c. but affordeth excellent matter of learning. But the module of a preface cannot express the observations that are made in this work, of the deep judgment and notable invention of our author. We have by comparison of the late and modern impressions with the original print, vindicated our author from two injuries: First, from divers corruptions in the late and modern prints, and restored

What is endeavoured by these Institutes.

restored our author to his own: Secondly, from all additions and encroachments upon him, that nothing might appear in his work but his own *.

The benefit of these Institutes.

Our hope is, that the young student, who therefore meeting at the first, and wrestling with as difficult terms and matter, as in many years after, was at the first discouraged as many have been, may, by reading these Institutes, have the difficulty and darkness both of the matter and of the terms and words of art in the beginning of his study, facilitated and explained unto him, to the end he may proceed in his study chearfully and with delight; and therefore I have termed them Institutes, because my desire is, they should institute and instruct the studious, and guide him in a ready way to the knowledge of the national laws of England.

Wherefore called Institutes.

Wherefore published in English.

This Part we have (and not without precedent) published in English, for that they are an introduction to the knowledge of the national law of the realm; a work necessary, and yet heretofore not undertaken by any, albeit in all other professions there are the like. We have left our author to speak his own language, and have translated him into English, to the end that any of the nobility or gentry of this realm, or of any other estate or profession whatsoever, that will be pleased to read him and these Institutes, may understand the language wherein they are written.

Regula.

I cannot coujecture that the general communication of these laws in the English tongue can work any inconvenience, but introduce great profit, seeing that *Ignorantia juris non excusat,*

---

* In this Edition several material passages of the author are restored, by collating the text as published by lord Coke with the more ancient printed copies by Lettou and Machlinia, Pynson, Redman, &c. as also with several ancient MSS.

excusat, Ignorance of the law excuseth not. And herein I am justified by the wisdom of a parliament; the words whereof be, "That the laws and customs of this realm the rather "should be reasonably perceived and known, and better "understood by the tongue used in this realm, and by so "much every man might the better govern himself without "offending of the law, and the better keep, save and defend "his heritage, and possessions. And in divers regions and "countries where the king, the nobles, and other of the said "realm have been, good governance and full right is done "to every man, because that the laws and customs be learned "and used in the tongue of the country:" as more at large by the said act, and the purview thereof may appear: *Et neminem oportet esse sapientiorem legibus*, No man ought to be wiser than the law. 36 E. 3. cap. 5. *Regula.*

And true it is, that our books of reports and statutes in ancient times were written in such French as in those times was commonly spoken and written by the French themselves. But this kind of French that our author hath used, is most commonly written and read, and very rarely spoken, and therefore cannot be either pure, or well pronounced. Yet the change thereof (having been so long customed) should be without any profit, but not without great danger and difficulty; for so many ancient terms and words drawn from that legal French are grown to be *vocabula artis*, vocables of art, so apt and significant to express the true sense of the laws, and are so woven in the laws themselves, as it is in a manner impossible to change them, neither ought legal terms to be changed. Our author's kind of French.

In school divinity, and amongst the glossographers and interpreters of the civil and canon laws, in logick, and in other liberal sciences, you shall meet with a whole army of words, which cannot defend themselves *in bello grammaticali*, in 36 E. 5. ubi sup.

in the grammatical war, and yet are more significant, compendious, and effectual to express the true sense of the matter, than if they were expressed in pure Latin.

Wherefore called the First Part.

This work we have called, "The First Part of the Institute," for two causes: First, for that our author is the first book that our student taketh in hand: Secondly, for that there are some other Parts of Institutes not yet published, viz. The Second Part, being a Commentary upon the statute of *Magna Charta*, Westm. 1, and other old statutes. The Third Part treateth of criminal causes and pleas of the crown: which Three Parts we have by the goodness of Almighty God already finished. The Fourth Part we have purposed to be of the jurisdiction of courts: but hereof we have only collected some materials towards the raising of so great and honourable a building. We have, by the goodness and assistance of Almighty God, brought this twelfth work to an end: in the Eleven Books of our reports we have related the opinions and judgments of others; but herein we have set down our own.

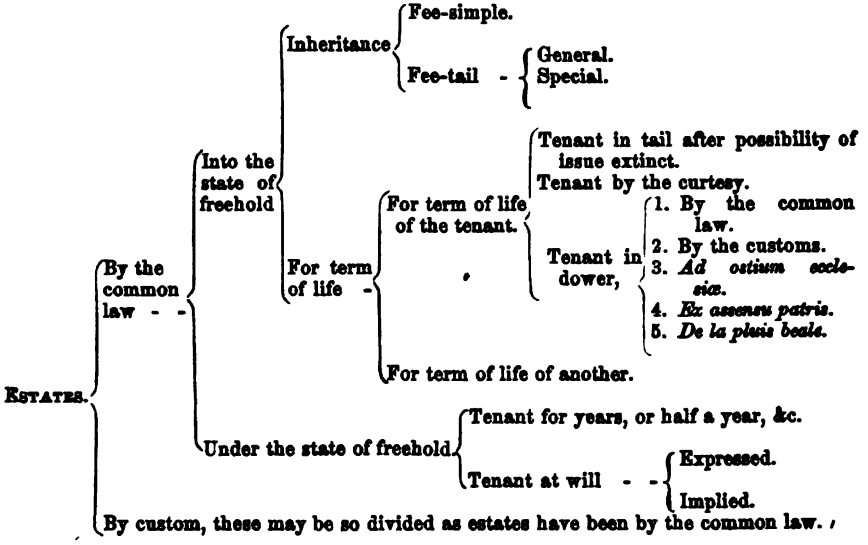
Before I entered into any of these Parts of our Institutes, I, acknowledging mine own weaknes and want of judgment to undertake so great works, directed my humble suit and prayer to the Author of all goodness and wisdom, out of the Book of Wisdom; *Pater et Deus misericordiæ, da mihi fedium tuarum assistricem Sapientiam! Mitte eam de cœlis sanctis tuis et à sede, magnitudinis tuæ, ut mecum sit et mecum laboret ut sciam quid acceptum sit apud te!* "O Father and God of "mercy, give me wisdom, the assistant of thy seats! O "send her out of the holy heavens, and from the seat of "thy greatness, that she may be present with me, and labour "with me, that I may know what is pleasing unto thee!" *Amen.*

Lib. Sap. cap. ix. vers. 4. 10.

Our

Our author hath divided his whole work into Three Books. In his First he hath divided estates in lands and tenements, in this manner: for *res per divisionem melius aperiuntur.* Bracton.

A FIGURE OF THE DIVISION OF POSSESSIONS.



Our author dealt only with the estates and terms above-said: somewhat we shall speak of estates by force of certain statutes, as of statute-merchant, statute-staple, and *elegit*, (whereof our author intended to have written) [*] and likewise to executors to whom lands are devised for payment of debts, and the like.

[*] See the first remark to the Preface.

I shall desire, that the learned reader will not conceive any opinion against any part of this painful and large volume, until he shall have advisedly read over the whole, and diligently searched out, and well considered of the several authorities, proofs and reasons which we have cited and set down for warrant and confirmation of our opinions throughout this whole work.

Regula. Incivile est parte una perspecta, tota re non cognita, de ea judicare.

Mine

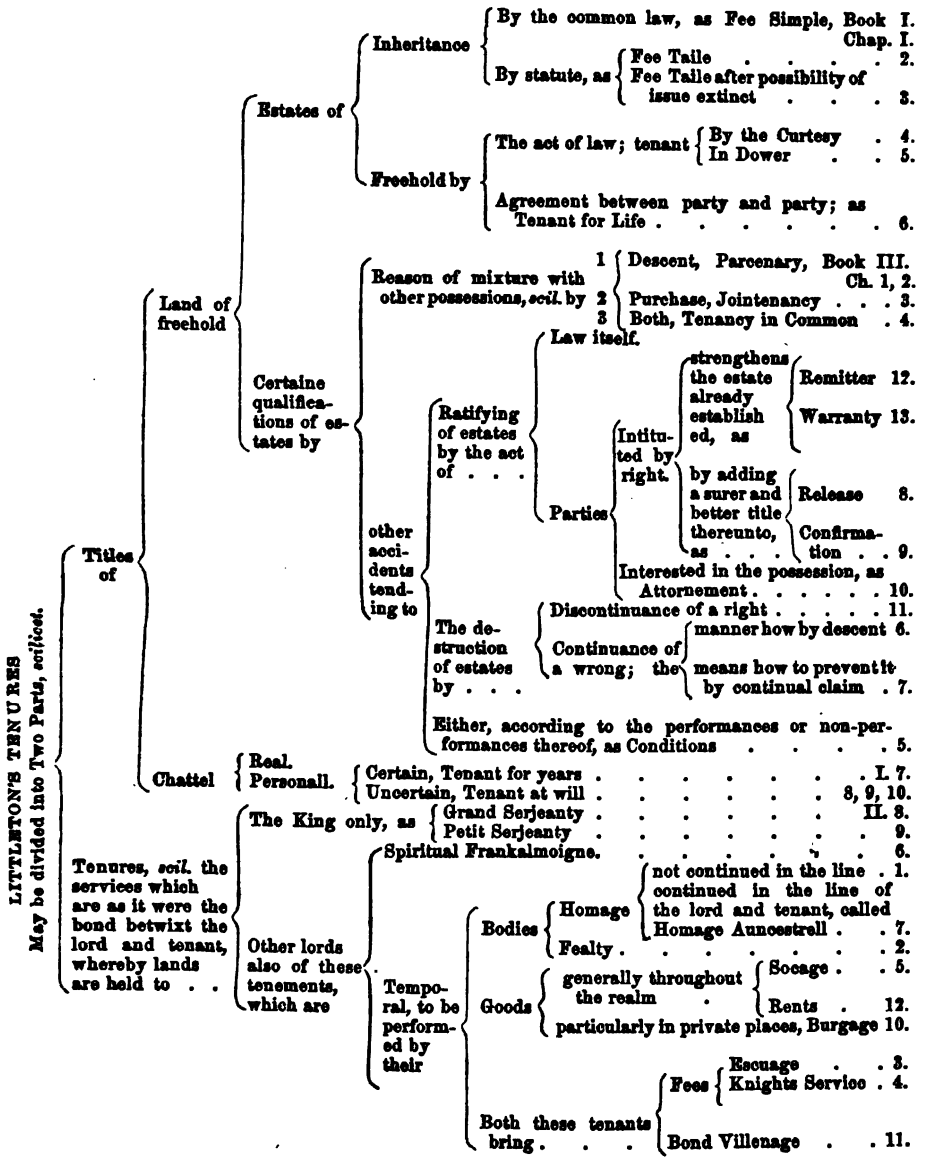
Mine advice to the student is, that before he read any part of our Commentaries upon any Section, that first he read again and again our author himself in that Section, and do his best endeavours, first of himself, and then by conference with others, (which is the life of study) to understand it, and then to read our Commentary thereupon, and no more at any one time than he is able with a delight to bear away, and after to meditate thereon, which is the life of reading. But of this argument we have, for the better direction of our student in his study, spoken in our Epistle to our First Book of Reports.

And albeit the reader shall not at any one day (do what he can) reach to the meaning of our author, or of our Commentaries, yet let him no way discourage himself, but proceed; for on some other day, in some other place, that doubt will be cleared. Our labours herein are drawn out to this great volume, for that our author is twice repeated, once in French, and again in English.

ANALYSIS of LITTLETON.

FEBRUARY 21, 1658—9.

Synopsis totius Littleton *Analytice.*



Fee Simple. Lib. 1. Cap. 1.

FEE SIMPLE; in which note

- The nature of this estate in respect of
  - The name.
    - the reason of the denomination, *feodum simplex, hæreditas legitima*, § 1.
    - The usual appellation thereof by this word fee without addition, 293.
  - The quality of the estate. It is the greatest a man can have, 11.
- The kinds thereof; Fee simple
  - Absolute, obtained by
    - 1 Purchase; where note
      - The first obtaining thereof.
        - The means how by one's own act, 12.
        - The words of force, *scil.* his heires, 1.
      - The continuing of it, being gotten by inheritance; in which note
        - The general rules thereof.
          1. The next heir collaterall of the whole blood shall inherit, § 2.
          2. None of the half blood, as heir; and therefore the uncle or sister of the whole blood, if the brother had possession, shall be preferred before the brother of the half blood, 6, 7, 8.
        - The degrees thereof between
          - Brethren. The eldest, 5.
          - Others.
            1. Lands may lineally descend, but not ascend in the right line, as to father or other ancestor, but shall rather escheat to the lord, 3.
            2. The heir of the part of the father shall first inherit, and then on the part of the mother, 4.
    - 2 Descent, the inheritance whereof goeth as before of lands purchased, but that it shall always continue in the line of the ancestor from whom it did come; and for default of such issue shall escheat to the lord, 4.
    - 3 Suits; where observe the manner of pleading, that he was seised . . .
      - Of things in manuall possession, occupation, or receipt, in his own demesne as of fee.
      - Of other things as of fee, 10.
  - Determinable upon contingency; as if a man have lands to him and his heirs as long as Paul's standeth; but it is not so of chattels, for they go always to the executor, 740.

Fee Taile. Lib. 1. Cap. 2.

FEE TAILE; in which note.

- The quality of this estate in
  - The reason of the name, *scil.* it is called fee taile, because entailed. 1. Limited how long it shall continue; for if the issue in taile faile, the donor or his heirs may enter as in their reversion, 18, 19.
- The incidents necessary to this estate.
  - Their tenure, *scil.* the donees hold of the donors by such services as they hold of the lord paramount; but donees in frankmarriage hold by fealty only, until the fourth degree be past, 19, 20, 138.
  - The conveyance to this estate, *scil.* by heirs entailed only.
- The divers sorts thereof; for some are . . .
  - By expresse words of the stat. of West. 2. c. 1. § 13. and these are
    - General.
      - When lands are given to a man or woman and the heirs of his or their body, 14, 15.
      - For if there be no certain body limited, it is fee simple, 31.
    - Speciall.
      - Expressly, when the body of the baron and feme is limited, 16.
      - Inclusively, when lands are given in frankmarriage, 17. And this estate was at common law, 271.
  - By the equity of the statute.
    - With a distinction to the sex; as to
      - Males only, 21. 23, 24, 25.
      - Females only, 22.
    - For the will of the donor is to be observed, 22.
    - Without; as
      - When lands are given to baron and feme and the heirs of the body of the baron, the feme hath an estate for life, and the baron in taile generall, 26; but if it were given to baron and feme and the heirs of the baron which he shall beget of the body of the feme, he hath taile speciall, and she an estate for life, 27.
      - When to a man and to the heirs which he shall engender on the body of his wife, he hath taile special, and she nothing, 29. 33. 53.
      - When a man hath issue a son, and dieth, and lands are given to the son and to the heirs of the father's body begotten, 30. and many such there be by equity of the statute, 30.

Tenant in Taile after Possibility of Issue extinct. Lib. 1. Cap. 3.

Is when lands are given in special taile, and one of the donees, or the man or woman of whose body the issue in taile is limited to proceed dieth, there being no issue in taile in life, then the surviving donee is thus called, because there is no possibility left of having issue inheritable to the land, § 32, 33, 34.

Tenant by the Curtesy of England. Lib. 1. Cap. 4.

Is when one taketh a feme inheretrix to wife, in whose right he was seised of lands, and by whom he that hath or had issue born alive, which by possibility might inherit those lands after her death, for he is tenant by the curtesy of England, § 35.

The reason of the denomination, *scil.* because used in no other country but in England, 35.

Dower. Lib. 1. Cap. 5.

There are five kinds of DOWER, § 51. whereof some are created

- By the operation of the law.
  - Common; where note - -: Of what lands a woman shall be endowed, *scil.* of the third part of all such which her husband had during the coverture, if he held them not jointly with others, 45. and if she were at the death of her husband of the age of nine years, 36. *Sed quære*, if this be necessary to the endowment *ad ostium ecclesiæ et ex assensu patris*, 42. If any issue which is or by possibility might have been begotten on her body, might by possibility have been heir, 36. 53. he shall be tenant by curtesy, if the issue might have been her heir, 52.
    - In what manner to hold:
      - In severalty, if the lands were not held in common, 36. 44.
      - By assignment, if it were not certain which should have, 43.
  - Customary; where according to the custom she may be endowed of the whole, and sometimes of a moiety, 37.
- By the act of parties, by matter
  - In suit, which is of two sorts, 38.:
    - *Ad ostium ecclesiæ*, when one seised of lands in fee (for tenant in taile cannot thus endow his wife, but that the issue in taile or donor may defeat it, 46.) and being of full age, (otherwise the heir of the husband may put her out, 47.) endoweth his wife at the church door of a certain part of his land, 39.
    - *Ex assensu patris* is as the former, but that this is in the life of the father, the son being heir apparent, 42. in which case it is thought she had need of the deed of the father proving his assent to it, 40.

    These two a woman may refuse, if she never accepted them, and take her dower at the common-law, 41.
  - Of record. This is dower *de la pluis beale*, where the feme, at the praying of gardein in chivalry in court of record, doth endow herself in the presence of her neighbours of the best part of the land she holdeth as gardein in socage, in recompense of her dower of those lands which the lord hath as gardein in chivalry; and this is for saving the estate during the minority of the heir, 48, 49, 50.

Tenant for Term of Life. Lib. 1. Cap. 6.

Note the
- Kinds of this estate, *scil.*
  - Of the lessee's own life; this is properly called lessee for life.
  - Of another man's life; and this is properly called lessee for another man's life, 56.
- Quality thereof, in consideration
  - Of the goodness of this estate, *scil.* it is in freehold, but yet in the lowest degree thereof.
  - Of the usual name in passing thereof from the one to the other. As in feoffments in fee they are called feoffer and feoffee, and in gifts donor and donee; so here he that granteth the estate is called lessor, and he to whom it is granted lessee, 57.

Tenant for Years. Lib. 1. Cap. 7.

Note the
- Name of this estate, viz, - - -
  - When one leaseth lands to another for a term of years, the lessee is thus called, 58.
  - So if the lease be but for half a year, or a quarter, for there is no other term to term him, 67.
- Nature of it,
  - How it passeth from the lessor to the lessee
    - By what circumstances.
      1. The lessee may enter when he will by force of his lease, by or without deed; and livery is not necessary, unless where freehold passeth in possession or remainder [then it is], 59, 60.
         Unless it be in exchanges, where if the lands be in one county it is good by parol, 62, 63.
         Note in exchanges,
         - That the estate of the exchanges must be equal [not the value], 64, 65.
         - That in both their deeds mention must be made of the exchange, 65.
      2. How many liveries there needs [when necessary], *scil.* but one in every county, if it be made in the name of all in the same county, 61.
    - At what time it taketh effect, *scil.* at the time prefixed, although the lessor die before the day; and yet the death of the feoffee is a countermand of a letter of attorney to deliver seisin, 66.
  - What inconveniences this estate is tied unto.
    1. To pay the rent reserved, else may the lessor distrain or bring an action of debt; but if the lessor were not seised at the time of the lease, the lessee may plead in barre, if it be not by indenture, 58.
    2. He must amove his household stuff, and come before his lease expire, or else after the lessor may take them, 68.
    3. The lessee for years is bound to repair the house, &c. 71.
    4. Liable to a writ of wast, if he commit any, 67.

Tenant at Will. Lib. 1. Cap. 8.

Note the
- Divers sorts of this estate; for it is created either - - - - -
  - Expressly; as when one letteth lands to hold at his will; and it is called so, because there is no certainty of the estate but only at will, 68. If therefore it be granted to the lessee and his heirs at will, this word (heirs) is void, 82. Yet if the lessor determine his will, the lessee shall have convenient time to carry away his corn and household stuff, as well as executors for the goods of their testator, 68, 69.
  - By implication; as when one having a deed of feoffment made unto him, and entereth before livery, 70.
- Necessary appendances to this estate. For - - - - - -
  - The services reserved.
    - They shall not do fealty, 84.
    - They must pay the rent reserved, else may the lessor distrain or bring an action of debt, 72.
  - The things he is not bound to reparations, yet is punishable for voluntary wast, as well as a bailee for goods lent him, 71.

Tenant at Will according to Custom. Lib. 1. Cap. 9, 10.

Note the
- Diversity of this estate; for it is by - -
  - Copy of court roll, 73. and so called, because the tenants have no other evidence but of their lord's court roll, 75. And it is when one holdeth land at the will of the lord; and although they have inheritance, yet if the lord oust them, they have no remedy but by petition, 77. according to the custom of the manor, 78.
  - The verge; which differeth from the former only in the use of the white rod in their surrenders, 78.
- Condition of it; in regard of
  - The quality of it is a base tenure, for they have no freehold by course of common law, 81; although by custom they may have estates of inheritance, 81, 82,
  - The circumstance
    - In passing it from a man, which is by surrender; for if he alien by deed, it is a forfeiture, 74. And this
    - Surrender is
      - Into the hands of the lord to the use of him who should have it by some custom, 78.
      - Into the hands of the bailiff or reeve, or of two honest men of the said lordship, and they to present it at the next court, 79. And generaly all such customs not repugnant to reason are allowable, 80.
    - In continuing of it being passed by - - -
      - Fine, which must be by plaint in their lord's court, 76.
      - Sustentation of their houses by reparation, 83.
      - Service, *scil.* such a tenant must do fealty, 84, 132.

Homage. Lib. 2. Cap. 1.

Homage.
- The nature of this service; *scil.* it is the most honourable a tenant can do to his lord, 85.
- The performance of it; where note
  - The persons which should
    - Make it. They must have a greater estate than for life; for no tenant for life can take or do homage; therefore one entitled to be tenant *per* curtesy during the life of his wife shall do homage; after her death not, 90.
    - Take it; none but the lord himself, 92.
  - The service itself.
    - The manner how it must be done, viz. the tenant be bare-headed, kneel on both knees, and hold both his hands between the hands of his lord, and shall say, if he hold
      - Of him only, "I become your man," &c. unless he be a man of religion, or feme sole, and they shall leave out these words, 85, 86, 87.
      - Of more lords, he shall say in the end, "saving my faith which I owe unto my sovereign lord the king and other lords," &c. 89.
    - The times how often it shall be done, viz.
      - One tender, if the lord refuse, excuseth the tenant of being distrained for it, until his lord demand it again, and it be denied, 150, 151.
      - Once doing of it excuseth him for his life against any that comes in by descent; but not against him that recovers by any title, 148, 149.

Fealtie. Lib. 2. Cap. 2.

Fealtie.
- What manner of service this is
  - Fealtie, in English, is as much as *fidetitas* in Latin, 91.
  - It is incident to all tenures but frankalmoigne, 131.
- How long it is to be performed; where note
  - The persons which should - - - -
    - Make it; *scil.* for life or years, but not tenant at will, 93. 132.
    - Take it; the steward or bailiff of the lord's court 92.
  - The forms of it, 88. 91. 94.

Escuage. Lib. 2. Cap. 3.

- **Escuage.**
  - The nature of this service in regard of
    - The nature of the name escuage, in Latin *scutagium, servitium scuti*, 95.
    - The performance thereof.
      - How it ought to be performed, viz. he that holdeth this, when the king makes a voyage royal out of the realme must go with him, and so continue after the rate of forty days, for a knight's fee; but how these forty days shall be acounted, *quære*, 95, 96.
      - If not performed.
        - How it shall be tried, viz. by certificate to the justice under the seal of the marshal of the king's host, 102.
        - How punished, viz. it hath been used to be assessed by parliaments how much kings tenants should pay after the quantity of the tenure; and there the mean lords shall either levy their duties by distress, or by a writ *de scutagio habendo*, 97. 100, 101.
  - The several kinds thereof; for it is either
    - Uncertain, as before; or if the tenants have a custom, to pay half, &c. if it be uncertain, and this kind is intended in speaking of escuage generally, which draweth to it homage, and homage draweth to it fealty, 98, 99.
    - Certain; as to pay 6*s*. 8*d*. at all times, this is but socage in effect, 98. 120.

Knights Service. Lib. 2. Cap. 4.

- **Knights Service.**
  - The kinds thereof. } Tenure by
    - Homage, fealty, escuage, is knights service, 103.
    - Castle-gard, 111. 121.
    - Cornage of a common person, 156.
  - The incidents thereunto. It draweth
    - Wardship; where note the persons:
      - Of the heir,
        - When out of ward at full age, *scil.*
          - When he shall be in ward, viz. during his nonage, after the death of any ancestor from whom he claims his descent, and shall not be in ward for his body during the life of his father, 114.
          - Of an heir male at the age of 21 years, which is full age of male and female, except he enters into religion during his minority, 104. 203. 259.
        - Of an heir female.
          - By the common law at 14 years which is the age of discretion, 103.
          - By the stat. Westm. 1. ch. 22. at 16, if the heir were under 14, and unmarried at the death of her ancestor, 103.
      - Of the garden; which is gardien
        - *En droit*, by reason of the tenure, as before, 116.
        - *En fait*, where the other grants the ward over, 116.
    - Marriage; where note
      - How the lord shall take benefit of the marriage.
        - In what manner, viz. without disparagement.
          - How often, *scil.* but once; and thereupon if the lord marry his ward within the age of 14 years, and he then disagreeth, as he may, or that his wife die during his minority, he shall not be in ward again to him for his body, 104, 105, 106.
          - When the heir shall be said to be married to his disparagement, 108. Of the kinds thereof, *quære*, 109. But generally it cannot be if the ward be above the age of 14 years at the time of his marriage, 107.
          - What penalty if the gardian thus marry him.
            - The friends of the ward may enter upon the gardian, 108. In their default it seems the ward himself may, 108.
      - What remedy, if the ward refuse to marry upon a lawful tender.
        - If he continue unmarried, he shall forfeit the single value of his marriage to his lord, 110.
        - If he marry himself during his minority, the double value, 110.
    - Relief of the heir, if he be at full age at the death of his ancestor, which is after the rate of 100 sol. for a whole knight's fee, 112, 113.

Socage. Lib. 2. Cap. 5.

Socage.

- **The tenure itself; where note**
  - **The divers sorts thereof.**
    - Where one holdeth land by certain service for all manner of services, as homage and rent, or homage and fealty, or homage, fealty, and rent, 117.
    - By fealty only, if the lord refuse no other service, 118, 130, 131.
    - By escuage certain, 120, to pay a sum certain for guarding a castle, 121, and generally by any service which is not knights service, 118.
  - The denomination *socagium*, or *servitium socæ*; the name whereof remaineth, although for the most part the manner of the service by mutual consent be altered into an annual rent, 119.
- **The incidents appertaining**
  - **To the lord of whom the lands are holden, relief after the death of such a tenant; where note**
    - How much must be paid for relief, *scil.* the value of a whole year's rent to the lord, 126, 128.
    - When to be paid, *scil.* immediately, or else the lord may distrain for it, unless the services be of that quality that they cannot be gotten but at some certain time of the year, 127, 129.
  - **To the gardian in socage.**
    - Ward; for if such tenant die, his heir within the age of 14 years, his *prochein amy*, to whom the inheritance cannot come, shall always have such heir in ward until he be 14 years of age; but he must account for the profit the reasonable expenses deducted, and so must any other that taketh upon him as gardian; but account will not lie against executors but for the profits after the age of 14 years. *Quære*, whether it shall be brought against him for profits after 14 as gardian or bailiff, 123, 124, 125.
    - Marriage doth not of right belong to the gardian but if he do marry his ward, he must account for it, 123.

Frankalmoigne. Lib. 2. Cap. 6.

Frankalmoigne.

- **The commencement of this tenure**
  - To whom lands may be so given to be holden, *scil.* to a man of the holy church, or to be a special corporation, 133, 134.
  - By whom. By the king only, unless it be by prescription, or else before the statute of *quia emptores terrarum* an. 18 *Ed.* 140.
- **The continuance thereof.**
  - **How long, *scil.* so long as the privity continueth; for if - - -**
    - The tenancy to be alienated by tenant be in frankalmoigne, or that the reversion cometh to another than the donor and his heirs, this tenure is determined, 139. 141.
  - **In what manner; where note**
    - What service the tenant must do, *scil.* no terrene service, or other service certain, for then he is called tenant by divine service, 137; but in conscience he ought to make prayers for, &c. but is not compellable otherwise than by complaint to the ordinary visitor, 135, 136, 138.
    - What advantage this tenure hath, *scil.* it draweth to it acquittal, 142.

Homage Auncestrell. Lib. 2. Cap. 7.

Homage Auncestrell.

- When it shall be called homage auncestrell, *scil.* when it hath continued in the lineal descent of lord and tenant without alienation, 143, 147, and it may be either in socage or knights service tenure, 152.
- **How it differeth from other services, *scil.* in**
  - Acquittal 144.
  - Warranty, if the lord then being hath received homage of the tenant of his ancestors, else may the lord disclaim, 143. 145. And upon disclaimer the seigniory is extinct, and the tenant shall hold of the lord next paramount, therefore an abbot or prior may not disclaime, 146.

Grand Serjeantie. Lib. 2. Cap. 8.

Grand Serjeantie.

- **The service wherein.**
  - **The several kinds thereof.**
    - When one holdeth of the king to do some special service to the king (for the most part within the realm) 155, in proper person, 153, or by some other, 157.
    - When one holdeth of the king by cornage, 156.
  - **The nature of it.**
    - Called grand serjeanty, *quasi magnum servitium*: can be held of none but of the king, 154. 156.
- **The incidents thereto.**
  - Ward, 158.
  - Marriage, 107, 108.
  - Relief which is the value of the land for the year, *ultra reprises*, 154.

Petit Serjeantie. Lib. 2. Cap. 9.

This is to render some small thing touching the war, as bow, arrow, &c. 159, which although it be socage in effect, 160, yet it can be held of none but of the king, 161.

Burgage. Lib. 2. Cap. 10.

BURGAGE.

- Where this tenure is, *scil.* where the inhabitants of some eminent borough so called heretofore (which now are cities and counties), from whence come the burgesses to the parliament, 164, do hold of the king, or some other spiritual or temporal lords by yearly rent, which is but socage, 162, 163.
- How it differeth from other places, *scil.* in their customs only; of which note
  - What customs good and allowable.
    - That the youngest son should inherit either solely as heir, as in borough English, 165. 211, or with all his other brothers, as in gavelkind, 210.
    - That the wife shall be endowed of the tenements of her husband, 166.
    - That a man may devise his land by testament, and that to his executor to sell, or to his wife, 167, 168, 169.
    - And such generally as stand with reason, and have continued time out of the memory of man, 170.
  - What not, *scil.* such as are against reason, *quia malus usus abolendus est*, 212: as if one prescribes . . .
    - To have for the marriage of the daughter of his tenant being a freeman, 209.
    - To have amends at his own pleasure for damages done unto him, 212.

Villenage. Lib. 2. Cap. 11.

VILLENAGE; of which note

- The estate continuing in regard of
  - The manner of this tenure:
    - When it is, viz. when a man that is villein, or a woman which is termed neife, 186, hold lands of their lord at will to do villein service, which service a freeman may also hold by; for the condition of a villein owner of lands altereth the nature of it, but *non e converso*, 172.
    - How many sorts there are thereof, viz. Villein . .
      - Regardant, which term is only proper to a villein, 184, when a man hath a manor to which a villein is regardant, 181.
      - In gross.
        - When a villein regardant is granted by deed to another, 181.
        - When one is seised of a villein by prescription, 175. 182, wherein, as in such like, one may not prescribe but by showing a deed, &c. in him and his ancestors, whose heir he is, 183.
        - When one confesseth himself to be a villein in court of record, 175. 185, as a bastard cannot be a villein otherwise, 188, and then his issue born before such confession is free, 176, born after is bond, although the mother were free, 187.
  - The mischiefs thereof
    - To the person of the villein.
      - The lord may seize his villein, although a chaplain secular, 202; but if the lord maim his villein, the king it seemeth may punish it, 194.
    - To his possessions.
      - His lands and goods are his lord's by seizure, not otherwise, 177. unless the king be lord, *cui nullum tempus occurrit*, 178.
      - His reversions, 179, and his advowsons *plein d'incumbent* by claim, 180.
- The means how he may be free
  - Expressly by charter or manumission, 204.
  - Implied. This is
    - For a time only.
      - When a villein entreth into religion, 202.
      - When a neife taketh a baron a freeman, 202.
    - For ever.
      - By suit.
        - Of a villein against the lord;
          - Where he shall be answered as in appeal of death, 189, appeal of rape, 190, as executor, 191, 192, if the lord make not protestation that he is his villein, 193.
          - Where he shall not; for in other actions villenage in the defence or plea is a good plea in abatement of the action, 195, 196, as also is outlawry, 197, attainder in *præmunire*, 199, profession in religion, 200. Excommunication pleaded by the letters of the ordinary a good plea till absolution, 201.
        - Of the lord against the villein;
          - If the lord bring a *præcipe*, &c. or other action of debt, trespass, &c. 208.
          - Or an appeal of felony not grounded on an indictment, if it be found with the defendant, 208.
      - Otherwise.
        - If the lord make an obligation to his villein, or a lease or feoffment, 205, 206.
        - But it seemeth a lease at will, for the uncertainty, is no franchisement, 297.

Rents. Lib. 2. Cap. 12.

Rents are three sorts.

- **Rent service, which is reserved upon a tenure; where note**
  - **How it hath beginning.**
    - Wheresoever the tenant holdeth of his lord by certain rent, 213, whether it be upon a gift in tail, for life, or for years, 58. 214, or upon a feoffment in fee before the stat. *quia emptores terrarum*, 216, 217, for which a distress is incident of common right, and the tenant is not bound to tender it elsewhere than upon the land out of which it issueth, 341.
    - But then the reversion must remain in him who hath the rent, 215, 228. 346, for rent passeth as incident to the reversion, 572, but not the reverse, 229, for where no fealty is there can be no real service, 227.
  - **How a determination of it.**
    - In part by the purchase of parcel of the land; for it is apportionable, unless it be so entire as it cannot be severed; and then such services as are annual are clearly extinct; such as are not, go out of the remnant that is left, 222, 223.
    - **In all by disseisin.**
      - By a stranger: as if one be disseised of a manor, and the tenants attorn by paying the rent to the disseisor and he die, and his heir be in by descent, 587, if it had been of another rent in gross, it had been a disseisin to me, but at mine election, 588, 589, but if I had given parcel of the manor in tail, before non-payment of the rent, tenant in tail continuing in possession, it could have been no disseisin to me, for that by the gift it is severed from the manor, 590, 591.
      - **By the tenant himself; wherein note**
        - The divers kinds of disseisin; which are - - - - Rescous, Replevin, Inclosure, Denial, 237.; and, which is common to the others, Menacing of him which should demand it, 240.
        - The means to recover the rent, when any disseisin is, viz. by an assize, which is *vox aequivoca*, in this sense taken for a writ of assise, 234.
- **Rent-charge, viz. when one granteth rent with a clause of distress, 218, or when rent is granted upon equality of partition; where note, 251, 252, 253,**
  - **How a grant of such a rent doth inure; *scil.* either**
    - **By a writ of annuity to charge the person of the grantor, 219, unless - - - -**
      - By distress and avowry in a court of record to charge the land, 219.
      - There be a special proviso for not charging the person, 220.
      - Or that the grant be only that if such a rent be unpaid to *I. N.* that he may distrain in such a place, 221.
  - **By what means such rent may be lost.**
    - By purchase of parcel of the land charged, the whole rent is utterly extinct; but if parcel descend, the rent shall be apportioned, 224.
    - By disseisin it may be interrupted; the causes whereof are four: Rescous, Replevin, Inclosure, Denial, 238.
- **Rent seek; in which consider**
  - **How it hath the original.**
    - **By grant:**
      - If one grant rent out of land without clause of distress, 218.
      - If one hold by fealty and rent, or by homage, fealty and rent, and the lord grant the rent only, or grant the rest, reserving the rent, 225, 226.
    - By other accidents; as if there be lord mesne and tenant, the tenant holding over by 5*s.* rent, the mesne holding over by 12*d.* the lord purchaseth the tenancy, the mesnalty is extinct, yet shall the mesne have the surplusage of the rent, which is 4*s.* as a rent seek, 231, 232.
  - **How it may be recovered when it is lost.**
    - Not by distress, for that were contrary to the name of rent seek, *quasi reddit us siccus*, 218.
    - But if the grantee have had seisin thereof, if he be disseised of it, which is by denial, enclosure, 239, he may have an assize, 233. 235.

Parceners. Lib. 3. Cap. 1 and 2.

PARCENERS.

- The divers kinds.
  - By the common law are females, or the heirs of females, which come to their land by descent; so called, because they are compelled to make partition by a writ *de participatione facienda*, 241, 242. 254.
  - By custom are heirs in gavelkind, 265.
- Certain rules touching partition
  - How it may be had.
    - By writ.
      - At whose suit, viz. not only of the parceners, but against others, as tenant by the curtesy, 264.
      - In what manner, viz. the sheriff, by the oath of twelve men, must set out the parts of all the parceners, as well parties to the writ as not, 276, and certify to the justices under his seal, and the seal of the jurors, their partition, 247, 248, 249.
    - Otherwise.
      - By agreement amongst themselves, either with or without deed, 250, 251, 252, in which the parts of all the parceners may be equally set out, or else the part only of one or more, and the rent to hold still in parcenary, 243. 276.
      - By help of friends, where the eldest must choose first, 244, unless herself set out the portions, then she must choose last, 245.
      - By allotment, 246.
      - By hotchpot, which hath only for the donee in frankmarriage, or her heirs; which is done by putting the land which was given her in frankmarriage to the rest which descended from the same ancestor to other coparceners in fee, and to take back so much as with that she had before doth amount unto a full purparty, 266, 267, 268, 269, &c.
  - How it may be defeated being made
    - By those that were not parties to the partition;
      - If the purparty of his ancestor were unequally set out, 255.
      - If the lands in fee were allotted to one, to the other the lands in tail, and the tenant in fee hath aliened her part, 260.
    - By those that were parties
      - For impediments annexed to their person at the time of the partition:
        - Infancy, if after his full age he doth not agree unto it, 258.
        - Coverture, if her purparty were not equal with the rest, 256, 257.
      - For eviction of that which was assigned by lawful title; for then he may enter and have a new partition made of the remnant, 262, 263.

Joyntenants. Lib. 3. Cap. 3.

JOYNTENANTS.

- How his estate hath its first creation.
  - Of what things.
    - Of lands and chattels real and personal, 281.
    - Of contracts and covenants; as an obligation, 282.
  - By what means.
    - By title, when one enfeoffeth divers of lands to hold jointly, 277, but baron and feme in such case are but one person in law, and shall have but one part, 291.
    - By sort, when divers disseise one, 278, which is when they put him out without title which was rightfully seised, 279.
- The nature of jointenants considered.
  - They are seised all of them of the entire, 288, and by the common law not compellable to make partition, 290.
  - In the quality of this estate.
    - The survivor shall have the whole, 280, which a devise by will cannot prevent, but only some act executed in the life of the joyntenant, and this the survivor shall hold discharged of a rent charge; but not of a lease for years made by his companion, although it be to begin after the death of the lessor, 286. 289.
  - In the quantity; for either it is - -
    - A joint freehold and joint inheritance, 283.
    - A joint freehold and several inheritance, 283.
    - A several freehold and joint inheritance. - - -
      - By the form of the gift of the giver, 283, 284, 285.
      - By the act of one of the jointenants; as if one make a lease for life, and die living lessee for life, by this he hath severed the freehold, but not the inheritance. *Quære*, for the contrary seemeth the better opinion, 302. 302, 303.

Tenants in Common. Lib. 3. Cap. 3.

TENANTS IN COMMON.

- Of what things a tenancy in common may be
  - Of lands
    - By prescription.
    - By grant
      - To a common person.
        - If one of divers jointenants alien in fee, or in taile, the alienee is tenant in common with the others, 292. 294, 295, 296. 304.
        - If one parcener alien her part, it is so likewise, 309.
        - If *I. S.* enfeoffe *T. S.* of the moiety of his lands, not assigning it in severalty, 299, and generally when two or more hold land in fee, or taile, or for life, 300, 301, undivided, and by the common law not compellable to make partition, 318, by several titles, 292.
      - To two bodies politique, or a body natural and a body politique, for they cannot be jointenants, 296, 297.
  - Of chattels
    - Real, 319, 320.
    - Personal, 321.
- How they shall maintain suit against - -
  - Strangers in action touching the realty they shall sever, unless the thing they sue for be so entire as it cannot be severed: touching the personalty, they shall join where jointenants and parceners join in both, 311, 312, 313, 314, 315, 316, 317.
  - One another.
    - They may maintain an *ejectione firmæ*, 322, and an ejectment *de gard*, 323.
    - But no action of trespass *quare vi et armis*, nor any action of chattels personal and real not severable, but in the first come first served, 323.

Estates upon Condition. Lib. 3. Cap. 5.

ESTATES UPON CONDITION ARE OF TWO sorts, *scil.* upon condition

- *In fait*; the consideration whereof is double.
  - In the creation of them.
    - When one maketh a gift in taile, a feoffment in fee, a lease for life or yeares upon condition, 325, 326.
  - In the operation of them, *B*†.
- How they may be made
  - What conditions may be made.
    - For the manner of them.
      - Precedent; as if a man make a lease for years upon condition that if he do such an act within such a time, that then he shall have fee, 349, 350.
      - Subsequent, when the condition followeth in defeasance of the estate precedent, 350.
    - The matter.
      - Such as are against law are void; as that a man seised in fee should not alien at all, 360.
      - Such as agree with the law are good; as
        - Not to alien to such an one, 361, that tenant in taile shall not discontinue, 362, 363, and by such condition it is said the right of the taile may be preserved to the issue; *quære quomodo*, 364.
  - Upon what estates.
    - When lands are mortgaged in such manner, 332, 333, 334, which because it is payment of money, or something in satisfaction thereof, which is as good if it be accepted, 334, there must be considered
      - The persons
        - By whom the payment should be made.
          - By the feoffor only, if no day be limited for the payment, 337.
          - By others; as by the heir, if the feoffor die before the day of payment, 334, or by his executor, 337, or feoffee, 336, of whom the feoffee in mortgage must receive the money upon lawful tender, or else he shall lose the land, and yet be without remedy for the money, 335. 338. but if a stranger tender it, he is not bound to receive it, 334.
        - To whom, *scil.* the feoffee himself, or if he die before the day, to his executor, unless it be expressly appointed to the heir, 339.
      - The place where.
        - If none be appointed, some say the feoffor must seek the feoffee any where within England, 340; others say it sufficeth if he tender it upon the land, *quære, ibid.*
        - If there be a place appointed, (as it is good to have it as certain as may be,) 342, the feoffee need not receive the money elsewhere; but if he do, it is good, 343.
    - By what means *A**.

In law, where the law itself annexeth it, 378: and therefore in pleading there need no deed to be shewed, 378. This is annexed either

- To officers of trust, that the trust reposed be performed by himself or his sufficient deputy, if the grant be to be executed by a deputy, 378, 379.
- To lands,
  - Where the estate dependeth upon a contingency; as if a lease be made to baron and feme during the coverture; or if a lease be made to have as long as the lessor is abbot, 380, 381, 382. Where it was conveyed upon confidence; as where lands are devised to executors to sell to the behoof of the testator, 383.

* For which *Vide* subsequent page. † For which also *Vide* subsequent page.

Estates upon Condition. Lib. 3. Cap. 5.—*continued.*

A. By what means Estates upon Condition *in fait* are created.

- Without deed; as if a condition be made upon the livery, 359.
- With deed; in which note - -
  - The force of the deed; for a condition to defeat a frank tenement cannot be pleaded without deed, but for a chattel it may, 365, yet the jury, by a verdict at large, may find such a condition without, and the party may take benefit of it if he be not enforced to plead it, 366, 367, 368, 369.
  - The form of it,
    - In regard of the words which import a condition, *sub conditione*, 328, *proviso semper et ita quod*, 329, *si contingat*, with a clause of re-entry, 330, 331.
    - In regard of the fashion of the deed; for either it is - -
      - Poll; and then it is doubted whether the feoffor may plead the condition, because by intendment it appertaineth to the feoffor; yet it seemeth he may plead it, *quære*, 375, 376, 377.
      - Indented. In this observe
        - The manner of making them.
          - In the first person, 372.
          - In the third person, 371, and both are equally good, if mention be made that both persons have put to their seals, 373.
        - The manner of pleading them, when the shewing of one part is as good as of the whole; for be it bipartite or tripartite, it is all but one deed, 370.

B. The operation of Estates upon Condition *in fait*.

- Whom do they tie; *scil.* any
  - That come in by descent; and although there be divers disseisins and descents past, yet the working of a condition shall take place, 391, 392. 409.
  - That come in remainder, although the particular tenant only receive the condition, 374.
- How they do tie those that are subject thereunto, *scil.* either - -
  - To leave their estate entire, and detain but the use only for a time; as when a lease is made, and rent reserved with a condition to re-enter upon nonpayment, and detain it until, &c. in manner of a distress, 327.
  - To wipe away the whole estate in such degree, discharged as it was at the time of the making of the condition, 358. This is
    - Upon breach of the condition, where the feoffor may enter
      - And in such case, where an entry is congeable, the frank tenement resteth not without entry, 351.
      - But such entry or re-entry can be reserved to none but the feoffor and his heirs, 347, as *Richell's* case is, 720, 721, 722, 723, 724. For if a feoffment be made to pay a yearly rent to a stranger, the condition is good, yet the rent is but a penalty to the feoffee, *ibid.*
    - Upon such an act done that the condition cannot afterwards be performed.
      - By the act of God; as by the death of them to whom the condition is to be performed: but if some of them only be dead, the feoffee must perform it to the other as near the meaning of the parties as he may, and so be discharged, 352, 353, 354.
      - By the act of the party, *C.* Vide *infra.*

C. Acts of the party that the condition cannot be performed afterward by him, and yet he should perform the condition as if it were to make a feoffment, and the feoffee - -

- Make a feoffment or a lease for life to another, 355.
- Or make a lease for years, 356.
- Or take a wife, if he were sole at the time of the feoffment, 357.
- Or if he charge the land, *quære de hoc*, 358.

Estates upon Condition. Lib. 3. Cap. 6. and 7.—*continued.*

Descents. Cap. 6.

Descents.

When descents do take away the entry of such as have right.

Upon a disseisin, when a disseisor being a body natural, 413, dieth naturally, 410, seised in fee simple, 385. 387, or a donee in taile from a disseisor dieth seised in taile, 386, 387, in possession, 388, and this by course of law doth immmediately descend to his issue or some collateral heir, 389. 394, not party to the disseisin, 395. But an escheat for want of his heir is not so, 390. And this putteth him that hath right to his action until the impediment be removed; as if the heir endow his mother, 393, or that the disseisee within age entereth upon the heir in by descent, 407, 408, in these cases the entry of the disseisee is reived, 409.

Upon an abatement between brethren; as if the younger entered upon lands descended to the eldest, the eldest not having made any actual entry, 396, and dieth, such descent taketh away no entry, 396. So it is of two coparceners, if one enter into the whole, 398, but if he which abateth were a bastard in the law of the land, yet a *mulier* in the spiritual law, and died seised without interruption, such descent doth not only bar the *mulier* of his entry, but also of his action, 399, 400, 401.

What manner of persons shall not be prejudiced by such descents.

In regard to their estates, lessee for years; for he leaveth the reversion in the heir which is in by descent, 411, but it is otherwise of a tenant for term of life, 411.

In respect of

The circumstances

Of time in which the disseisin and descent was, viz. if it be in time of war, it taketh away no entry, 412.

Of making the claim.
- Expressly.
- Implicatively, by bringing of an action, but if a descent be cast *dum curia advisare vult, quære*, 422.

The privileges of the persons of such as should make their claim.

For defects
- In themselves,
  - Infancy, 402.
  - Coverture, 403, if no title of entry were given but only the coverture, 404.
- In others; as the heir shall avoid a descent cast in the time of his ancestor *de non sane* memory, as well as he shall a feoffment; neither of which the ancestor himself could avoid, 405, 406.

For impediments. *Vide A. infra.*

A. For impediments.

For distance of place; as if he were out of the realm
- About the king's affairs, 439.
- Otherwise, for such by intendment, cannot have notice of things done in the realm, 440, and such should not have been barred by a fine before the statute of nonclaim, 441.

By reclusc of their persons of necessity.
- Compulsive; as if he were in prison, 436, for neither outlawry, nor recovery by default, shall bar such an one, which are matters of record, 437, 438.
- Civil; for the aid of their profession; therefore if one enter into the lands of an abbey in time of vacation, and die seised, *quære* if such descent shall bar the next elected abbot of his entry, 443.

Continual Claim. Lib. 3. Cap. 7.

Continual Claim.

How this claim must be made. For this consider

The persons which should make it.

He himself which then hath title of entry, whose claim shall avail for those in remainder or reversion, 416.

Some other for him; as his servant; which being made by his commandment, and in his name, sufficeth, if it be made in such effectual manner as the master himself durst have done it at the time of the commandment given, 432, 438, 434, otherwise *quære* how it shall avail, 435.

The circumstances in making of it.

Of time. It must needs be made within the year and day of the death of the disseisor, else it giveth no benefit of entry to the disseisee, 423, 424, 425. 427, 428.

Of place.
- In the land whereof one is disseised, or in parcel of it, in the name of all in the same county, 417, 418.
- If one dare not enter into the land of itself, then in some place so near the land as he dare, 419, 420, 421.

The operation of it when it is made.

For purging the present *tort*, it defeateth the estate upon which the claim was made; as if it were upon a tenancy in taile, the continuance of occupation afterwards is a new disseisin, which giveth a fee, 429, for which the claimor may maintain an action of trespass, or *quare vi et armis, &c.* or upon the statute 5 *R.* 2. 7. or 8 *H.* 6. 9. 430, 431.

For preserving the future right of entry after such claim made; for then the entry of the claimor is congeable, notwithstanding the descent of any, 414, 415. 422.

Releases. Lib. 3. Cap. 8.

RELEASES.

- The making of them; which is to be considered
  - In the matter whereof it is made; for either it is.
    - Of lands, 444.
    - Of other things; as
      - Actions
        - Real, which barreth not an entry, 496.
        - Personal, which barreth not the reprisal of personal things, 497, 498.
        - Either of these is a bar of mixt actions; as -
          - Waste, 492.
          - Assise, 494.
      - Appeals; which barreth an appeal of murder or robbery; and so doth a release of all manner of actions, 500, 501, and an appeal of mayhem by a release of actions personal, 502.
      - Errors; for other releases bar not by bringing a writ of error to reverse an outlawry, 503.
      - Executions; which a release of all actions will not bar, unless it be a *scire facias* after the year, 504, 505, 506, 507.
      - All manner of demands. This is the surest release, 508, 509, 510, but a release of all manner of quarrels, *quære* of what effect it is, 511.
  - In the manner of making of it in respect of - - -
    - The persons to whom a release of right of land may be made; either to the tenant
      - Of the freehold,
        - In deed, 447.
          - By a descent without actual entry, 448.
          - By suit in law as - -
            - If the tenant in a *præcipe* alien depending the suit, a release to him notwithstanding is good, 490, 491.
            - To the vouchee, who is supposed tenant in the eye of the law, 491.
          - By reason of an ancient right remaining in him to whom the release is made; as between lord and tenant, if the latter be disseised in regard of the privity, this release is good as to the extinguishment of the seigniory, 454. 458, but a release to the tenant which hath made a feoffment is void, 457, so it is between donor and donee in tail, 455, so between lessor and lessee, but then the rent only is extinct, and not the reversion given away, 456.
        - In law, 447.
      - In possession; as to - - -
        - Lessee for years after his actual entry, 459, lessee at will as it seems, 460, but not to him that occupieth only by permission of the owner without any lease, and that is for want of privity, 461, unless it be between feoffor and feoffee upon confidence, 461, 462, 463.
      - In reversion sometimes; as if a disseisor make a lease for life, 449, but not to one in remainder *in droit*, 451, and such a release shall benefit the particular tenant, if he have the deed to show, *et è converso*, 453.
    - The form of a release. *Vide A. infra.*
- The effect of a release,
  - How it inureth
    - Between the parties to the release, it inureth by way of
      - *Mitter l'estate*, as between jointenants, 305.
      - *Mitter le droit*, as between disseisor and disseisee, 306. 466.
      - Extinguishment, 307, 308, and this is where he to whom the release is made cannot have the things released; as between lord and tenant for service, or for rent charge, or common, 479, 480.
    - Against strangers
      - Entitled by the right; as if the releasee had accepted it of a stranger upon condition, or had granted a rent charge, he shall avoid neither of them by a release, without actual entry of him who had right, 476, 477.
      - Claiming of wrong.
        - If there two disseisors, and the disseisee release to one of them, he shall hold out his companion; but a release to one of the feoffees of a disseisor inureth to both, 472, 473, 474, 475.
        - If an infant disseisor alien in fee, the alienee dies, to whose heir the disseisee releaseth, he shall bar the disseisor, continuing yet within age, in a writ of right, 478. 481, 482, 483, 484, 485, in which writ the mere right cometh in question, and not his lawfulness of possession, 486, 487. 489, and he must count in seisin of him or his ancestors, and prove it according to the count, 514.
  - How it must be pleaded.
    - A release of real actions can be pleaded by none but the tenant of the land, 494.
    - If a disseisor maketh a feoffment, &c. and yet taketh the profits, and the disseisee releaseth unto him all real actions, and yet sueth afterwards a writ of entry, in nature of an assise against him, *quære* how the disseisor should plead this release to take any advantage thereby, 499.

A. the form of a release; for the which note,

- That no future right passeth by way of release, notwithstanding the common form, 445, 446, therefore a release
  - Of a debt due upon an obligation before the day of payment is good, 512, of a rent service before the day void, 513.
- If it be made to enlarge an estate, the estate intended must be made and expressed, 465. 468, but if the releasor hath but a right, 469, 470, or if the releasee had a fee before, it needeth not, 467.

Confirmation. Lib. 3. Cap. 9.

Confirmation.

The form of it, 515, in which these words *dedi et concessi* amount to as much as *confirmavi*, 531, which (as some others) inureth by way of extinguishment; as where the lord granteth his rent to the tenant, or the grant of a rent-charge, 543, 544.

The force of it.

How it inureth.

Where it enureth, viz. where there is such a possession before whereupon a confirmation may work; therefore if one take away my villein in gross, and I confirm his estate, it is void, 541, 542.

In what manner.

Expressly.

By implication; as if the heir of a disseisor being in by descent, the disseisee joineth with him in a feoffment, here is the confirmation only of the disseisee, and the feoffment of the other; but if the disseisee shall bring a writ of entry in the *per et cui* against the feoffee, *quære* how shall he plead this, 534.

To what purpose.

Merely to confirm an estate made before, which is the proper force of it; for *confirmare idem est quod firmum facere;* as when disseisee confirmeth the estate of the disseisor, 519, 520, 521, 522, or of a lessee to a disseisor, or a rent-charge granted by a disseisor, though he after enter into the land, *quære de hoc*, 527, or when the lessor confirmeth the grant, 529. 547, or the lessee of his lessee, 516, 517, or when the lord confirmeth the estate of the tenant of the land where the seigniory, rents, and common, remain notwithstanding, 535, 536, 537, or where the parson of a church chargeth his glebe by the confirmation of the ordinary or patron seised in fee, it is made perpetual, 528. 648, *quære*, whether the patron and chaplain may not do the like, 530.

To confirm with some addition.

By enlarging the estate confirmed.

To commence presently, 524. 526. 533.

To take effect by way of remainder, 523, where it is necessary to have these words, *to have and to hold*, 525, but by neither of both a rent-charge can be enlarged by confirmation, but by new grant upon surrender of the old; but the rent *in esse* before may be, 548, 549.

By altering of it; as a lord by confirmation may diminish the services of his tenant, but not exchange them for other or reserve new, 538, 539, unless he alter it by frankalmoigne, which indeed is no corporal service, 540.

Attornment. Lib. 3. Cap. 10.

Attornment.

Where it needeth.

Whersoever the lord, or he in reversion, grants the service of his tenant, or what lies in reversion by deed, 551. 568. Without attornment (which is nothing but a consent to the grant) made to the grantee in the life of the grantor, the grant is void; therefore if one make two several grants to two several persons, he to whom the attornment is first made shall have it, 552, and a reversion barely granted without attornment settleth not, 567. But if it be granted by fine, the reversion *settleth* without attornment; but the conusee cannot punish waste, or have relief, or other things lying in distress, without it, 579, 580, 581, 582. So they who claim by grant cannot avow without attornment, but such as claim by escheat, 583, 584, or by devise, may, 585, 586.

Unless

The party which should attorn

Have sufficient before the grant; as,

Where one jointenant releaseth to another, there lessee need not attorn, 574.

Where there is lessee for life, the remainder for life, and the lessor releaseth in fee to him in the remainder, 575.

Be the same person which granteth; for then he cannot attorn to his own grant, 578.

Where services be granted to the tenant, who hath as great estate in the tenancy as the grantor hath in the seigniory; for there it enureth by way of extinguishment, 561.

How it is made.

By what person, viz. always by him who is tenant to the grantor; therefore

Upon grants of seigniories, the tenants of the manor must attorn, but not the tenants at will, 553. If it be in lease, he in the reversion must attorn, for he is tenant to the lord, 554. 562, but he in remainder must not, for then the particular tenant is tenant *as to make avowrie*, 557, and if there be mesne and tenant, the mesne must attorn, 555.

Upon grant of a reversion, the tenant of the freehold, 571, and tenant in tail may attorn, but he is not compellable, 570.

Upon grant of a remainder, the particular tenant, 569.

Upon grant of a rent charge, the tenant of the freehold, 556.

In what manner.

Expressly, 551, where the attornment by one jointenant, 566, or by one kind of service, if it be held by divers, 563, 564, is as effectual as if it were by all, because the seigniory is entire.

Implicatively;

By accepting of the grant

Of a reversion, 558, 559, 560.

Of a remainder; as where the estate of the tenant for life is confirmed with a remainder, 573.

By giving *a penny* as seisin of the rent, which includes an attornment, but not otherwise, 565.

By re-entering into his term; as if lessor enter upon his lessee for years, or life, and make a feoffment, and the lessee re-enter, 576, 577.

Discontinuance. Lib. 3. Cap. 11.

Discontinuance.

- What it is, viz. when by wrongful alienation of land, he which hath right cannot enter, but is driven to his action, 592.
- When it is; in which observe
  - What persons
    - May discontinue. They are either bodies
      - Politick; as an
        - Abbot,
        - Bishop,
        - Dean, if he alien
          - Part of his deanery, 652.
          - Part of the lands of the dean and chapter, it is not, 652.
        - Master of an hospital, 657.
      - Natural.
        - Tenant in tail, and driven them which have right to their formedon in descender, 595, remainder, 597, reverter, 596, as the case is.
        - The husband, if he alien his wife's land, 594.
    - May not, viz. the parson or vicar of a church, because they have no fee simple, 643, 644, 645, 646, 647, for a fee may be in abeyance, 648, as when tenant in tail releaseth all his right to a disseisor, 649, or when he granteth all his estate, 650.
  - How it may be made.
    - For the means.
      - By feoffment with livery, 611, 631, to some other than he in the reversion, 625, 626.
      - But not by
        - Release without warranty descending on him whose land is discontinued, 598. 600, 601, 602, 603, 604, 605, 606. 612.
        - Confirmation, 607, 608, 609, 610.
        - Grant, 627, 628, although the grant by fine, 618, unless there was a new reversion gotten before by the discontinuor; as if tenant in tail make a lease for life, and after grant the reversion in fee, 620, 621. 623, but then it must be executed in the life of the tenant in tail, 622. 629.
        - Devise, 624.
        - Escheat, because the lord in such case claimeth not in by the discontinuance, 642.
    - For the manner of the estate.
      - Before discontinuance, the discontinuor must be seised of that estate which is discontinued at the time, or else there is no discontinuance, 637, 638, 639, 640, 641.
      - After discontinuance how long it shall so continue.
        - For ever, until the right be re-continued by an action.
        - For a time only, *Vide A. infra.*

A. For a time only, and that depending upon

- Contingency.
  - Where the tenant in tail maketh a gift in tail, or a lease for life, reserving the reversion to himself, 630.
  - Where a husband having issue by his wife, who had issue also by a former husband, alieneth for life, the feme dyeth, lessee for life surrendereth to the baron, after the death of lessee for life the heir may enter without question; *quære* if he may not before, 636.
- Condition.
  - *In fait;* for if the discontinuor enter for breach of a condition, the discontinuance is purged, 632.
  - In law; as if an infant discontinue, and die in his infancy; for seeing such alienation should not have barred the infant himself, it seemeth it shall not bar others, 633, 634, 635.

Remitter. Lib. 3. Cap. 12.

Remitter.

The reason of the name, viz. it is an ancient term in law when a man hath two titles unto land, and he cometh to possession by the latter; and when he is in, the law supposeth him in by the former, which is the surer title, 659, and the cause hereof is, because he hath no man against whom to bring his action for his former title, 661.

When it happeneth.

To whom, *scil.* to none but such as have a freehold in deed or law to cast upon them, 680, 681, 682, 683.

How this freehold, which is the puisne possession, must come.

By descent,

Natural; as if tenant in taile discontinue, and after disseiseth the discontinuee, and die, the issue in taile is remitted, 659. 662, notwithstanding a recovery by feigned title; which

If it be not executed, he shall bar his execution, 690.

If it be executed, he shall satisfy, 688.

Civil; as if an abbot or bishop alien, and the alienee enfeoffeth him again with license, his successor is remitted, and shall hold discharged of all mesne incumbrances, 686, 687.

By purchase,

By act of law;

As if the heir in taile within age marry with the discontinuee, 665.

Or upon disclaimer of the discontinuee, which the demandant cannot hinder, but in such actions where damages are to be recovered, 691, 692.

By the act of the party himself.

Where his entry is congeable: there the taking of any estate otherwise than by indenture, or matter of record, will not estop him of his remitter, 693, 694, 695, 696.

Where his entry is not congeable. *Vide A. infra.*

A. Where his entry is not congeable, there his folly in taking any thing from the discontinuee must be excused,

By his disagreement thereunto; as if tenant in taile enfeoffe his son and another and maketh livery to the other, 684.

By other imperfections wherein folly cannot be imputed; as

Infancy.

Coverture; as if the husband discontinue the wife's land, and the discontinuee lease it, 666. 671, 672, or the disseisee of the discontinuee lease it, 678, to

Baron and feme, although it were by fine, 669, for in taking any thing she shall not be examined, 670. Yet the baron cannot bar his lessor in an action of waste, 667, but the feme in default of her baron at the grand distress may, 668, 669, and she shall maintain an assise against him for entry afterwards, 679, and if this be but a particular estate, they in reversion or remainder are remitted also, 673.

The feme only, if the baron were then absent, and after agree unto it, 677.

Warranty. Lib. 3. Cap. 13.

WARRANTY.

- The several kinds of it; which are
  - Lineal, where a man maketh a feoffment with warranty, and this descends to his son; the cause of which name is not for the lineal descent of it, but because the land should have lineally descended if such warranty had not been, 703. 706. 715. The like is of the feoffment of the mother with warranty, 713, 714.
  - Collateral. This is where he that maketh the warranty is collateral to the title; and he upon whom the warranty descendeth cannot convey the same land from the warrantor, 705. 717; as
    - If the father disseise the son, and after make a feoffment with warranty, 704.
    - If a man be disseised of lands in fee, and have issue two sons, the youngest releaseth with warranty, this is collateral to the eldest, 707, 708.
    - If the disseisee were of lands in taile, the warranty of the uncle is collateral, 719. And so if a man have three sons, and entail his land to the eldest, with remainder to the second, &c. and the eldest doth discontinue with warranty, 716. 719. As it is of sons, so it is of daughters, 710.
  - Commencing by disseisin; as if the father, &c. being lessee for years, or at will, of his sons, make a feoffment with warranty, 698, or if he be jointenant with his son, and make a feoffment of all the warranty, 700. So if a guardian in socage or chivalry make feoffment, 699. So if a disseisee immediately make a feoffment over with warranty, 702, or if one make a feoffment of the house of *A. B.* with warranty to barretors of the country for fear of whom *A. B.* departeth the house, 701.
- The quality of it.
  - What words will make a warranty, viz. *Warrantiso* only, 733.
  - What effect a warranty is of, viz. to bar or rebutt, &c. *Vide A. infra.*

A. What effect a warranty is of, viz. to bar or rebutt, &c.; where note,

- What warranties do bar, viz.
  - Lineal, for lands in fee, but not in fee taile without assets, 712.
  - Collateral barreth both, but in cases especially provided, 712, as by the stat. of *Gloucester* the warranty of the tenant by the curtesy barreth not without assets, although it be by fine levied by the husband only, 724. 728, 729, 730, 731, 732. But tenant in dower or for life are not within the statute's compass, 725, yet if such warranty descend upon an infant, he shall not be barred, 726.
  - Commencing by disseisin doth never bar, 697.
- Whom they bar, viz. none but those upon whom they do descend; therefore they must needs attach in the ancestor, and the warranty by devise barreth not, 734, and warranty doth descend always upon the heir, therefore it never descends upon the brother of the half-blood, 737, nor where the blood is corrupted, 745, 746, 747, at the common law; not by custom, as borough English, or gavelkind, 718. 735, 736.
- How long they bar, viz. until
  - The estate whereunto they be annexed be
    - At an end, 738.
    - Defeated, 741, 742, 743, 744.
  - The warranty be released, and he on whom the warranty doth descend hath the release to show, 748.

END OF THE ANALYSIS OF LITTLETON.

A

TABLE OF THE HEADS

CONTAINED IN THE

INDEX TO LORD COKE'S COMMENTARY

IMMEDIATELY FOLLOWING.

A.

ABATEMENT.
——— of Writs. *Vide* Writs.
Abbot. *Vide* Corporation.
Abeiance.
Abettors.
Ability. *Vide* Capacity.
Abjuration and Exile.
Abridgment.
Acceptance.
Accessory.
Accompt.
Acquittal.
Acquittance.
Acre.
Actions.
Admeasurement.
Administrator. *Vide* Executor.
Admiral.
Admission.
Advowson.
Æquivocum.
Affiance.
Affinis.
Age.
Agent and Patient.
Agreement. *Vide* Disagreement.
Aid.
Alien.
Alienation.
Allegiance.
Allodium, Allodiarii.
Allnetum.
Amerciament.
Ancestor.
Annuity.
Appeal.
Appearance.
Appellant.
Appendant.
Apportionment.
Approbatio.
Appropriation.
Appurtenant.
Archdeaconries.
Argument.
Arms and Armory.
Arraignment.
Array.
Arrearages.
Assets.
Assignment.
Assise.
Attainder.
Attaint.
Attorney.
Attornment.
Audita Querela.
Averment.
Aumone.
Avowry.
Authority.
Ayel.

B.

Bail.
Bailment.
Bailiff.
Bank.
Bar.
Bargain and Sale.
Baron and Barony.
Baron and Feme.
Barretor.
Bastardy.
Bedell.
Bennerth.
Berewica et Berewit.
Berquarium.
Bishop.
Blood.
Bokeland.
Bona.
Bordarii et Borduanni.
Boscus.
Bote.
Bovata Terræ.
Briga.
Bruera.
Burgage.
Burgebote.
Burgh English. *Vide* Custom.
Bye and *Byan.*

C.

Capacity.
Castle.
Castle-guard.
Causâ Matrimonii prælocuti.
Certainty.
Certificate. *Vide* Trial.
Cessavit.
Challenge.
Champerty.
Chance Medley.
Charge and Discharge.
Charters.
Chase. *Vide* Forest.
Chattels.
Chevage.
City.

Claim

Claim. *Vide* Continual Claim.
Clergy.
Clifford.
Coleberti.
Collusion. *Vide* Covin.
Combe.
Commote.
Commission.
Common.
Conclusion. *Vide* Estoppel.
Condition.
Confirmation.
Consanguinity.
Constable. *Vide* Marshal.
Continual Claim.
Contract.
Conusans of Pleas.
Cope.
Copyhold.
Cornage.
Corody.
Corporation.
Corruption of Blood.
Cosinage.
Costs. *Vide* Damages.
Cotterelli and *Cottagium.*
Covenant.
Coverture.
Covin and Fraud.
Count.
Court.
Cui in vitâ.
Curtesy of England.
Custagia.
Customs.

D.

Damages.
Date of a Deed.
Day.
Dean and Chapter.
Debt.
Deceis tantum.
Deeds.
Default.
Defeasance.
Defence.
Deforcement.
Degrees.
Demand.
Demurrer.
Dene and *Denne.*
Denizen.
Departure.
Deraignment.
Detinue.
Devise.
Dilapidations.
Disability.
Disceit.
Discent.
Disclaimer.
Discontinuance.
Disparagement.
Disseisee and Disseisor.
Disseisin.
Distress.
Divorce.
Donatives.
Double Plea.
Dower.
Drenchs.
Droit. Vide Right.
Dunum, Duna, Dun.
Dum fuit infra ætatem.
Dum non compos mentis.

E.

Eire.
Election.
Elegit.
Elopement.
Emblements.
Embracery.
Entry Congeable.
Error.
Escheat.
Escheator.
Escrow.
Escuage.
Esplees.
Essoin. *Vide* Protection.
Estates.
Estoppel.
Estovers.
Etymologies.
Evidence.
Examples.
Exception.
Exchange.
Excommunication.
Execution.
Executors.
Exposition of Words.
Extent.
Extinguishment.
Extortion.
Ey.

F.

Falsifying of Recoveries.
Fealty.
Fee simple.
Fees.
Felony.
Feoffment.
Ferdwit.
Ferlingus.
Fines to the King.
Fines of Lands.
Firma.
Folkland.
Forcible Entry.
Forest, Park, Chase, Warren.
Forfeiture.
Forejudger.
Formedon.
Frankalmoign.
Frankmarriage.
Frassetum.
Freebank.
Freehold.
Frith.
Frustum Terræ.

G.

Gavelkind.
Glebe.
Glyn.
Grand Serjeanty. *Vide* Serjeanty.
Grange.
Grants.
Grava.
Guardian.
Gurges.

H.

Habendum.
Haga.
Haugh and *Hough.*
Heir.
Heirloom.
Herbage.
Heresy.
Heriot.

Hida Terræ.
Hirst and Hurst.
Holm and *Hulmus.*
Holt.
Homage.
——— Auncestrel.
Homicide.
Hope.
Horngeld.
Hors de son Fee.
Hospital.
Hotchpot.
Howe and *Hoo.*

I. J.

Jampna.
Ideot.
Imprisonment.
Incident. *See* Appendant.
Incumbent.
Indenture.
Indictment.
Infant.
Infranchisement.
Inheritance.
Inrolments.
Instant.
Institution.
Intention of the parties.
Interesse Termini.
Interest.
Intrusion.
Jointenants.
Jointure.
Ireland.
Issue.
Judgment.
Jugum Tarræ.
Juncaria & Joncaria.
Juris utrum.
Juror and Jury.
Justices.

K.

King.
Knight.
Knight's Service.
Knol.

L.

Laches.
Lagamas.
Lannemanni.
Lapse. *Vide Quare Impedit.*
Law.
Lea and *Ley.*
Leases, Lessor, Lessee.
Lectures.
Leper.
Leswes et Lesues.
Librata Terræ.
Licence. *Vide* Authority.
Ligeance.
Limitation.
Livery out of the Hands of the King.
Livery and Seisin.

M.

Machicollare et Machecouare.
Maihem.
Maintenance.
Manor.
Manumission.
Marches.
Marchet.
Maremium.
Mariscus et Mora.
Marriage.
Marshall.
Maxim.
Mayor and Commonalty. See Corporation.
Meason.
Merchants.
Merger.
Mesne.
Messuagium.
Minera.
Miscontinuance.
Mise.
Modo et forma.
Monasteries.
Money.
Monk.
Monster.
Mortdancestor.
Mortgage.
Mortmain.
Mulier.
Multitude.
Murder.
Mute. *See* Treason.

N.

Name.
Niefe.
Nobility.
Nonage.
Non compos, &c. See *Dum non compos.*
Nonsuit.
Notice.
Nuisance.

O.

Obligation.
Occupant.
Occupation.
Office and Officers.
Office or Inquisition.
Ordinary.
Ouster le Main. See Livery.
Out of the Realm.
Outlawry.
Oxgang.

P.

Pannel.
Pardon.
Park. *See* Forest.
Parliament.
Parol demur.
Parson and Patron.
Partition and Parceners.
Pascuum et Pastura.
Patents. *See* Grant, King.
Payment.
Per quæ Servitia.
Pew.
Piracy. *See* Attainder, Felony.
Place.
Pleadings and Pleas.
Plenarty.
Plight.
Plough-land.
Possession.
Possibility.
Pound.
Præcipe.
Præmunire.
Præsumptio.
Prerogative.
Prescription.
Presentation.
Presumption.
Primer Seisin.
Privies and Privity.
Profession.

Profession.
Property.
Proprietate probandâ.
Protections.
Protestation.
Proviso.
Pudzeld.
Purchase.
Purpresture.

Q.

Quare Impedit.
Quarentena.
Quarrel.
Queen.
Que Estate.
Quid Juris clamat.
Quod Ei deforcent.

R.

Radmans et Radchemistres.
Ransom.
Rape.
Rationabili Parte Bonorum.
Ravishment of Ward.
Rebutter.
Recluse.
Record.
Recovery.
——— in Value.
Redisseisin.
Register of Writs.
Relation.
Releases.
Relief.
Remainder.
Remitter.
Rents.
Replevin.
Report.
Request.
Resceit.
Rescous.
Reservation.
Responsalis.
Resummons.
Retainer.
Retraxit.
Reve.
Reversion.
Reviver. *See* Extinguishment.
Revocation.
Richel.
Right.
Riot.
Robbery.
Ruscaria.

S.

Saliva.
Scire facias.
Scutagium.
Seals.
Seisin.
Selda.
Selio Terræ.
Sequatur sub suo Periculo.
Serjeanty.
Services.
Shaw.
Sheriff.
Shire.
Simony.
Socage.
Sokemans et Sokmanni.
Solinum et Solinus Terræ.
Stadirm Terræ.
Stagnum.
Stanlaw.
Statutes in General.
Statute *Mag. Chart.*
Statute Merchant and Staple. *See* Execution, *&c.*
Stethe sue Stede.
Steward.
Stowe.
Summons and Severance.
Surrender.
Suspense.

T.

Tail.
Tail after Possibility of Issue extinct.
Taini et Tainland.
Tallage.
Tenant.
Tenant at Will and Sufferance.
Tenants in Common.
Tender and Refusal.
Tenellare or *Tanellare.*
Tenure.
Testament.
Testimonies.
Tillage.
Time.
Tithes.
Title.
Town.
Traverse.
Treason.
Trespass.
Trial.
Twaite.

U. V.

Vaccaria.
Valuation.
Venire. *See* Trial.
Ventre inspiciendo.
Verdict.
Vestura Terræ.
Village.
Villenage and Villein.
Virgata Terræ.
Visitor.
Void and Voidable.
Voucher.
Uses.
Usurpation.

W.

Wager of Law.
Wales.
War.
Wardship.
Wardwit.
Warranty.
Warreccum seu Warrectum Terræ.
Warren. *See* Forest.
Waste.
Way.
Wera et Were.
Wit seu Wita.
Witness. *See* Testimony.
Woodgeld.
Words. *See* Exposition of Words.
Worscot.
Worth.
Writs.

Y.

Year and a Day.

AN

AN

INDEX

TO THE

FIRST PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND.

[☞ *A separate INDEX to the NOTES of Hargrave and Butler is added at page* CXLV.]

AB

Abatement. *See* Writs.

THE etymology of the word, 134. b.
The divers acceptations of the word, and what it properly signifies, *ibid.* 277. a.
The difference between an *Abatement*, Disseisin, Intrusion, Deforcement, Usurpation, and Purpresture, 277. a. b.

Abbot. *See* Corporation.

Abeiance.

The signification and derivation of the word, 342. a. b.
Where the freehold and inheritance of lands, &c. shall be in abeiance, 342. b.
Where an estate of lands, &c. in abeiance may be aliened or charged, and where not, 343. a.
Where by the grant of tenant in tail of all his estate or right, to a disseisor, the right of the title shall be in abeiance, 345. a. b.
Where an entry or claim by one that hath no right, shall gain an inheritance by wrong, which is in abeiance, 263. b.
The fee-simple of the glebe in abeiance, by the alienation of the parson, and during the vacancy of the parsonage, 341. a.
When by attainder, 345. a. b.

Abettors.

Where the defendant in an appeal shall recover damages against the plaintiff, and where not, 138. b. 139. b. *Vide Stat. W.* 2. *cap.* 12.

AC

Ability. *See* Capacity.

Abjuration and Exile.

How a person abjured or exiled is esteemed in law, 133. a.
Where the wife of such person may sue and be sued without naming her husband, 132. b. 133. a.
What banishment shall be said in law a civil death, and what not, 133. a.

Abridgment. *See* Condition, Confirmation.

Acceptance. *See* Arrearage, Avowry, Condition, Dower, Escheat, Remitter, Surrender, Waste.

Acceptance of rent will not make a void estate good, 215, a.
Where the acceptance of a rent shall dispense with a condition broken for non-payment, and where not, 211. b. 215. a.
Where the acceptance of another thing in satisfaction shall be a good bar in debt, upon an obligation, and where not, 212. b. 213. a.
Where the acceptance of a lesser sum in satisfaction shall be a good bar, and where not, 212. b.
Where the acceptance of homage or fealty shall bar the lord of his escheat, 268. a.
Where the acceptance of rent shall bar the lord of his escheat, and where not, 264. a. b.

Where

Where the acceptance of the services by the hands of the tenant after forejudger of the mesne, shall conclude the lord paramount of the arrearages incurred before, and where not, 296. b.

Accessory.

Accessorium sequitur, non ducit suum principale, 152. a.
In what offences there may be accessories, in what not, 57. a.

Accompt. *See* Guardian, Socage.

The several kinds of writs of accompt, and against what persons such writ lieth, and against what not, 172. a. 200. b. 87. b. 90. b.
Where in an accompt against one as receiver he shall have allowance of expenses and charges, and where not, 172. a.
Where an accomptant shall have allowance of goods stolen and miscarried, and where not, 89. a.
Where an accompt lieth by and against an executor or administrator, and where not, 89. b. 90. b.
Where an accompt lieth by one jointenant or tenant in common against his companion, and where not, 172. a. 186. 200. b.
A release of all duties no bar in an accompt, 291. a.
Where in an accompt as receiver, the defendant may wage his law, and where not, 295. a. *Vide tit.* Wager of Law.
Where and against whom a *capias* lieth in accompt, and where and against whom not, 89. a. *Vide Stat. W.* 2. c. 1.

Acquittal.

The signification and derivation of the word, 100. a.
The several kinds of acquittals, *ibid.*
To what tenure acquittal is incident, and to what not, 100. a. 101. a.

Acquittance.

Where if given for the whole, though but part paid, it is good, 212. b.
For rent due the last day, when it shall discharge all before, 373. a.

Acre.

Its quantity and contents, 5. b.

Actions.

The definition of an action, 285. a.
The division of actions, 284. b. 285. a.
The difference between an action and a writ, 289. a.
The difference between an action and an execution, 289. a.
A release of actions is no bar of executions, 289. a.
A feint action } what, 361. a.
A false action }
In what places and counties actions shall be brought, 282. a. b. *per tot. pag.*
Where and what actions shall be brought *in consimio comitatus*, and where and what not. *Vide tit.* Assise.
Where in actions for things transitory, the place or county is traversable, and where not, 282. a. b.
In actions transitory the day and time not traversable, if the act be done before the writ brought, 283. a.
Where by a release of all actions, causes of actions be released, but within a submission of all actions to arbitrement, causes of actions are not contained, 285. a.
When they lie *quia timet*, 100. a.
Cannot be altered by the party's own act, 285. a.
When they continue, though part of the cause is determined by the act of God, 285. a.

Admeasurement.

Admeasurement of dower, where it lieth by the guardian in chivalry, and where by the heir, 39. a.

Administrator. *Vide tit.* Executor.

Admiral.

The etymology of the word, 260. b.
How called anciently, and how at this day, 260. b.
The jurisdiction of the admiral's court, and from what antiquity, and according to what law they proceed, 260. a. b. 391. a.

Admission.

The description and form of an admission and institution of a clerk, 344. a.

Advowson.

Advocatio quid, et unde, 17. b. 119. b.
The antiquity of the word, 17. b.
How *advocatio medietatis* and *medietas advocationis* differ, 17. b. 18. a.
Where an advowson lies in tenure, 85. a.
Where in grant, and not in livery, 332. a. 335. b.
Where the disseisee or issue in tail after discontinuance may present to an advowson before recontinuance of the manor, to which, &c. and where not, 307. a. 333. b.
Where and what act shall put the patron out of possession of an advowson, and where and what not, 344. b.
Is a thing of trust, 17. b. 89. a.

Æquivocum *quid et quotuplex*, 154. b.

Affiance.

Affiance, and *Affidare*, quid, 34. a.

Affinis, 34. a. 157. a.

Age. *See* Infant.

Age to alien or contract, what our law requires, and what other laws, 78. b. 172. b. *Vide tit.* Infant.
Age to do knights service. *Vide tit.* Knights Service.
The several ages of a man to divers purposes, 78. b. 79. a.

The divers ages of a woman to several purposes, 78. b.
Age to be professed in religion. *Vide tit.* Profession.
Where one parcener being an infant, shall have her age, notwithstanding the full age of her sister, 164. a. *Vide tit.* Parole demurre.
A lease to one and his heirs *pur auter vie*, the heir of the lessee shall not have his age, 239. a.
Where a bastard shall have his age, 244. b.
Where the heir upon a discent by reason of the profession of his ancestor in religion shall have his age, 248. b.
No *elegit* upon judgment, or recognisance, shall be sued, that lands descended to an infant, 200. a.
Where tenant for life surrenders to him in the reversion within age, he shall not have his age, 338. b. 381. a.
If the heir within age endow his mother, no *elegit* shall be sued against her during his minority, *ibid. et ubi supra.*
Where the heir shall have his age in a *cessavit*, 380. b. 381. a.

Agent and Patient. *See* Executor, Voucher, Remainder.

Where a woman may endow herself *de la plus beale*, 39. a. b.

Agreement and Disagreement. *See* Acceptance, Attornment, Coverture, Damages, Dower, Election, Remitter, Warranty.

Where an infant or his heirs may disagree to his own purchase, 2. b.
The heir of an idiot or madman to that of his ancestor, *ibid.*
The husband or the wife herself after coverture to the purchase of the wife, 3. a.
Where an agreement to the entry or act of a stranger shall be as available or prejudicial to the party as his own act or entry, and where not, 180. b. 207. a. 245. a.
Where the agreement to a conveyance whereby an estate is after cast upon the disseisee or issue in tail shall hinder a remitter, 359. b.
Where a feme covert may disagree to an estate determined to save herself from damages, 380. b.

Aid. *See* Knight Service, Parceners, Stat. *W.* 1, *cap.* 6, *et* Stat. 21 *H.* 8, *cap.* 19.

Where a parson, vicar, &c. shall have aid of his patron and ordinary, 341. b.
Where upon an avowry at this day for services, aid is grantable of any man, 312. a.
Where a bishop, abbot, &c. shall not have aid of the king, otherwise of a dean collative, 341. b.

Alien. *See* Challenge, Denizen, Dower, Ligeance, Release, Wager of Law.

The etymology of the word, 118. b. 128. b.
The description of an alien, 129. b.
The sons of an alien born within the ligeance of the king, not inheritable either to other, 8. a.

Where an alien may be capable of lands, &c. to his own use, and where only to the use of the king. 2. b.
Where and by what means he may be made to inherit, and where and by what not, 8. a. 129. a.
If a prior may sue in right of his house, 129. a.
What actions an alien may or may not bring in his own right, 129. a.
Alien enemy may not have any action, *ibid.*
Where an alien may wage his law, 295. a.
Where a reversion is granted to an alien, and after denization the tenant attorns, the king upon office found shall have the land, 310. b.

Alienation.

The derivation of the word, 118. b.
What shall be said an alienation to divers purposes, and what not, 118. b.
When licence for alienation first began, how and when taken away, 43. *per tot. pag.*

Allegiance.

How such oath first began, and where, and when to be taken, 68. b. 172. b.
How it differeth from the oath of fealty, 68. b.

Allodium, Allodiarii.

Quid et qui, 1. b. 5. a.

Alnetum.

What, 4. b.
What passes by this name, *ibid.*

Amerciament. *See* Pardon.

Amerciament what, and whence so called, 126. b.
How it differeth from a fine, 127. a. *Vide tit.* Fines.
The causes of amerciaments in actions real and personal, 126. b. 127. a.
Where an amerciament shall be due for the abatement of a writ, and where not, 127. a.
How an amerciament anciently was called, 127. a.
Where in debt for an amerciament the defendant shall wage his law, and where not, 295. a.
Where issues and amerciaments shall be levied upon the lands which the jurors or parties non suit had at the time of the pannel returned, or finding of pledges, and where not, 102. b.
Who shall be amerced and who not, 127. a.
By whom it ought to be affeered, 126. b.
No *capiatur* lies for one, 126. b.
When land is liable for it, 102. b.

Ancestor.

The derivation of the word, 78. b.
How it differeth from predecessor, *ibid.*

Annuity. *See* Grant, Parson, Rent, Reservation.

The description of an annuity, 144. b.
Where the heir of the grantor shall not be charged in an annuity without naming, 144. b.

Where the heir of the grantee and his assignee may have a writ of annuity, 144. b.
Where and for what rent a writ of annuity lieth against the grantor, and where and for what not, 144. b.
Where it lieth not for a rent reserved by indenture upon a feoffment in fee, 144. a.
Where two joining in a grant of an annuity, the grantee may have two several writs, and where but one, 144. b.
Where it lieth not against an heir by prescription, 162. a.
How created, 144. b. *per tot.* 147. a. 146. *per tot.*
Annuity, *pro consilio*, &c. where grantable over, and where not, 144. a.
What shall be said a sufficient act to determine the election of the grantee of a rent-charge to make it an annuity or a rent, and what not, 144. b. 145. a. b.
Where the rent-charge being determined, the grantee notwithstanding shall have an annuity, and where not, 148. a. 150. a. 349. a.
Where the cause of the grant of an annuity shall amount to a condition, and the one ceasing, the other shall determine, 204. a.
Annuity granted in *Feb.* payable at *Mich.* and the *Annunciation*, shall be construed to be at the *Annunciation* and *Mich.* 217. b.
Where, in a writ of annuity, the annuity determineth hanging the writ, the arrearages are become irrecoverable, 285. a.
A release of actions real or personal, a good bar in an annuity, *ibid.*
Where the annuity is not arrear, a release of all actions is no bar, 192. b.

Appeal. *See* Abettors, Outlawry, Release.

The description and derivation of an appeal, 123. b. 287. b.
The several sorts of appeals, 287. b.
What shall be said a good plea in bar of an appeal of murder or felony, and what not, 287. b. 288. a.
Where the wife shall have an appeal of the death of her husband, and where not, 33. b.
Where the wife shall have an appeal, and yet shall not be endowed, *et è converso*, ibid.
Where the heir shall have an appeal of the death of his ancestor, where the party by whom he conveyeth his discent could not by possibility, 14. a. 25. b.
Within what time it ought to be brought, 254. b.
Where in an appeal the parties ought to maintain the combat in proper person, otherwise in a writ of right, 294. b.
When to be brought before the constable and marshal, 74.

Appearance. *See* Default.

Appellant, who, 123. b. 287. b.

Appendant Parcel, Incident. *See* Acquittal, Distress, Fealty, Grants, Manor, Prerogative.

Appendant, what, and why so called, 121. b.
The difference between appendants and appurtenants, 121. b.
What things may be appendant to other, and what not, 49. a. 121, 122. b.
Where an advowson at one turn may be appendant, and at another in gross, 122. a.
Where a remitter to the principal shall be a remitter to the appendant, notwithstanding severance by the discontinuee, 349. b. 363. b.
Where a remitter shall not be to a thing appendant before recontinuance of the principal, 349. b.
How they pass, 56. 121. b. 305. b.
Where a thing being totally disappendant, may be appendant again by a grant in as ample manner, 121. b.
What properly said to be an incident, 15. b.
The several sorts of incidents, 93. a.
What services incident to other, 69. a.
Rent and services incident to the reversion, and shall pass by grant of reversion, but not *è converso*, 151. b. 152. a. 317. a. 324. a. b.
Incidents to the blood not forfeitable or transferable over, 99. a.

Apportion, Apportionment. *See* Damages, Extinguishment, Rent, Revocation, Warranty.

What and whence derived, 147. b.
Where part of the land out of which, &c. coming to hands of a grantee of a rent-charge, the rent shall be apportioned, and where not, 147. b. 149. b. 150. a.
Where a rent-charge may be apportioned by the act of the party, and where not, 148. a. 149. b. 150. a.
Where by the eviction of part of the land, the rent issuing thereout shall be apportioned, and where not, 148. b.
Where by purchase or surrender of part of the land, or alienation of part of the reversion, a rent-service shall be apportioned, 148. a.
Where a rent-charge shall be apportioned, albeit the grantee claimeth part of the land out of which, &c. under the grantor, and where not, 148. b.
Where a condition may be apportioned, and where not, 215. a.
Where notwithstanding a discent of part of the land to a commoner, the entire common shall remain, and where it shall be apportioned, 149. a.
By purchase of part of the tenancy by the lord, what services shall be apportioned, and what not, 149. a. b.

Approbatio.

Quid, 295. b.

Appropriation.

Where the appropriation of a church to a house of religion shall be mortmain, 304. a.

Appurtenant. *See* Appendant.

What, 121.

AT

Archdeaconries.

How divided, 95. a.

Argument.

The several sorts of arguments, and what shall be said a good argument of proof in law, 11. a. b.

Arms and Armory.

The course of discent of arms, and how it differeth from other inheritances, 27. a. 140. b.
The arms of *England* and *France*, when first united, 7. a.
When the kings of *England* began first to seal their charters with a seal of arms, 7. a.

Arraignment.

The signification and derivation of the word, 156. a. 262. b.
To arraign an assize, what, *ibid.*
Arraignment of a prisoner, what, 263. a.

Array. *See* Challenge.

The signification and derivation of the word, 156. a.

Arrearages. *See* Acquittance, Acceptance, Annuity, Avowry, *Stat.* 32 *H.* 8. *c.* 37.

Where an acquittance for rent due the last day, shall be a discharge of all the arrearages incurred before, 236. a.

Assets.

What shall be said assets in the hands of an executor or administrator, and what not, 41. b. 113. a. 117. a. 124. a. 236. a.
What shall be said sufficient assets to make a lineal warranty a bar to an estate-tail, and what not, 374. b.
Where a rent extinct shall be said assets, 374. b.
Where an advowson shall be assets, and how valued, *ibid.*
A seigniory of homage or fealty, or in frankalmoign, no assets, 374. b.
Where there may be assets in law, and where not, 216. a.

Assignment, Assigns. *See* Annuity, Dower, Executor, *Stat.* 32 *H.* 8. *c.* 34. Warranty.

The derivation of the word, 8. b.
The several sorts of assigns, *ibid.*
Where an assignee shall take an advantage of a condition, and where not, 214. b. 215. a. b.
Where an assignee shall take advantage of a covenant real, without being named in the deed; otherwise of a warranty, 384. b. 385. a.

Assise. *See* Attornment, Disseisor, *Stat.* 2 *R.* 2. *c.* 10.

The derivation and proper signification of the word, 153. b.
The several acceptations in law of the word assize, *ibid.* 154. b. 155. a. b. 159. b.

AT

The several sorts of writs of assizes, and why so called, 155. a. 159. a. b.
Assize of novel disseisin, and whence so called, 153. b.
Where an assize *in confinio comitatûs* lay at the common law, and where at this day, 154. a. *Vide Stat.* 2 *R.* 2. c. 10.
What shall be said a good plea in bar of an assize, and what not, 228. b. 229. a. 285. a. b.
Where the cousee of a reversion by fine upon a lease for years being disseised, shall have an assise before attornment, 320. a.
Assise of novel disseisin lies against the coadjutors, as well as against the tenant, 180. b.

Attainder. *See* Felony, Treason.

Attainder, *quid*, 294. b. 390. b.
The several sorts of attainders, 390. b.
The several writs of escheat upon attainders, 390. b.
How it differs from conviction, 390. b.
Attainder commences by the pronouncing the judgment, 390. b.
Where a man may be attainted after his death, 390. b.
By discent of the crown upon a person attainted, the attainder *eo instante* void, 26. a.
The difference between a person attainted and convicted, 390. b. 391. a.
What a felon forfeits by conviction before attainder, 391. a.
Judgment to *peine fort et dure* upon refusal to answer according to law, or saying nothing, no attainder, 391. a.
Where the defendant in any appeal waging battel is slain, he shall have judgment to be hanged, 390. b.
Where attainder in the admirals court (by proceeding according to the civil law) for piracy, murder, &c. upon the sea shall work no corruption of blood, or forfeiture of lands; otherwise of an attainder before commissioners by the statute 28 *H.* 8. *Vide Stat.* 28 *H.* 8. *cap.* 15.
Attainder of heresy, or in a *præmunire*, no corruption of blood, 391. a. 8. a.
In what manner and degree the blood is said to be corrupted by attainder, 391. b.
Where a person attainted hath issue, and after pardon hath issue, the youngest is not inheritable during the life of the eldest, or his issues, 8. a. 392. a.
Where the sons of a person attainted, born before the attainder, shall inherit each to other; *secus* of sons born before the attainder, 8. a.
Attainder of treason or felony disables one from bringing any action, 130. a.
——— disables one from being heir, 8. a. *per tot.*
——— how it affects the blood, and how it may be restored, 8. a. *per tot.*
What tenant in tail forfeits by attainder of felony or treason, 392. b.

Attaint. *See* Conusance, Release, *Stat.* 23 *H.* 8. *c.* 3.

The derivation of the word, 294. b.
Where such writ lieth, *ibid.*
The judgment in attaint, 294. b.
No *supersedeas* grantable upon an attaint, 227. b.
A release of all actions, a good bar in attaint, 289.

No

No attaint lieth upon a verdict in waste, *quale jus*, or other inquest of office, 355. b.
Where it lieth upon a verdict in an assise, 355. b.
Where an attaint lieth upon a verdict, where the witnesses are joined to the inquest for trial of the deed, and where not, 6. b.

Attorney. *See* Livery, Wager of Law.

The signification of the word, 51. b.
The several kinds of attorneys, *ibid.*
What persons may be attorneys in the King's court, and what not, 128. a.
The difference between an attorney and a *responsalis* in ancient times, 128. a.
Where an idiot or lunatic ought to sue in person, and not by attorney, 135. b.
Where livery of seisin by an attorney shall be good, and when one acts merely as such, he cannot thereby prejudice his own interest, 52. a.

Attornment. *See* Alien, Condition, Infant, Notice, Prerogative, Pleading, *Quid Juris clamat*, *Per quæ Servitia.*

The definition of an attornment, 309. a.
The division of attornments, 309. a.
Attornment, why requisite, *ibid.*
What act or words shall amount to an attornment, 310. a.
Where it ought to be in the life of the parties, and where it shall be good to the heir, 309. a. b. 315. a.
In what conveyances requisite upon passing a reversion, &c. at this day, and in what not, 309. b. 314. b. 321. b.
Where the mesne grants over his mesnalty, and the lord paramount releases to the tenant, attornment by the tenant after shall be sufficient to pass the rent seek by surplusage, 309. b.
Where after a grant of the reversion of two acres, the lessor levies a fine of one, an attornment after to the grantee shall pass the other acre, 309. b.
Where an attornment for part of the rent shall be good for the whole, 369. b. 314. a. b.
Where an attornment to one jointenant shall be good to both, and one dying, an attornment to the survivor good, 310. a.
Attornment to him in the remainder after the death of grantee for life, void, 310. a.
Where an assent in the absence of the grantee shall be a sufficient attornment, 310. a.
Where two grants are made of the same thing, an attornment of the second shall be a frustration of the first, 310. a.
Where the enlargement or alteration of the particular estate, after grant of the reversion, shall be a countermand of the attornment, 310. a.
Where a feme grants a reversion, the taking of a husband shall be a countermand of the attornment, 310. b.
To what purposes an attornment shall have relation to the first grant, and to what not, 310. b.
Where a reversion is granted to a man and a feme, by an attornment to them after marriage, they have no moieties, 310. a.
Where the intermarriage of a feme grantor with the grantee shall be a good attornment in law, 310. a.
Where an attornment to *cestuy que use* shall vest the reversion in the grantee, 310. a.
Where an attornment to the grantee for life of a reversion shall be good to all in the remainder, 310. a.
Where a reversion is granted for life, and after to the same grantee for years, an attornment to both grants void, 310. b.
Where a seigniory is granted to a bishop and his heirs, and after to him and his successors, attornment to both grants void, 310. b.
Where a reversion is granted of *Black Acre*, or *White Acre*, an attornment to the grant shall vest the estate in the grantee upon his election, 310. b.
Where upon the feoffment of a manor nothing of the services pass until attornment of the free tenants, 110. b.
Where in pleading such a feoffment the attornment of the tenants need not be alleged, 310. b.
Where the tenant attorns to a lease for years of the manor, the attornment after of the lessee shall be sufficient to pass the reversion, 311. a.
Where to the grant of a seigniory, &c. the attornment only of the immediate tenant in privity requisite, 311. a. b. 312. a. b. 313. b.
Where to the grant of a rent-charge or seek, the attornment only of the tenant of the freehold requisite, 311. b. *per tot. pag.*
Where such rent is granted for life, and the tenant attorns, the attornment after of the grantee shall be sufficient to pass the reversion, 311. b.
Where upon grant of such rent issuing out of the reversion, the attornment only of him in the reversion requisite, 311. b.
Where, and to what kind of inheritances granted, attornment is requisite, and where, and to what not, 312. a.
Where an attornment to the grantee for life of a seigniory shall be good to him in the remainder to distrain, and where not, 312. b. 320. b.
Where the acceptance of a grant of the seigniory by the baron seised of tenancy in the right of his wife, shall be a good attornment to bind the wife after coverture, 312. b.
Where a seignory is granted to the tenant and a stranger, the acceptance of the tenant shall be a sufficient attornment to extinct his moiety, and vest the other in the grantee, 313. a.
Where the acceptance of a grant of the seigniory to the wife by the husband being tenant, shall be a good attornment, 313. a.
Where the acceptance of a grant of the seigniory by a lessee for life of the tenancy shall be a good attornment to vest the seigniory in himself, 313. a. b.
Where, in a *scire facias* upon a fine, judgment to recover part of the services shall be a good attornment in law, for the whole, 314. b.
Attornment by one jointenant good for all, 314. a. 319. a.
Where a man deaf and dumb may attorn: *secus* of a *non compos mentis*, 315. a.
Where upon grant of reversion, tenant by statute merchant, &c. or executors having the land till the debts be paid, shall be compelled to attorn, 315. b.
Where tenants in dower, or by the courtesy, after assignment of their estates shall attorn, and where the attornment of th assignee shall be sufficient, 316. a.

Where

Where the attornment of an assignee of the particular estate upon condition shall be sufficient to pass the reversion, 316. a.

Where an attornment by tenant in tail shall be good, and where he shall be compelled to attorn, and where not, 316. a. b.

Where the attornment of lessee for years, or him in the remainder for life expectant, shall be sufficient to pass the reversion in fee, 316. b. 317. a.

Where the acceptance of a lessee for life of a confirmation of his estate, the remainder over, shall be a good attornment to vest the remainder, 317. a.

Where by the release of one jointenant to his companion, he shall distrain for the whole, and have an action of waste against the lessee without attornment, 318. a.

Where the re-entry of the lessee upon the feoffee of his lessor shall be a good attornment to settle the reversion in the feoffee, 318. b.

Whether the recovery in an assise by the lessee for life against such feoffee shall be an attornment, *quære*, 319. a.

Where a reversion is granted for life upon a lease for life, and the lessee attorns, and the lessor disseises the lessee, and make a feoffment, the regress of the lessee shall be no attornment of the grantee for life, 319. a.

Where a seigniory or reversion is granted by fine, what advantages the conusee may take before attornment, and what not, 319. b. 320. a. and b. *per tot. pag.*

Where by a general attornment, without any saving, the tenant for life shall lose his privilege, and where not, 320. a. b.

Where one that claimeth under a conusee by fine may distrain or maintain any action, albeit no attornment made to the conusee or him that hath his estate, and where not, 309. b. 321. a. and b. *per tot pag.*

Where the devisee of a reversion may distrain or have any action without attornment, 322. a. b.

Where an attornment upon condition shall be good, and where not, 274. b.

Attornments taken away by 4 & 5 *Anne*, 402. a.

Audita Querela. *See* Executor. Release.

Where for matter of discharge happening since the judgment, the party shall have an *audita querela* before execution, 290. b.

A release of all actions personal, a good bar in an *audita querela*, 289. a.

Averment. *See* Pleadings.

Averment, what, 362. b.

The several kinds of averments, 362. b.

What pleas ought to be averred, and what not, *ibid.* 303. a.

Where in a *præcipe* the tenant pleads non-tenure, or disclaims, the demandant notwithstanding may aver him tenant, and where not, 362. b. 363. a.

Aumone.

What *aumoné* is, 97, a.

Avowry. *See* Acceptance, Aid, *Stat.* 21 *H.* 8. *c.* 19. 32 *H.* 8. *c.* 37.

The several forms and kinds of avowries for rents and services, 296. a. b.

Where the lord shall be compelled to avow upon the feoffee or grantee of his tenant, and where not, 269, b. 321. a.

Notice to the lord to change his avowry not sufficient without tender of his arrearages, 269. b.

Where the lord by his avowry upon the feoffee of his tenant shall lose the arrearages incurred in the time of the feoffor, and where not, 269. b.

Where the tenant being disseised shall compel the lord to avow upon him, and where not, 268. a. b.

Where the avowry of the donor upon his own donee in tail shall be good notwithstanding a discontinuance, 77. a. 269. a.

Where the donor in tail, having but one reversion, shall make two several avowries upon his donee, 23. a.

Where the lord at this day may avow upon the lands and tenements holden without naming any person in certain, 262. b.

Authority. *See* Apportionment.

Where the performance of the substance shall be a good pursuit of an authority, and where it ought to be strictly pursued, 49. b. 52. a. b. 303. b.

Where by the execution of the authority of another concerning lands, a man shall prejudice his own interest, and where not, 52. a.

Where a man may do less than his authority warrants, and where not, 52. a. b. 258. a. 259. a.

Where the death of the party shall be a countermand of his license and authority, and where not, 52. b.

Where an authority shall survive, and where not, 181. b.

Where an authority is given to three or four jointly or severally, the act done by two shall be good, and where not, 181. b.

Where a man doing more than his authority warrants, it shall be good for all; and where good for that which is warranted, and void for the rest, 258. a.

Ayel.

Where a writ of ayel lies, 160. a.

Bail.

Whence derived, 61. b.

How they are bound, 265. b.

Bailiff. *See* Accompt, Socage, Stat. *Magna Charta*, cap. 28.

The signification and derivation of the word, 61. b. 168. b. 172. a.

The office and duty of a bailiff, 62. a. 168. b.

Where and for what things a bailiff chargeable in an accompt, 172. a. 89.

Bailiff shall not be charged as receiver, 172. a.

Bailment.

Where the bailee shall satisfy for the goods stolen or otherwise miscarried, and where not, 89. a.

Bank.

The signification of it, 71. b.
The antiquity of the court of common bank, *ibid.*
The style of the courts of the king's bench, and common pleas, 71. b.

Bar. *See* Pleadings.

The signification of the word, 372. a.

Bargain and Sale. *See* Attornment, Reservation.

What estate the bargainor shall be said to have in him before enrolment, 147. b.
To what purposes a bargain and sale after enrolment shall relate to the first delivery, and what not, 147. b. 186. a.
Where the bargainee of a seigniory or reversion shall distrain or have an action of waste before attornment, 309. b. 321. b.

Baron and Barony. *See* Bishop, Challenge.

How barons anciently were created, and how at this day, 9 b. 16. b.
The first creation of a baron by a patent, 9 b.
The estate and livelihood of a baron, 69, a. 83. b.
The relief of a baron, 69. b. 23. b.
Where a man called by writ dieth before he sits in parliament, no baron, 16 b.
The form of such writ, *ibid.*
Issue of baron, &c. or no baron, how triable, 16. b.
What monasteries and bishoprics in England were and are held by barony, 79. a.
Where a barony may be entailed, 20. b.

Baron and Feme. *See* Coverture, Fine, Jointenants, Marriage, Partition, Remitter, Resceit, *Stat.* 32 *H.* 8. *c.* 37. Waste, Wager of Law.

To what purposes baron and feme are said to be one person in law, 112. a. 187. b.
What things of the wife are given to the husband by the marriage, and what not, 119. 170. 300. 351. a *per tot. pag.* and b.
Where the husband shall have the chattels real of his wife, and where not, 46. b. 185. b. 299. b. 300. a. 351. a.
What act of the husband shall be a disposition or alteration of the term of his wife, and what not, 46. b. 351. a.
Where upon an execution against the husband the sheriff shall sell the term of the wife, 351. a.
Where the charge of the husband upon the chattel of the wife shall not bind the wife surviving, *ibid.*
Where the husband surviving shall have the chattels of his wife consisting in action, and where not, 351. a. b.
Where the wife and her heirs shall be bound by her's and her husband's lease, and where not, 344. a.
What, and how the husband may convey to his wife, 112. b. 132. b. 133. *per tot. pag.* 297.
What, and how the wife may convey to her husband, 112. a. and b.
What act, and when the wife may do with her husband, 132. b. 352. 353. a.
When the feme may vouch the husband, 390. a.
The acts of the husband and wife shall be accounted his, 352. b. 356. a. b. 357. a.
By what means the husband in his life may pass an estate in lands to the wife, and by what not, 112. a.
Where a sale of lands by the wife to the husband shall be good, and where not, 112. a. 187. b.
Where a protection cast for the husband shall be good also for the wife, 130. b.
Where the husband may be an attorney to deliver seisin to his wife, 52. a. 187. b.
Where the grant of acquittal to the husband and his heir shall extend to the wife after his death, 241. a.
Where the laches of the husband shall prejudice his wife, and where not, 246. a. b.
Where by attainder of the wife the lord by escheat shall oust the husband before issue, 351. a.
What estate the king gaineth by attainder of the husband during coverture, *ibid.*
Where a devise by the husband to the wife shall be good, but not *è contra*, 112. a. b.

Barretor. *See* Warranty.

The derivation of the word, 368. b.
The description of a barretor, 368. a.

Bastardy. *See* Age, Mortdancestor, Partition.

The etymology of the word (Bastard) 243. b. 244. a.
The several kinds of bastards, 244. a.
Bastard, of what esteem in law, 3. b. 123.
By what names he may purchase lands, and what not, 3. b.
Bastard, no child within the statute of 32 and 34 *H.* 8. of wills, 78. a. 123. b.
No consideration to raise an use, 123. a.
A bastard brother, &c. no principal challenge, 157. a.
Issue born after nine months or forty weeks of the husband's decease, a bastard, 123. b.
Where the issue born within marriage shall be reputed a bastard, and where not, 244. a 40. a.
How to be tried, 74. a.
In what law, and to what purposes, a bastard-eigne is esteemed a *mulier*, 245. a.
Where the dying seised of the bastard-eigne without interruption shall bar the right of the *mulier*, 243. b. 244. a. b.
Where such dying seised without a descent shall be no bar, 244. a.
What seisin by the bastard during life shall be sufficient to bar the *mulier*, and what not, 15. a.
Where an entry by the bastard, and a descent after the death of the *mulier*, his wife being *privement enseint*, shall bar the son born after, 244. a.
Where the bastard dies, his wife *enseint*, the entry of

of the *mulier* shall bar the issue born after, 244. a.
Where the descent to the issue of the bastard before entry shall bar the *mulier*, 244. a.
Where such dying seised of the bastard shall bar an infant or feme covert *mulier*, ibid.
Where such discent of services, rents, reversion, &c. shall bar the *mulier*, 244. a.
Where such discent shall bind the *mulier* notwithstanding the wife of the bastard be endowed, 244. a.
Where such descent upon the profession of the bastard in religion shall be a like bar, 244. a. 248. b.
Where the collateral heir shall as well be bound by such descent as the *mulier*, 244. a.
Where two daughters, a bastard and *mulier*, enter generally upon the death of the bastard, her issue shall inherit a moiety, 244. a. 368. a.
Where the entry and dying seised of the son of the bastard shall bar the *mulier*, 244. b.
The entry of what persons shall avoid the estate of the bastard, and of what not, 245. a.
Where the agreement of the *mulier* to the entry of a stranger shall be a good claim to avoid the estate of the bastard, 245. a.
What act shall be said an interruption of the possession of the bastard, and what not, 245. b.
Where the bastard after his entry shall be vouched only by reason of the warranty of his ancestor, 376. b.

Bedell.

The derivation of the word, 235. b.
The oath and office of bedell, *ibid.*

Benerth.

The signification of it, 86. a.

Berewica and *Berewit.*

The meaning of the words, 116. a.

Berquarium seu *Bercaria.*

The meaning of those words, 5. b.

Bishop. *See* Aid, Confirmation, Corporation, Ordinary.

How all the bishoprics in England and Wales are of the king's foundation and patronage, and held by barony, 97. a. 134. a. 344. a.
The number of them, and which are of ancient continuance, and which of later foundation, 94. a.
How anciently they were donative, and by what means they became elective, 134. a. 344. a.
Who may write to the bishop to certify bastardy, mulierty, &c. and who not, 134. a.
Where, and as to what acts, the privation or translation of a bishop shall amount to a death, and where and as to what not, 329. a.
When he did or did not pay relief, 70. b.

Blood. *See* Attainder, Heir, Inheritance.

The several bloods which a man is said to have in him, 12. a. b. 14. a.
Who shall be said next of blood as to several purposes, 10. b. *per tot. pag.* 88. b.
What blood shall be said more worthy than other, and shall inherit before other, 12. b. *per tot. pag.* 14. a. *per tot. pag.*

Bokeland.

What it is, 6. a. 58. a.

Bona.

What the word signifies, 118. b.
How divided, *ibid.*

Bordarii and *Borduann.*

Who are said to be so, 5. b.

Boscus.

Quid, and what passeth by it, 4. b.

Bote.

The signification of the word, 127. a.

Bovata Terræ.

What it is, 5. a.

Briga.

The meaning of it, 3. b.

Bruera.

Quid, unde, and what passes by it, 5. b. 5. a.

Burgage. *See* Knights Service and Socage.

The etymology of the word, 108. b. 109. a.
The description of a tenure in burgage, 108. b. 109. a.
Of what person such tenure may be, 109. a.

Burgebote.

What it is, 109. a. 127. a.

Burgh-English. *See* Custom.

Bye and Byan.

What they are, 5. b.

Capacity. *See* Alien, Attorney, Challenge, Coverture, Feoffment, Infancy, Juror, Office, Purchase, Queen, Socage.

Mutus, surdus et cæcus, of what things capable in law, and of what not, 8. a.
What persons capable of offices of state, or which concern the common weal, and what not, 107. b. *per tot. pag.*
Of what things a monk is capable, and of what not, 132. b.

Castle. *See* Dower, Knights Service.

What things shall pass by the grant of a castle, 5. a.
What castle may be built by a subject, and what not, *ibid.*
What castle may be divided in partition between parceners, and what not, 165. a.

Castleguard. *See* Knights Service.

Where such tenure remains though the castle is ruined, 83, a.

Causa Matrimoni prælocuti. *See* Warranty.

Where a man gives land to a woman, *causa, &c.* though he marry her, or the woman refuse, he shall retain the land for ever, but not *é converso*, 204. a.

Where the feme in pleading may aver such gift to be *causa matrimonii, &c.* without showing a deed, *ibid.* 226. a.

Certainty. *See* Estoppel, Pleading.

The several kinds of certainty, 303. a.

Where there may be a certainty in an uncertainty, 96. a.

Certificate. *See* Trial.

Cessavit. *See* Age, Stat. *Westm.* 2. *c.* 21.

Where it lieth against the heir within age, 380. b.

Where the tenant holdeth lands in several counties by one service, no *cessavit* lieth, 154. a.

Challenge. *See* Juror, Stat. 2 *H.* 5. *c.* 3. 27 *El.* *c.* 6. *W.* 2. *c.* 38. *Artic. super Chart.* *c.* 9. Trial Verdict.

The signification and derivation of the word, 155. b.

The several sorts of challenges, 156. a.

What shall be said a principal cause of challenge to the array of the panel, and what not, 156. a.

What shall be said a sufficient challenge to the array for favour, and what not, 156. b.

Where such challenge may be made, the king being party, and where not, 156. a.

Where the party, notwithstanding his challenge to the array found against him, shall have his challenge to the polls, 156. b.

Challenge to the polls, what, and the several kinds of such challenges, 156. a.

Challenge peremptory, what, where admitted, and what number the party might challenge at the common law, and what at this day, 156. b.

The several sorts of principal challenges to the polls, 156. b.

Where a peer of the realm ought to be challenged, and if neither party will challenge him, he may challenge himself, 156. b.

What shall be said a good challenge for want of freehold, and what not, 156. b. 157. a.

Where an alien or villein may be challenged, 156. b.

What person may be challenged for an insufficient hundredor, and what not, 157. a.

What shall be said a principal challenge to the polls by cause of affection, and what not, 157. a. b. *per tot. pag.*

Where the plaintiff may allege a principal cause of challenge to the array, and pray process to the coroners, and where he ought to have a *venire facias* to the sheriff, 157. b.

Where in outlawry of treason issue is joined upon a collateral point, yet the party may have such challenges, as if he had been arraigned upon the crime itself, 157. b.

What crime in a juror shall be a principal cause of challenge, and what not, 6. a. 158. a.

At what time each challenge ought to be taken, and where the party must show the cause of his challenge presently, and where not, 158. a. b.

How and by whom challenges shall be tried, and to whom process shall be awarded, 158. a. b.

Where a witness may be challenged, and where not, 6. b.

Where a man may be challenged to be a juror, that cannot be challenged to be a witness, *et é converso*, 6. b.

Where a nobleman being arraigned cannot challenge his peers, 156. b. 294. a.

Where the four knights electors of the grand assise ought not to be challenged, 294. a.

Where and at what time the jurors in a writ of right may be challenged, and where not, *ibid.*

Champerty [*Cambipartia*]. *See* Maintenance.

The etymology and signification of the word, 368, b.

Chance Medley.

What it is, 287. b.

Charge and Discharge. *See* Abeiance, Annuity, Baron and Feme, Confirmation, Condition, Forfeiture, Heir, Jointenant, Parson, Remitter, Rent, Reservation, Tail.

Where, and how a moveable inheritance in lands may be charged, 343. b.

Where a charge shall survive, and where not, 386. b.

Where the estate of the wife shall be bound by the charge of her husband, and where not, 148. b.

Where the acceptance of an estate against common right shall subject the party to charges accruing since his title, 32. b. 33. a. 273. a.

Where tenant in tail discontinues for life, and after grants a rent-charge, notwithstanding the death of the discontinuee the charge remains, 145. a.

Charters. *See* Detinue, Dower.

Where they pass as incidents to the land, where not, 6. a.

Chase. *See* Forest.

Chattels. *See* Baron and Feme, Executor, Freehold.

The several sorts of chattels, 118. b.

Where they shall descend or go in succession, and where not, 9. a. 18. b. 46. b. 185. b. 388. a.

What chattels are grantable without deed, and what not, 85. a. *per tot. pag.*

In what respects tenant by statute-merchant, staple, &c. said to have a freehold, and in what but a chattel, and why, 42. a. 43. b.

Where a freehold may be limited in a chattel, 147. b.

What only a chattel interest, 42. a. 45. b.

Chevage.

What chevage is, 140. a.

City. *See* Village.

The description of a city, 109. b.
For what purpose cities first instituted, 109. b.
The number of cities in England, *ibid.*
Every city a village, but not *è converso*, 115. b.
Citizen not capable of the performance of an honourable service, 107. b.

Claim. *See* Continual Claim.

Clergy. *See* Bishop, Dean and Chapter, Monk.

The several sorts of ecclesiastical persons, 93. b.
The state of the clergy in England at this day, 94. a.
How clergymen anciently excelled in the knowledge of the common law, and the names of divers that had principle offices of judicature, 304. b.

Clifford, Lord.

Case as to his barony and sheriffwick of Westmoreland, 222. a.

Coleberti.

Who are so called, 5, b. 86. a.

Collusion. *See* Covin.

Combe.

What it is, 5. b.

Commote.

What a commote is, 5. a.

Commission.

Where a commissioner to examine witnesses may be challenged to be a juror in the same cause, and where not, 157. b.

Common. *See* Appendant, Apportionment.

Common, whence so called, 122. a.
The several kinds of commons, 122. a.
Where by purchase of parcel of the lands in which, &c. the whole common shall be extinct, and where not, 122. a.
Where the disseisee cannot take benefit of a common appendant before a recontinuance of that to which, &c. *secus* of an advowson appendant, 122. b.
Prescription to have *solam communiam*, and to exclude the owner, void; *secus* to have *solam vesturam*, or *pasturam*, 122. a. 165. a.
Where the lord claims common appendant to his manor, the escheat of a tenancy is no increaser of the common, 127. a.
Appendant belongs of common right to arable land for beasts of the plough, 122. *per tot.*
Appurtenant, for what beasts and how it commences, 122. a *per tot.*
Par cause de vicinage, how it commences and for what beasts, 122, a.
In gross, what, and how it began, 122, a.
When it shall, and when it shall not be extinguished, 149, a.

Conclusion. *See* Estoppel.

Condition. *See* Acceptance, Apportionment, Assignee, Coverture, Deeds, Demand, Infant, *Stat.* 32 *H.* 8. c. 34. Tender and Refusal.

The division of conditions, 201. a. b.
The description of a condition in deed, 201. a.
What words shall make a condition, and what not, 230, a. b. 204. a. and b.
Where the cause of a grant shall amount to a condition, and where not, 204. a.
Where a proviso shall amount to a condition, where to a limitation, and where to a covenant, 203. b. 237. a.
What words shall amount to a condition in case of a lease for years, 204. a.
Where by entry for a condition broken the parties shall be in their former estates as to all purposes, and where not 30. b. 103. a. 202. a. b. 218. b.
Where upon a condition of re-entry for not payment of a rent and retainer until satisfaction, the profits after entry shall be accounted as parcel of the satisfaction and where not, 203. a.
What state the feoffor gaineth upon such re-entry, 203. a.
Where, notwithstanding such condition to retain, the feoffee upon tender of the rent may oust the feoffor, 202. b. 203. a.
Where a condition subsequent is against law, or impossible at first, or becometh after impossible by the act of God, the estate of the feoffee shall be absolute, 206. a. b. 219. a.
Where the condition of an obligation or recognizance, &c. becometh impossible by the act of God, the obligation, &c. is saved, 206. a.
Where the condition of a bond being against law, the bond itself shall be void, and where not, 206. b.
Where a man shall never take advantage of a condition where the not performance cometh by his own act or default, 206. b. 209. a.
Where a lease and release shall be a good performance, of a condition to make a feoffment, 207. a
Where an assignee or the feoffee himself after assignment, may tender money in performance of a condition, 207. b. 208. a.
Where no time is limited for performance of a condition where the party shall have time during his life, and where it ought to be performed in convenient time, 208. a. b. *per tot. pag.* 219. a. b.
Where a condition is to be performed to a stranger, a tender and refusal shall give the feoffor or obligee a title of entry or forfeiture, and where not. *Vide* tit. Tender and Refusal.
Were a condition is broken for not payment of a rent, the bringing of an assise, distress, or acceptance at a day after shall be a good dispensation, 211. b.
Where a condition shall be said performed albeit the words be not pursued, and where not, 213. a. 218. a. 219. b.
What person may take advantage of a condition, and what not, 214. a. b. 215. a. and b. 379. a.
Where the heir may take advantage of a condition which his ancestor could not by possibility, 214. b.

CO

Where a condition which createth an estate shall be good without deed, 216. a.

Where upon a grant for years conditionally to have fee, the fee shall be said to be in the grantee before performance of the condition, and where not, 216. b. 217. a. and b. 218. a.

A lease to a man and a woman upon condition which of them first marry shall have fee, and they intermarry, no fee shall accrue, 218. a.

Where a lease is made with condition to have fee upon payment of money, the attainder and execution of the lessor before the day shall hinder the accruer, 218. a.

Where notwithstanding the devesting of the freehold or fee by condition subsequent, the former interest of the party shall remain in him, and where not, 218. b.

Where a man may take advantage of a condition without entry or claim, and where not, 218. a. b. 216. b. 237. a. 379. a.

Where a condition is to make a gift in frankmarriage to one with the cousin of the feoffor, a gift to him for life shall be good performance. 219. a.

Where a condition is to make a gift in frankalmoign to a layman, a gift to him for life shall be a good performance, 219, b.

Where a condition is to made a lease for life to a woman without impeachment of waste, a lease to her and her husband, without such clause shall be a good performance, 219. b. 220. a.

Where a condition to infeoff the feoffor and his heirs, a feoffment to the heir of the feoffor to have to him and his heirs shall be no performance, 220. b.

Where a feoffment is made upon condition of re-feoffment, what act by the feoffee shall be said a breach of such condition, and what not, 221. a. b. 222. a. b.

Where the feoffee is once disabled, no possibility after can enable his performance; *secus* of a disability of the part of the feoffor, 221. b. 222. a.

Where a tenant of the king by license makes a feoffment upon a condition of re-feoffment, a feoffment to his heir after his death shall be no performance, 222. a. b.

Where an advowson is granted upon condition of re-grant, a re-grant after the church is void, is no performance, 222. b.

Where the restriction of alienation by the condition of a gift or conveyance shall be good, and where repugnant, 223. a *per tot. pag.* b.

To what intent a condition that restrains the donee in tail to alien shall be good, and to what not, 223. b. 224. a. b. 379. a.

Where a condition restraining an infant, baron and feme, or an ecclesiastical corporation, to alien, shall be good, and where not, 224. a.

Where a condition that tenant in tail may alien for the benefit of his issue shall be good, 224. b.

Where a condition to enter upon the alienation and death of tenant in tail without issue, shall be a good prevention of a discontinuance, 224. b. 225. a.

Where a condition consisteth of several parts in the conjunctive, disjunctive, or both, how it shall be construed, and when said to be performed, 225, a.

CO

How a man may be aided by a condition without a deed, 226. a. b.

The description of a condition in law, 233. b.

Where an entry or recovery by reason of a condition in law shall avoid precedent charges, and where not, 233. b. 234. a.

What words in a last will shall make a condition, that cannot in a deed, 236. b.

What things may be done upon condition, and what not, 274. b.

Where and what assent to an act may be upon condition, and what not, 300. b. 297. a.

Where the heir shall enter for a condition broken, albeit no right in the land descend, 202. a. 336. b.

Where upon a gift, &c. a condition is reserved to a stranger, the donor himself shall take advantage of it, and not the stranger, 379. a.

Where a condition may stand good for part, and be void for other part, 379, a.

Where an alienation shall extinguish a condition or power of revocation, and where not, 265. b. 379. a. b.

Where a lease for life is made with condition to have fee upon alienation of the reversion, upon alienation by fine there shall be no accruer, 378. b.

Where in a gift in tail a condition upon alienation of the donee, that his estate shall cease and remain over, shall be void, 377. b. 378. a. b. 379. a.

Confirmation. *See* Attornment, Release.

The etymology and definition of a confirmation, 295. b.

The form of a confirmation, *ibid.*

The several kinds of confirmations, 295. b.

What shall be said good words of confirmation, and what conveyance shall amount to a confirmation, and what not, 301, b. 302, a. *per tot. pag.*

Where the same words shall amount to a grant and confirmation of one and the same thing, 302. a.

Where privity is requisite in a confirmation, and where not, 296. a. 305. b.

Where a confirmation to the lessee for years of a tenant for life or disseisor shall be good; *secus* of a release, 296, a. b. 308. a.

Where a lease is made to begin at a day to come, a confirmation to the lessee before the day shall be void, 296. b.

Where a confirmation of part of the estate shall be a good confirmation of the whole, and where only for that part, 296. b. 297. a.

Where a confirmation to him in the reversion or remainder shall enure to the particular estate in possession, but not *è converso*, 297. a. b. 298. a.

Where tenant in tail hath reversion in fee expectant, a confirmation of the estate tail shall not extend to the reversion, 297. a.

Where two leases for years are in being, determinable upon the death of tenant for life, and he in the reversion confirms the last, and after confirms the first lease, by death of tenant for life, the first shall determine, and the last continue, 296. a.

Where two jointenants be, one for life, and the other

ether in fee, a confirmation to the jointenant in fee for his life shall extend to his companion, and the whole fee simple also, 297. b.

Where one disseisor by the confirmation of his disseisee should hold out his companion, and where not, 298. a. b.

Where a confirmation to tenant for life to have his estate to him and his heirs shall make no enlargement; otherwise where it is to have the land to him, &c. 191. b. 298. a.

Where a confirmation to the husband and wife seised in the right of his wife for life, shall enure to the husband in remainder for his life, 299. a. b.

A confirmation to a baron and feme, seised for life in right of the feme, to have to them and their heirs, how it shall enure, 299. b.

A confirmation to baron and feme, tenants for life by several moieties to have to them and their heirs, how it shall enure, 299. b.

A confirmation to the tenant for life and him in the remainder for life, to have to them and their heirs, how it shall enure, 299. b.

Where after a gift to two men and the heirs of their bodies, the donor confirms to them and their heirs, how it shall enure, *ibid.*

Where a confirmation to baron and feme possessed of a term for years in right of the feme, shall enure to them for their lives in jointenancy, 300. a.

Where the re-entry or recovery of the disseisee shall not avoid the charge of the disseisor or his heir against his own confirmation, 300. a.

Where the feoffor by entry for a condition broken, shall not avoid the charge of the feoffee against his own confirmation, 300. a. 301. a.

Where the license of the patron and ordinary to the parson to grant a rent shall be a good confirmation of the same grant, 300. b.

Where the confirmation of the grant of a parson by the bishop sole without the dean and chapter, shall be good, and where not, 300. b. 329. a.

Where the grant of a parson, with the confirmation of patron and ordinary, shall bind the successor during the continuance of the patron's estate, 300. b.

Where the grant of a parson confirmed by another parson, his patron, shall bind only during his life without the confirmation of the patron paramount, 300. b.

Where tenant in tail being patron, confirms and after discontinues, the grant shall bind during the discontinuance, and if the tail be barred, for ever, 300. b.

Where a bishop having two chapters makes a grant, the confirmation of the one without the other shall not bind his successor, 301. a.

Where a disseisor makes a charter of feoffment, and a letter of attorney to make livery, the confirmation of the disseisee before livery is void, *secus* of such charter by a bishop, and confirmation by the dean and chapter, or of the grant of a reversion before attornment, 301. a.

Where a bishop at the common law granted land to the king, the confirmation of the dean and chapter before enrolment was good to bind the successor, albeit the confirmation was never enrolled, 301. a.

Where tenant for life grants a rent in fee, the confirmation of him in the reversion shall make the rent good for ever, 301. a.

Where the lease of tenant for life and him in the reversion shall be said the lease of the tenant and confirmation of him in the reversion, and where *è converso*, 45. a.

Where the grant of the bargainor and bargainee before enrolment shall be said the grant of the bargainor and confirmation of the bargainee, but *è converso*, after enrolment, 147. b.

Where the heir of the disseisor and the disseisee join in a feoffment, it shall be construed the feoffment of the heir and confirmation of the disseisee; but *è converso*, if the disseisor himself and the disseisee had joined, 302. b. *Vide* tit. Feoffment.

Where a tenure may be abridged by a confirmation; *secus* of a common or rent-charge, 305. a.

Where the reservation of a new tenure upon a confirmation to the tenant shall be void, 305. a. 306. a.

A confirmation or release by the lord paramount to the tenant to hold by lesser services void, 305. b.

Where the lord releases or confirms to his tenant in chivalry to hold by knights service only for all services and demands, yet ward, marriage, &c. shall continue, 305. b.

Where a confirmation to an abbot, tenant to hold in frankalmoign, shall be good, 306. a. b.

Where a stranger seizes and detains a villein, a confirmation to him by the lord void, 306. b.

Where a confirmation to the grantee for life of a rent, shall be good by way of enlargement, and where not, 308. a.

Where a confirmation to lessee for life of his estate, the remainder over, shall be sufficient to pass the remainder, 317. a.

Consanguinity.

How the degrees are computed by the common, canon, and civil law, 23 and 24 *per tot.*

Constable. *See* Marshal.

The several acceptations in law of the word, 234. b.

Continual Claim. *See* Discontinuance, Entry, Fines, Livery of Seisin, Remitter, *Stat.* 32. *H.* 8. *c.* 33.

The description of a continual claim, and whence so called, 250. a. b.

Where a continual claim by him that hath right and cannot enter shall avoid a descent, 250. b.

Where the heir shall take benefit of a continual claim made by his ancestor to avoid a descent, and where not, 250. b.

Where the continual claim of him in the reversion or remainder shall avoid a descent, in the alience of tenant for life, 251. a.

Where the claim by him in the remainder for life shall avail him in the remainder in fee, as to the avoidance of such descent, and where not, 251. a. b. 252. a.

Where the surviving jointenant shall take benefit of a continual claim made by his companion, 252. a.

Where and to what purposes a continual claim shall amount to an entry and seisin, and where and to what not, 253. b. *per tot. pag.* 254. a. 263. a.
Where such claim out of the view of the land, and where within the view, shall be sufficient, and where not, 254. a. b.
Within what time a continual claim ought to be made at the common law, and within what at this day, 254. b. 255. a. 256. a.
Where such claim at the common law shall avoid all manner of discents happening within the year and day, 255. b.
Where such year and day to avoid a discent shall not be accounted from the disseisin but from the claim, 256. a.
Where the continuance of possession after every such claim shall be a disseisin, for which the party may have trespass or a forcible entry if it be with force, 256. b. 257. a.
Where such claim made by the servant of him that right hath upon his commandment, shall be sufficient to avoid a discent, and where not, 257. b. 258. a. and b. 259. a.
Where a claim of goods shall amount to a seisure, and where not, 111. b.
Where the bringing of an action shall amount to a claim, 263. a. 145. b.
Where the husband discontinues the land of his wife upon condition, by the entry of his heir for the condition broken, the state shall vest in the wife without entry or claim, 202. a. 336. b. 337. a.
Where an agreement to the entry of a stranger in the name of him that hath right within the five years, shall be a good claim to avoid a fine, 245. a. 258. a.
Within what time claim ought to be made after judgment in a writ of right or upon a fine levied at the common law, 254. b. 262. a.
Nonclaim no prejudice to an infant at the common law; otherwise to a feme covert, 262. b.

Contract.

The derivation of the word, 47. b.
What shall be said a sufficient contract whereupon to ground an action of debt, and what not, 162. b.

Conusans of Pleas. See *Quare Impedit*, Stat. 33. *H.* 8. *c.* 8.

Of what matters the ecclesiastical court ought to have conusans, and of what not, 96. a. b.

Cope.

What it is, 4. b. 5. b.

Copyhold and Copyholder. *See* Bailiff, Dower, Steward, Tenant at Will.

The signification of the word *copia*, 57. b.
The description of a tenancy by copy, 57. b. 58. a.
Copyholder may make a lease for one year, 58. a.
May maintain an ejectment, *ibid.*
Whence so called, 60. a.
How copyholders in ancient times were called, 58. a. 61. a. 62. a.
By what things a copyhold custom ought to be supported, 58. b.
What things may be granted by copy, and what not, 58. b.
By what persons admittances and voluntary grants by copy ought to be made, and by what not, 58. b.
Where a grant by copy shall be good by one who is not *dominus pro tempore*, 58. b.
By what means copyhold land or right may be transferred over, and by what not, and why not by deed, 58. b. 59. a. 61. b.
The form of a copyhold surrender, 59. a.
Where such a surrender out of the court of the lord shall be good, and where not, 59. a. 61. b. 62. a.
What act, &c. by the tenant shall be said a forfeiture of his copyhold estate, and what not, 59. a. 63. a.
To what purpose the lord shall be said in by the surrender of his copyhold tenant, and to what not, 59. b.
Where the interest of the copyhold estate shall be bound by the surrender, and the admittance of the lord shall have relation unto it, 59. b. 12. a.
Where the estate of *cestuy que use* shall ensue the limitation in the surrender, and not in the admittance of the lord, 59. b. 60. b.
Where the lord shall be compelled to make admittance according to the surrender to him which was *dominus pro tempore* before, 59. b.
Where a custom to have fines of copyhold tenants upon the alteration of the lord or tenant, shall be good, and where not, 59. b.
Where fines incertain are unreasonably exacted, the copyholder shall not be compelled to pay them, 59. b. 60. a.
How copyholders shall implead, and be impleaded, and the form of such plaint, 60. a.
Where a copyhold may be intailed, and such intail also docked by surrender, 60. b.
What remedy a copyholder hath against his lord for an ejectment without cause, 60. b. 61. a. 62. b. 63. a.
What remedy a copyhold tenant hath for an erroneous recovery in the court of his lord, 60. a.
The office and duty of the lord of a copyhold manor, 59. b.
Where admittances by the lord out of the court or manor shall be good, 61. b.
Where the wife of the copyholder shall be endowed, and where not, 33. b.
Tenants by the verge, why so called, and how they differ from tenants by copy, 61. a.

Cornage.

What it is, 106.
Tenant by cornage paid no escuage, 69.

Corody. *See* Appendants.

Where a house or land may be appendant to a corody, 49. a.

Corporation. *See* Homage, Leases.

The description of a corporation, and why so called, 250. a.
The division of corporations, 2. a. 250. a.
How many several ways a corporation may commence and be established, 250. a.

What corporation shall take a fee simple without the word (successors), and what not, 94. b.
Where a sole corporation shall take a fee simple without the word (successors), and where not, 9. b. 94. b.
Where the privileges belonging to a corporation by prescription shall determine by the change of the same corporation, and where not, 102. b.
Where by the dissolution of a corporation their lands shall revert to the donor, and shall not escheat, 13. b.
Where and what corporation may maintain a writ of right, and where and what not, 341. b. *per tot. pag.*
Where a disclaimer, or other act by an abbot, bishop, &c. shall bind their successors, and where not, 103. a.
The power which ecclesiastical corporations had to dispose of their lands, &c. at the common law, and how they are now restrained by statutes, 44. a. 300. b. 301. a. 325. b. 324. a.
What leases at this day are good by a bishop, dean, and chapter, &c. and what not, 44. a. and b. 342. a.
Where and what corporation may do and receive homage, and where and what not, 65. b. 66. b. 67. a. 341. b.
Where a grant to a corporation aggregate, albeit the head of the corporation be wanting at the time shall be good, and where not, 264. a.

Corruption of Blood. *See* Attainder, Heir.

In what manner and degree the blood said to be corrupted by attainder, 391. b.
By what means the blood corrupted by attainder may be restored, and by what not, 8. a. 391. b. 392. a.
Where corruption of blood in the father shall disable the issue to inherit to his mother, 12. a.
Where corruption of blood in the father shall disable the son to inherit to his brother, and where not, 8. a.
Where corruption of blood in the eldest son shall hinder a descent to the youngest, 13. a. 392. a.
Judgment to be hanged by martial law no corruption of blood, 13. a.

Cosinage.

Where, and by whom a writ of cosinage lieth, 160. a.
Where it lieth for a rent charge or seek, *ibid.*

Costs. *See* Damages.

Cotterelli and *Cottagium.*

The meaning of the words, 55. b. 56.

Covenant. *See* Payment, Warranty.

Where an assignee shall take advantage of a covenant, without being named in the deed, and where not, 384. b. 385. a.
Where a man shall be bound by the covenants and conditions in an indenture, albeit he never sealed the deed, and where not, 230. b. 231. a.
Where a covenant in deed shall destroy the covenant in law, and where not, 384. a.
A release of all actions and suits, no discharge of a covenant before it be broken; *secus* of a release of covenants, 292. b.
Where upon a covenant to pay money at several days, after the first default an action of covenant lieth; otherwise of debt upon an obligation, 292. b.
How to plead performance of covenants, 303.

Coverture. *See* Bastard, Baron and Feme, Banishment, Forfeiture, Infant.

The signification of the word, and whence so called, 112. a.
Where a feme covert may be a purchaser, and where the estate shall be said to be in her before the agreement of her husband, 3. a. 356. b.
Where laches shall be adjudged in a feme covert, and where not, 246. b. 352. a. 356. b.
Where a feme covert may sue and be sued without her husband, 132. b. 133. a. *per tot. pag.*
Where the breach of a condition in law shall be a forfeiture of the office or estate of a feme covert, and where not, 233. b.
To what purposes a procurement, precedent, or agreement subsequent shall make a feme covert a disseisoress, and to what not, 357. b.
No privilege of nonclaim to a feme covert at the common law, 262. b.

Covin and Fraud. *See* Forfeiture, Remitter, Stat. 13 *El. c.* 15. 27 *El. c.* 4. 14 *El. c.* 8. 21 *H.* 8. *c.* 15. Stat. *Merton, c.* 6. Wardship, Warranty.

The description and derivation of the word, 257, a. b.
Where assignment of dower or other lawful act compassed by covin, shall be avoided, 35. a. 357. b.
Where upon a condition of payment of money, a covinous payment in show shall be no performance, 209. b.
Where and how fraudulent conveyances, extortions, &c. shall be avoided at this day, and against what persons they shall be void, and against what not, 3. b.
Where a recovery by covin against a tenant for life shall be a forfeiture of his estate, 362. a. 356. a.
Where a collateral warranty after a disseisin by covin shall be no bar, 366. b.
Where a termor for years, guardian, tenant by statute-merchant, *elegit*, &c. shall falsify a recovery by covin had against him in the reversion, and where not, 46. a.

Count. *See* Pleadings, Writ.

The etymology and signification of the word, 17. a.
The office and nature of a count, 17. a. 303. b.
Where the count varying from the words of the writ shall be good, and where not, 26. b. 54. b. 335. b. 344. a.

Court. *See* Admiral, Marshal, Parliament.

The definition and derivation of the word, 58. a.
The divers kinds of inferior courts, and the several judges of them, *ibid.*
Court-Baron, whence so called, who the judge, and in what place such court ought to be holden, and in what not, 58. a. 260. a.

Defeasance. *See* Deeds, Execution.

The derivation of the word, 236. b.
Where and what inheritances may be defeated by indentures of defeasance, and where and what not, 236. b. 237. a.

Defence.

What, and the derivation of it, 127. b.
When to be used, 127. b.
Divided, *ibid.*
How to be made, *ibid.*

Deforcement. *See* Abatement.

The signification and derivation of the word, 331. b.

Degrees. *See* Frankmarriage.

Gradus unde dicitur, 24. a.
The several sorts of degrees in a writ of entry, 238. b.
What estate or change shall make a degree to have a writ of entry in the *per*, and what not, 239. a. 318. a.
Where albeit the degrees be once past, the writ may be brought within the degrees again, 239. a.
Where two estates shall make but one degree in a writ of entry, *ibid.*

Demand. *See* Release, Request.

The several kinds of demands, 291. b.
At what place and time a demand of a rent to enter for a condition broken, or to have an assise, ought to be made, and at what not, 144. a. 153. a. b. 201. b. 202. a.
Where a distress is granted upon not payment and demand, yet the grantee may distrain after the day of payment, without any demand, 144. a. 202. a.

Demurrer. *See* Statute 27 *El.* 4 *&* 5 *Annæ.*

Demurrer what, and whence derived, 71. b.
The form of a demurrer, 71. b.
The several kinds of demurrers, 72. a.
What things are admitted by a demurrer, and what not, 72. a.
Where there is a demurrer for part, and issue for other part, which shall be first tried, 72. a. 125. b.
The course of the proceeding of the judges upon a demurrer, 72. a.
Where the party shall alledge special matter, and conclude with a demurrer, 72. a.
Where a demurrer may be upon aid-prier, receipt, voucher, wager of law, &c. 72. a.
Where the party shall be compelled to join in demurrer, and where not, 72. a.

Dene, Denne.

The meaning of the words, 4. b. 5. b.

Denizen. *See* Alien, Ligeance.

The etymology of the word, 129. a.
The several acceptations of the word, 129. a.
The difference between naturalization, and denization by the king's letters patents, 8. a. 129. a.

Denizen may purchase lands, 2. b. 8. a.
What issue of the denizen may inherit, 2. b. 8. a.

Departure. *See* Action, Pleading, *Retraxit.*

Departure in pleading, 304. a.
Where the rejoinder containing matter subsequent to the bar shall be a departure, and where not, 304. a.
Where the defendant pleads performance of covenants, and the plaintiff replies that he did not such an act, &c. to say that he offered to do it, and the plaintiff refused, shall be a departure, 304. a.
Where the party entitleth himself by the common law, to make it good by a custom or act of parliament shall be a departure, 304. a.
Where the party pleads an estate generally, in his second plea to maintain it by a matter tantamount in law shall be a departure, 304. a.
Where the plaintiff counts of a gift, and maintains in his replication by a recovery in value, this is no departure, *ibid.*
Where in an action transitory the varying of the plaintiff in his replication from the time and place alleged in the count shall be no departure, 282. a. b.

Deraignment. *See* Warranty.

The signification and derivation of the word, 136. b.

Detinue.

Where and for what things a writ of detinue lieth, and where and for what not, 286. b.
Where the defendant shall wage his law in a detinue, and where not, *ibid.*
Where in a detinue of charters, summons and severance lieth, 286. b.
Where a release of actions personal shall be a good plea in detinue of charters, *ibid.*
Where a *capias* lieth in a detinue, and where not, *ibid.*
This action is now disused, and why, *ibid.*
In what cases it is better to bring an action of detinue, than an action of trover, *ibid.*

Devise. *See* Attornment, Condition, Entry, *Stat.* 32 *H.* 8. *c.* 1. 34 *H.* 8. *c.* 5. Testament, Uses.

The signification of the word (devise), 111. a.
Where devises ought to have construction according to the intent of the devisor, and where not, 25. a. 322. b.
Where an inheritance shall pass by devise without the word (heirs), 9. b. 322. a. b.
Why in devises a greater latitude is allowed than in any conveyances, 9. b.
When a subsequent devise shall not be a revocation of the former, 112. b.
A devise to a man and his heirs male, a good estate-tail, 27. a.
Where by a devise to a man and his heirs males the son of his daughter shall not inherit, 25. a.
Where an estate may pass by devise, that cannot by act be executed in the life of the devisor, 42. a.

Where the devisee shall take the thing devised without the assent of the executors, and where not, 111. a.
Where upon a devise of lands the freehold shall be said in the devisee, before entry, 111. a.
What remedy the devisee hath upon the intrusion of a stranger, and a descent cast before his entry, *ibid.*
Devise of lands by custom before the statutes, where good, and where not, 111. a. b.
Where by a custom to devise lands, a devise of a rent out of the same lands shall be good, 111. a.
Where devises of lands, &c. since the statutes of 32 and 34 *H.* 8. shall be good, and where not, and where such devises shall be good for the whole, and where but for part, 111. b. *per tot. pag.*
Where the custom to devise lands holden by knights service shall continue, notwithstanding the making of those statutes, 111. b. 115. a.
Where a devise by the husband to the wife shall be good, but not *e contra*, 112. a. b.
Where a devise of lands to be sold by executors shall be good, and where such sale by them shall be good, and where not, 112. b. 113. a. 236. a. *per tot. pag.*
Where a feoffment being made to the use of a last will, or of such persons as shall be named in the last will, the estate shall be said to pass by the will, and where by the feoffment, 271. b.

Dilapidations.

May be sued for in the spiritual court, 32. b.
Whether in an action on the case will lie for them at common law, *ibid.*

Disability. *See* Alien, Capacity, Excommunication, Outlawry, Profession.

The several disabilities in law in the person to bring any action, and who were anciently disabled, and who at this day, 128. a 135. b.

Disceit. See *Quod Ei Deforceat.*

Where upon a recovery by default in an action of waste a writ of disceit lieth, 355. b.
Where upon a recovery by default had against a person in prison, a writ of disceit lieth not, 259. b.

Discent. *See* Appeal, Attainder, Chattels, Corruption of Blood, Entry, Heir, Inheritance.

The signification and derivation of the word, 237. a. 13. b. 163. b.
Where the heir shall be in by discent, of an estate that by possibility could not be his ancestor's, 378. b.

Disclaimer.

The etymology and signification of the word, 102. a.
The several kinds of disclaimers, 102. a.
Where and what persons may disclaim in the seigniory, and where and what not, 103. a. 161. b. 102. a.

What is wrought by such disclaimer in the seigniory, 102. b.
Where upon the disclaimer of the tenant in real action, the demandant may enter before judgment, 362. a. 363. a.

Discontinuance. *See* Condition, Corporation, Entry, *Stat.* 32 *H.* 8. *c.* 28. 1 *H.* 7. *c.* 20. 34 *H.* 8. *c.* 20.

The description of a discontinuance, 325. a.
The derivation and several acceptations of the word, 325. a.
How many several ways the discontinuance may be wrought, and to the prejudice of how many several persons, 325. a. b.
What inheritances may be discontinued, and what not, 327. b. 331. b. 332. a. b. 325. b.
Where the divesting or displacing the estate of another by alienation shall work a discontinuance, and where not, 327. b.
Where the alienation of a corporation was a discontinuance to the successors at the common law, and where not, 325. b. 341. b. 346. a. and b. 347. a.
Where and what act by the husband was a discontinuance of the lands, &c. of his wife at the common law, and what shall be a discontinuance at this day, and where, and what not, 328. a. *per tot. pag*
What act or conveyance by tenant in tail shall be a discontinuance of the estate tail, and what not, 326. b. 327. a. b. 328. a. 334. b.
Where the feoffment of the husband being jointly seised in special tail with his wife, shall be a discontinuance to the issue after the death of the wife, 326. b.
Where the alienation of one jointenant shall be no discontinuance to his companion surviving, 188. a. 127. b.
Where a partition between parceners shall work no discontinuance, 173. a.
Where a warranty annexed to a release, or confirmation shall work a discontinuance, and where not, 328. b. 329. a. 339. a.
Where the release of an abbot with warranty shall be no discontinuance to his successors, 329. a.
Where the grant of a rent in fee with warranty by tenant in tail shall be no discontinuance to his issue, but at his election, 332. b.
Where tenant in tail of a rent disseises the tertenant, a feoffment by him with warranty shall be no discontinuance of the rent, *ibid.*
Where a grant, release, or confirmation in fee to a lessee for years by tenant for life, or in tail, shall work no discontinuance, 329. b. 330. a. b. 332. b.
Where the conveyance of an inheritance that lieth in livery, whereto no livery is requisite, shall work no discontinuance, 332. b.
Where a fine levied by tenant in tail of a reversion upon a lease for years shall be a discontinuance, *secus* of a reversion upon a lease for his own life, 323. b.
Where a lease by tenant in tail for the life of the lessee was a discontinuance at the common law during the particular estate, 333. a. 336. a. 338. b. *Vide* Stat. 32 *H.* 8. *cap.* 28. where such lease shall be good at this day, and where not.

Where the freehold may be discontinued, and not the reversion, 333. a.

Where a reversion in fee upon a lease for life, or gift in tail being executed in the life of tenant in tail, who made the estates, shall be a discontinuance to his issue, and where not, 333. a. 334. 335. b.

Where a gift in tail by tenant in tail, and a release to the donee in fee, shall be no discontinuance after the death of the donee without issue; *secus* of a lease for life and such release, 333. b.

Where tenant in tail makes a gift in tail, a feoffment in fee by the donee shall be no discontinuance after his death without issue, 327. b.

Where tenant in tail makes a feoffment of a manor with an advowson appendant, and dies, his issue may present before recontinuance; *secus* if the feoffee had presented in the life of the tenant in tail, 333. b.

Where a fine *sur* grant and render by tenant in tail, not executed in his life, shall be no discontinuance to his issue, 333. b.

Where a reversion with warranty not executed in the life of tenant in tail shall be no discontinuance, *ibid.*

Where tenant in tail disseises his lessee for life, and makes a feoffment, and the lessee dies, this shall be no discontinuance, 333. b.

Where a feoffment by tenant in tail to him in the reversion or remainder shall be a discontinuance, and where not, 325. a.

Where a reversion may be revested, and yet the discontinuance remain, 335. a.

Where the estate which wrought the discontinuance is defeated by entry for condition broken, &c. the discontinuance itself is avoided, 336. b.

Where and by what means an estate tail may be discontinued by him that was never seised of the same estate, and where, and by what not, 338. b. 339. a. b. 340. a. 347. a. b.

Where the escheat of a reversion in the life of tenant in tail not executed in his grantee, shall work no discontinuance to the issue, 340. b.

Where the alienation of a parson, prebend, &c. shall be no discontinuance to the successor, 341. a. b.

Disparagement in Marriage. *See* Marriage, Wardship.

The etymology of the word (disparagement), 80. a.

The several kinds of disparagements in marriage, and what shall be said a disparagement, and what not, 80. a. b. 82. a.

The penalty incurred by the lord for such disparagement, 80. b.

Where a disparagement by one jointenant shall be a forfeiture of the wardship as to both, 80. b.

Upon a disparagement to the heir who shall enter and oust the guardian, and who not, 81. a.

Where the heir after disparagement shall be in ward again, and where not, 80. b.

Disseisee, Disseisor.

What he may and what he may not do before reentry, 256. a.

Disseisin. *See* Abatement, Assise, Coverture, Continual Claim, Jointenants, Judgment, Tenant at Sufferance.

The definition of a disseisin, and the signification of the word, 153. b. 181. a.

What shall be said a disseisin of a rent-seck to have an assise, and what not, 153. a. b. 161. b.

What shall be said a disseisin of a rent-service, and what not, 160. b. 161. a. b.

What shall be said a disseisin of a rent-charge, 161. b.

Where a man shall have several assises, for one disseisin of one and the same, 153. b.

Where an assise lieth against a coadjutor, and counsellor to a disseisin, notwithstanding the death of the tenant, 18. b.

Where the agreement of him in the reversion to a disseisin of the tenant for life to his use, shall make him a disseisor in fee, 108. b.

Where a disseisin of the tenant in a *præcipe* by the demandant to the use of others, shall not abate the writ, 108. b.

Where the entry of a man into lands of his own wrong shall be a disseisin, notwithstanding his claim to hold at the will of the tenant, 271. a.

Where a particular tenant holding over his estate shall be reputed a disseisor, abator, &c. and where a tenant at sufferance, 271 a.

Where he in the remainder for life disseises the particular tenant, by the death of the tenant the disseisin shall be purged, 276. a.

Where the confession of a disseisin shall be prejudicial to the tenant in a real action, and where not, 287. a.

Where the payment of rents or services to a stranger by the tenant shall be a disseisin to the lord, and where not but at his election, 323. a. and b. 324 a. and b.

What acts by a disseisor shall be good to bind the disseisee, and what not, 35. a. 357. b. 58. b.

Where tenants for years, guardian, tenant by *elegit*, &c. by their feoffment shall be disseisors, 330. b. 367. a. b.

Distress. *See* Attornment, Rescous, *Stat.* 2 *W. & M.* 32 *H.* 8. *c.* 37.

The dērivation of the word, 96. a.

Of what things a distress may be taken, and of what not, 47. a. b.

How the distress ought to be demeaned, 47. b.

What shall be said a sufficient pound to impound a distress, and what not, *ibid.*

Where a distress in the night shall be good, and where not, 142. a.

Distress inseparably incident to every service, 150. b. 151. b.

For what service incertain the lord may distrain, and for what not, 96. a.

Where a distress lieth for a rent-seck, 153. a.

Where the lord may distrain the cattle of his tenant out of his fee, and where not, 161. a.

Where the owner may make rescous of a distress taken for damage-feasant out of the land in which, &c. *ibid.*

For damage-feasant, where it must be taken, 161. a.

Divorce. *See* Bastard, Dower, Marriage.

The derivation of the word, 235. a.
The several kinds of divorces, *ibid.*
A vinculo matrimonii, what, 32. a. 235.
A mensa et thoro, what, 32. a.

Donatives.

How they are made, 344. a.

Double Plea. *See* Plea.

Where and why such plea not allowable in law by one tenant and defendant, 303. a. 304. a.
Where in pleas dilatory, duplicity of matter may be used; *secus* in pleas peremptory and perpetual, 304. a.
By what means a man having divers distinct matters in excuse or bar of an action, may take advantage of them all, 304. a.

Dower. *See* Admeasurement, Attornment, Curtesy, Jointure, Waste, Warranty.

The definition and derivation of dower, 30. b.
The divers kinds of dowers, 33. b. 39. b.
The description of dower at the common law, 30. b. 33. a. 33. b.
What things requisite to the consummation of dower, 31. a. 32. a.
The wife of what person shall have dower of the lands of her husband, and of what not, 30. b. 31. a.
The privileges incident to dower, 31. a.
Of what inheritances the wife shall have dower, and of what not, and in what manner they shall be assigned unto her, 30. b. 32. a. 37. b. 164. b. 165. a. 307. a.
Why the law made this provision for the wife, 31. a.
Why dower may be *ad ostium ecclesiæ* not *ad ostium castri*, 34. a.
Of what castle or mansion-house the wife shall be endowed, and of what not, 30. b. 36. b. 31. b. 165. a.
Of what seisin of her husband the wife shall be endowed, 31. a. 226. b. 253. b.
Where the wife shall not be endowed of the seisin of her husband had by intrusion upon the king's possessions, 30. b.
Dos de dote, where it shall be, and where not, 31. a. b. 40. b.
Where the wife shall be endowed of an estate of her husband determined, 31. b.
Where the wife shall not be endowed upon a remitter or alteration of the estate to the heir, 31. b.
Where the wife shall not be endowed, albeit the issue by possibility may inherit, *et è converso*, 31. b. 40. b.
Where the wife, being an alien or Jew, shall be endowed, and where not, 31. b.
Where the wife shall have dower of a thing suspended or extinct, and where not, 32. a.
Where the wife shall be endowed according to the improvement or decay of the value of her husband's estate after his death, and where not, 32. a.

Where the wife divorced shall have dower, and where not, and why, 32. a. 33. b.
Where the wife shall lose her dower by elopement, and where not, 32. a.
Where the wife shall be endowed in severalty by metes and bounds, and where not, 32. b.
Where a charge shall be good against the wife made after her title to dower, and where not, 32. b. 33. a. 173. a.
Where the wife shall lose her dower by the attainder of her husband, and where not, 31. a. 37. a. 41. a. 392. b.
Where the wife shall recover damages in a writ of dower, and where not, 32. b.
What shall be said a good plea in dower to bar the wife of damages, 33. a.
To what purposes the dower of the wife shall be said a continuance of the estate and possession of her husband, and to what not, 241. a. 244. a.
Of what age the wife ought to be to have dower, 33. a. 37. a.
What shall be said a good marriage as to dower, and what not, 33. a. b.
Where the disability of the wife during coverture, being removed before the death of her husband, she shall be endowed from the first seisin of her husband, and where not, 33. a.
Where the wife shall have dower which cannot have an appeal of the death of her husband, *et è converso*, 33. b.
Upon what death of the husband the wife shall be endowed, and upon what not, 33. b. 133. b.
Where by custom the wife shall be endowed of the whole, and where of the moiety, and where but of the fourth of the husband's estate, and in what place such custom is pleadable, 33. b. 110. b. 111. a.
The description of dower *ad ostium ecclesiæ*, 34. a.
Where such dower shall be good without deed, 34. a.
At what age the husband may endow his wife *ad ostium ecclesiæ*, 34. a. 38. a.
Such endowment not good by tenant in tail, 38. a.
Where the wife shall enter into her dower after the death of her husband without assignment, and where not, 34. b. 37. a.
What things are requisite to assignment of dower, 34. b. 35. a.
By what persons such assignment may be made, 34. b. 35. a.
Where assignment of dower by a disseisor, &c. shall be good against the disseisee, and where not, 35. a. 357. b.
Where one tenant of the land shall take advantage of an assignment of dower made by another tenant, and where not, 35. a.
Of what things assignment of dower may be made, 34. b. 39. a.
Where an assignment of dower shall work a degree to have a writ of entry in the *per*, and where not, 239. a.
The description of dower *ex assensu patris*, and of what tenements such endowment may be made, 35. a.
By what person such endowment shall be good, and by what not, 35. b. 37. a.
At what age a man may endow his wife *ex assensu patris*, 35. b. 38. a.
Dower *ex assensu, matris, fratris, &c.* where good, and where not, 35. b.

Of what part of the land dower *ex assensu patrie*, and *ad ostium ecclesiæ*, may be made, 34. b. 36. a.
Where the wife may disagree to dower *ad ostium ecclesiæ*, or *ex assensu patrie*, and where agreement to one dower shall bar her of another, and where not, 36. a.
What shall be said a sufficient act by the wife to determine her election to dower, and what not, 145. a.
The description of dower *de la pluis beale*, 38. a.
Where the wife shall retain for part, and recover against the guardian in chivalry for part, 39. a.
Where a writ of dower lieth against the guardian, and where against the heir, 38. b.
What shall be a good plea by the guardian in bar of dower, and what not, 39. a.
What shall be the surest provision for the wife for her dower, 34. b. 36. b. 37. a.
Where a protection may be cast in a writ of dower, and where not, 131. a.

Drenchs.

Who are so called, 5. b.

Dunum, Duna, Dun.

What they are, 4. b.

Dum fuit infra Ætatem. *See* Entry, Infant, Jointenant.

Where and by whom such writ lieth, 247. b.
Where baron and feme infants join in a feoffment by indenture, the feme after the death of her husband may have a *dum fuit infra ætatem; secus* where herself was of full age at the time of the feoffment, 337. a.
Where an infant tenant *pur auter vie* makes a feoffment, and *cestuy que vie* dies, *dum fuit infra ætatem* lieth not, 336. b.
Where upon a feoffment by two jointenants within age, a *dum fuit infra ætatem* lieth by them severally, 337. a.
Where two jointenants, one within age, and the other of full age, make a feoffment, the infant surviving shall have a *dum fuit infra, &c.* but for a moiety, 337. b.

Dum non Compos Mentis. *See* Attornment, Entry, Idiot.

The several sorts of *non compos mentis*, 247. a.
By what means a feoffment or other estate made by a *non compos mentis* may be avoided during his life, and by what not, 247. a. b.
Where a fine or recovery by a *non compos mentis* shall bar his heir, 247. a.
Where a *non compos mentis* may be a purchaser, 2. b.
By what person a writ of *non compos mentis* lieth, and by what not, 247. b.
Where the act or wrong of a *non compos mentis* shall be imputed to him, and where not, 247. b.

Duties.

Release of, no bar in action of account, 291. a.

Eire.

The signification of the word, 293. b.
The authority and manner of proceeding of the justices in eire anciently, 293. b.

Election. *See* Annuity, Avowry, Dower, Warranty.

Where a man having several remedies for one thing, the election of one remedy shall conclude him as to the other, and where not, 146. a.
Where an election is given to several persons, the election of which of them shall stand, 245. a.
Where of two several things who shall have the election, 145. a.
Where such election ought to be in the life of the parties, and where not, 145. a.
Where a man by his act and wrong shall lose his election, 145. a.
Where the privilege of election shall descend, or is transferable over, and where not, 46. b. 166. b. 186. b.
Where it shall be in the election of the tenant to vouch, &c. by reason of a warranty in deed, or in law, 384. b.
Where the lord may elect to have the wardship of the heir of his tenant, or take himself to his seigniory, 83. b.

Elegit. *See* Execution, Stat. *West.* 2. *cap.* 18.

Such writ, whence so called, and where it lieth, 289. b.
What things the sheriff may deliver in execution upon such writ, and what not, 289. b.

Elopement. *See* Dower.

What elopement is, 32. a. b.

Emblements.

Where a lessee at will shall have the emblements after his estate determined. and where not, 55. a. b.
Where a tenant for life, or his executors, shall have the emblements after his estate ended, and where not, 55. b.
Where the lessee for years of a tenant for life shall have the corn after the death of his lessor, 55. b.
Where the husband sows the land of his wife, his executors shall have the corn, 55. b.
Where the husband jointenant with his wife sows the ground, the wife surviving shall have the corn, *ibid.*
Where lands descend to a daughter who sows the ground, the son born after shall not have the corn, *ibid.*
Where the estate of the tenant is defeated by a right paramount, forfeiture, condition, &c. the tenant shall not have the corn, *ibid.*
Where the disseisee by his regress shall have the emblements severed before the entry, *ibid.*
Where tenant by statute merchant sows the land, and after is satisfied by a casual profit, he shall have the emblements, *ibid.*
The remedy which the tenant hath to come by the corn after his estate ended, 56. a.

Embracery.

The signification of the word, 369. a.

Entry, and Entry congeable. *See* Abeiance, Bastard, Condition, Continual Claim, Degrees, Discontinuance, *Dum fuit infra Ætatem*, Freehold Jointenants, Statute of *Marlbridge*, Surrender.

The divers writs of entry, 239. a.

The several writs of entry *sur disseisin*, and where each writ lieth, 238, b.

Where an entry generally into one acre shall be said an entry into others, and where an entry into part shall be an entry into the whole, and where not. 15. a. b. 252. b.

Where the entry of one parcener shall be accounted in law the entry of both, and where not, 243. b. 373. b. 374. a.

Where the entry of a stranger to the use of him that hath right or title of entry shall vest the estate in him before agreement, and what not, 245. a. 258. a.

What act upon the land by him that hath a right of entry shall amount to an entry, and what not, 49. b. 245. b. 368. a.

Where an entry into one acre in the name of other acres in the same county shall be sufficient for both, and where not, 252. b. *per tot. pag.*

Why anciently a long possession, and why at this day a discent shall take away the entry of him that right hath, 237. b.

The discent of what inheritance shall toll an entry, and of what not, 237. b.

The discent of what estate shall toll an entry, and of what not, 239. a.

Where the dying seised of a seisin in law shall toll an entry, 239. b.

Where the dying seised of a reversion or remainder shall toll an entry, and where not, 239. b.

Where the disseisor makes a lease for his own life, and dieth, this discent shall not toll the entry of a disseisee, 239. b.

Where a collaterall discent shall toll an entry, as well as a lineal, 239. b.

Where a discent after a recovery and before execution shall take away the entry of the recoveror, and where not, 238. a.

Where a discent cast, the disseisee being in prison, shall not toll his entry; *secus* of a person recluse, and where the disseisin was before imprisonment, 258. b. 259. a. *per tot. pag.*

Where a discent cast, the disseisee being beyond sea, shall not toll his entry, 260. a. b. 261. a 262. b.

Where a discent cast in time of vacation of an abbathy or other sole corporation shall not toll the entry of the successor, 263. b. 264. a.

Where a title of entry shall not be tolled by a discent, 240, a. b.

Where the entry of the disseisee shall be congeable upon the lord by escheat, and where not, 240. a.

Where upon the discent the heir is remitted to another estate than his ancestor died seised of, the entry of the disseisee is congeable, 238. b.

Where a disseisor made a gift in tail, and after divers discents the issue in tail dies without issue the entry of the disseisee shall be congeable upon him in a reversion or remainder, 238. b. 240, a.

Where the entry of the disseisee shall be congeable upon the disseisor notwithstanding divers mean discents, or a purchase of the freehold from his father, upon whom the land descended, 238. b. 242, a. 248. a.

Where an infant, lessee for life of a disseisor, is disseised, and a discent cast, the entry of the disseisee shall be congeable upon the infant after his re-entry, 238. b. 248. a.

Where the entry of a patentee of the king, or a devisee of lands, shall be congeable notwithstanding a discent cast upon an intrusion, 112. a. 240. b.

Where the entry of the disseisee shall be congeable upon the wife of the disseisor, after endowment, notwithstanding the discent, 240. b. 241. a.

Where upon the abatement of the disseisee the wife of the disseisor recovers in dower, the entry of the disseisee after shall not be congeable; *secus* if he had assigned her dower *in pais*, 241. a.

Where the entry of the disseisee, upon tenant for life, shall divest the reversion settled in the king, 241. a.

Where a discent mediate to the dying seised of the ancestor shall not oust the disseisee of his entry 241. b.

Where a discent cast upon the disseisin or abatement of the younger brother shall toll the entry of the eldest, and where not, 242. a. b. 243. a.

Where a discent cast upon the abatement of one parcener shall toll the entry of her sister as to her moiety, and where not, 243. a. b.

Where a man dies seised, his wife *enseint*, a discent cast upon the abatement of a stranger shall toll the entry of the issue born after, 245. b.

Where a discent shall take away the entry of an infant that right hath, and where not, 245. b. 246. a.

Where a discent cast during the coverture shall toll the entry of the feme, and where not, 246. a b. 358. b.

Where the entry of the heir of a *non compos mentis* shall be congeable, notwithstanding a discent or alienation in the life of his ancestors, 247. a. b.

In what cases the entry of the heir shall be congeable, where the entry of his ancestor was not, 247, a. b.

Where the entry of an infant after his full age shall be congeable upon his alienee, 248. a.

Where an infant disseisor enters upon the heir of his alienee, the entry of the disseisee shall be congeable upon the infant, 248. a.

Where a discent by reason of profession in religion shall not toll the entry of the disseisee, 248. b.

Where a dissent shall not toll the entry of a lessee for years, tenant by *elegit*, &c. 249. a.

Where a discent in time of war shall not toll an entry, 249. a. b.

Where a dying seised and a succession shall not toll an entry 250. a.

Where the husband within age discontinues the land of his wife, the entry of the feme after his death shall be congeable upon the discontinuee, 336. b. 337. a.

Where an infant tenant in general tail in the right of his wife discontinues in tail, and dies, the entry of his heir or feme shall be congeable upon the discontinuee, 337. a.

Where an infant tenant in tail makes a feoffment, and after is attainted, and dies, the entry of his issue is not congeable upon the feoffee, 337. a.

Where two infants jointenants make a feoffment, the entry of the survivor shall be congeable into the whole, 337. a.
Where the baron discontinues the land of his feme for life by the surrender of the tenant, the entry of the heir of the feme is congeable upon the baron in the life of tenant for life, 388. a.
Where baron and feme and a third person are jointenants, and the baron makes a feoffment and dies, the entry of the third person surviving shall be congeable into the whole, and where but to a moiety, 327. b.
Where a disseisor makes a lease for life, and levies a fine of the reversion, and five years pass, the entry of the disseissee is not congeable upon the tenant for life, 298. a.
Where upon nontenure pleaded, or disclaimer in a *formedon*, the entry of the issue in tail shall be congeable upon the tenant before judgment, 362. a.
Where two jointenants, one within [redacted] and the other of full age be disseised, and a discent cast, and he of full age dies, the entry of the other shall be congeable into the whole, 364. b.

Error. *See* Release.

Where and upon what judgment such writ lieth, and where and upon what not, 168. a. 288. b.
Where a release in actions shall be a good plea in a writ of error and where not, 288. b.
Where after recovery in a real action, a release by the tenant of all his right in the land shall bar him of a writ of error, 289. a.
Where a recovery by default against a man out of the realm in the king's service shall not be avoided by error, 262. b.
This writ lies on judgments in courts of record only, 117. b.
On a recovery of a freehold, who may bring it, 251. b.

Escheat. *See* Acceptance, Attainder, Corruption of Blood, Entry, Heir, Rebutter, Relation, Warranty.

The etymology and signification of the word, 13. a. 92. b.
How many ways an escheat may happen, 13. a. 92. b.
Where upon the dissolution of a corporation their lands shall revert to the donor, and shall not escheat, 13. b.
Where the disseisor makes a feoffment, or dies seised, upon the death of the disseisee without heir, an escheat lieth not, 268. b.
Where the father dieth, his son being attainted of treason, the lands of the father shall escheat, and not go to the king, 13. a.

Escheator.

His office and duty, 13. b.
Why so called *ibid.* 92. b.
The number of them in ancient and modern times, *ibid.*

Escrow.

Must be delivered to a stranger, and not to the party to whom it is made, 36. a.

Escuage. *See* Debt.

The etymology of the word, 68. b.

The several kinds of escuage, 72. b.
For what time such tenant is bound to attend upon the king in his war, 68. b. 69. b.
From what the time of attendance shall be computed, 70. a. 71. a.
Where the tenant may perform his attendance by deputy, 70. a. b. 83. a.
Where attendance by tenant paravail shall excuse all the mesnes, 69. b. 78. b.
Where attendance by one jointenant shall excuse his companions, 69. b. 78. b.
What persons are exempted from personal performance of this service, 70. b.
Where escuage shall be assessed by parliament, and for what cause, and when it was last assessed, 72 a. b.
Where the tenant dying in the army, his heir shall be excused by escuage, 72. b.
Where the tenant of the king by escuage shall have escuage of his own inferior tenants, for their not attendance in the war, and where not, 72. b. 73. a. b.
Where and what escuage shall be knight's service, and what socage, 72. b. 87. a.
Escuage generally, which shall be intended, 73. a.
What service incident to a tenure by escuage, 73. a.
The remedy which lords have to come by their escuage, 73. b.
How it shall be tried whether the tenant was with the king in his war, or not, 74. a.
What shall be said a voyage royal, wherein such tenant is bound to attend, 69. b. 130. b.
Escuage uncertain in knight's service, 73. a.
——— certain in socage, *ibid.*

Espleas.

In a writ of right of advowson shall be laid in the incumbent, 17. a.

Essoign. *See* Protection.

Estates. *See* Devise, Fee Simple, Freehold, Grant, Heir, Jointenants, Leases, Tail.

The signification of the word, 345. a.
Status unde dicitur, 9. a.
Where two several estates of the same land may be *simul et semel* in the same person, and how, and when they shall be said to be executed, 54. b. 182. b. 184. a. b. 338. b.
Where the estate of a man for his own life shall be esteemed higher than for the life of another man, and where not, 41. b. 42. a.
Where several freeholds may be derived out of an estate for life, and where not, 42. a.
Where a man shall have an estate for life determinable at will, 42. a.
Where an incertain interest in lands shall be deemed in law an estate for life, and where but at will, 42. a.
Where tenant for life having a fee expectant upon a remainder in tail, grants *totum statum suum*, both estates shall pass, 345.
What can support another, and what not, 54. *passim.*

When

When the greater shall drown the less, when not, 28. a. 54. b.

Estoppel. *See* Verdict.

The signification and derivation of the word, 352. a.
The several kinds of estoppels, and by what matter or act an estoppel may be wrought, and by what not, 352. a.
Where estoppels ought to be reciprocal to bind both parties, 352. a.
Where every estoppel ought to be precisely affirmative and certain to every intent, 303. a. 352. b.
Where matter neither traversable nor material shall be no estoppel, 352. b.
Where acceptance before title accrued shall work no estoppel, *ibid.*
Where an estoppel against an estoppel shall put the matter at large, 352. b.
Where the adverse party shall not be estopped to take advantage of a truth apparent in the record, 352. b.
Where the acceptance of an estate by the husband to him and his wife shall estop him to allege a remitter to the wife, 352. a.
What persons shall be bound to take advantage of estoppels, and what not, 352. a. b.
Of what estoppels that go to the person a stranger shall take benefit, and of what not, 128. b. 352. b.
Where an estoppel of the part of the mother shall not bind the heir claiming from his father, 365. b.
Where an estoppel to the son descending mediately upon his father, shall bind him, and where not, 12. a.
Where a deed indented shall be an estoppel, and where not, 45. a. 47. b. 363. b.
Where a man accepts a lease of his own land by indenture, how long the estoppel shall be said to continue, 47. b.
Where in a *nuper obiit* the defendant claims by purchase, the plaintiff may have a *mortdancestor* against her for the whole, 146. b. 164.
A conclusion, what, and whence derived, 37. b.
To whom estoppels extend, 353. a.
Where a thing alledged by way of supposal in account is an estoppel, and where not, 352. a.
Who may take advantage of estoppels, 352. a.

Estovers.

The derivation of the word, 41. b.
What estoveis of common right belong to a tenant for life, years, &c. *ibid.*

Etymologies.

The use and benefit of etymologies, 68. b. 86. a. 87. a. 106. b. 109. a. 137. a. 177. a. &c.

Evidence. *See* Pleading, Trial, Verdict.

The derivation of the word, 283. a.
The extent of the word, and what matters shall be said good evidence to an enquest, *ibid.*
Where a thing done beyond the seas may be given in evidence, 261. b.

Examples.

Illustrant non restringunt legem, 24. a.

Exception.

How it differs from a reservation, 47. a.

Exchange. *See* Partition.

The description of an exchange, 50. a.
Of what things an exchange may be made, and of what not, 50. b.
What things requisite to the perfection of an exchange, 51. b.
Where an exchange shall be good without deed, and where not, 50. a. b.
Where an exchange shall be good, albeit there be no transmutation of possession, 50. b.
What equality ought to be observed in exchanges, and what not, 51. a. *per tot. pag.*
Where an exchange of lands with the king shall be good, 51. a.
Where an exchange by an infant shall be good, and where voidable, 51. b.
Exchange implies a warranty, 174. a. 384. b.
——— must be executed in the life of both the parties, 51. b.

Excommunication.

Excommunicatio, quid, et quotuplex, 133. b.
The condition of a person excommunicated, 133. b.
What persons are disabled thereby to bring an action, and what not, 134. a.
Where an excommunication certified by a bishop, shall not disable the plaintiff in an action against the same bishop, *ibid.*
By whom excommunication ought to be certified, and what certificate shall be good, and what not, 134. a.
Where an excommunication by the pope, or other foreign authority, shall not disable the party, *ibid.*

Execution. *See* Debt, Payment, Stat. of *Acton Burnel. West.* 2. *c.* 45. 23 *H.* 8. *c.* 6. 32 *H.* 8. *c.* 5.

The legal acceptation of the word, 154. a.
Divers maxims in law concerning executions, 289. b.
Where the demandant may enter, or distrain after judgment, and before execution, and where not, 34. b.
Where upon a judgment in debt the plaintiff shall have execution of the lands which the defendant had at the time of the writ brought, and where not, 102. a.
Where by discent of part of the lands in execution to the conusee the whole execution shall be avoided, 150. a.
Where tenant in tail recovers in value and dies without issue before execution, execution shall be sued by him in the reversion, 252. a.
Where after a perfect execution by extent returned, and of record, there shall be no re-extent upon any eviction, 290. a.
Where no execution by *elegit*, statute-merchant, &c. shall be sued against the heir, or his mother endowed by the heir during his minority, 290. a.
Where a *capias ad satisfaciendum* lay at the common law, and where at this day, 290. b.
Within what time writs of execution ought to be sued forth, and where, being commenced within the time, they may be continued after, 290. b.

Where to a writ of execution no plea can be admitted, but for matter since the judgment, the party is to put his *audita querela*, 290. b.
Where a release of all debts, duties, demands, executions, shall discharge an execution; *secus* of a release of all actions, 76. a. 289. a. 291. a. b.
Where a release of all suits shall bar an execution, and where not, 291. a.
Where an execution upon a recognisance may be defeated by a deed of defeasance, 291. a.
Where a man may have execution upon a recognisance the first day, without staying till all the days incurred, 292. b.
Execution may be awarded for the king without suit, by the court or office, 291. a.
For a common person shall not be awarded without the party prays it, 291. a.
Is discharged by a release of a debt to the conusee, 291. a.
Where none can be made till a *scire facias* is brought, 254. b.

Executors. *See* Account, Assets, Devise, Obligation, Testament.

Where a remainder for years limited to the executors of *I. S.* shall vest presently in *I. S.* 54. b.
Where the executor shall have remedy for the arrearages of rent which the testator in his life could not, 146. b.
Where executors shall be bound by the obligation of their testator without naming, 209. a.
In what respects the executor shall be said more to represent the person of the testator, than the heir the person of the ancestor, 209. a. b.
Where an executor shall be reputed in law an assignee, and where not, 210. a.
Where an executor may release an action before probate of the testament, 292. b.
Where a man shall have an action of debt against his own executors, 133. b.
Where the executors of a bishop shall have a ward which fell in the life of a bishop; *secus* of a presentation to a church which voided in his life, 90. a. 388. a.
Where a church voided in the life of the testator, the executors shall present, and not the guardian in chivalry; *secus* where the tenant of the king *in capite* dies, &c. 388. a.
Where an infant makes his debtor his executor, the debt is extinct, 264. b.
Where a feme executrix takes the debtor to husband, notwithstanding the debt remains, *ibid.*
Power to sell, how conferred, 112. b. 113. a. 236. a.

Exposition of Words. *See* Advowson, Confirmation, Grant, Words.

Where the word (*ut*) shall be taken positively, and where by way of similitude, 17. b. 43. b.
Where the word (or) shall be taken in the conjunctive, where in the disjunctive, 99. b. 383. a.
Where the legal termination in (*agium*) in composition signifies service or duty, 86. a. 109. a.
The words (*prochein amy*) how taken in law, 88. a.
How many things the adjective (*liber*) distinguisheth in law, 94. a.
The exposition of the words (*dedi et concessi*) in grants, 301. b.

Of the word (*dimisi*), 301. b.
Of the word (*volo*), 301. b.
Of the word (*eadem*), and how it shall have relation, 20. b. 385. b.
Of the word (*predict'*), and the force of its relation, 20. b.
Of the word (hereditament) 6. a. 16. a. 383. a. b.
Of the words (*proxima advocatio*), 378. b. 379. a.
Of the words (*sans impeachment de wast*), 220. a.
Of the words (demesne land), 17. a.
Of the words (*a confectione*), 46. b.
Of the words (from henceforth), *ibid.*
Of the words (from the date, *or* from the day of the date), *ibid.*
Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fieri debet, 147. a.
Quæ dubitationis tollendæ gratia inseruntur, non laedunt, 205. a.
Expressio eorum quæ tacitè insunt, nihil operatur, 19. a.
A disjunctive in the latter end of a sentence disjoineth the whole, 225. a.
When the words of a deed, or of the parties without deed, may have a double intendment, one agreeable to law, the other against law, the intendment that standeth with law shall be always taken, 42. a. b.

Extent. *See* Execution, Stat. *W.* 2. *c.* 18. Stat. *de Acton Burnel*, 23 *H.* 8. *c.* 6. 32 *H.* 8. *c.* 5. Stat. Merchant and Staple.

Extinguishment. *See* Apportionment, Common, Heriot, Mesnalty, Release, Suspension.

The signification and derivation of the word, 147. b.
Where by purchase of part of the land out of which, &c. the whole rent-charge shall be extinguished, 147. b.
Where by discent of part of the tenancy to the lord, an entire rent-service shall be extinct, and where not, 149. a.
Where by purchase of part of the tenancy by the lord an entire rent-service shall be extinct, and where not, 149. a. b.
Where by the grant of the lord, of the services of his tenant by castleguard, the seigniory shall be extinct, 83. a.
Where and to what purpose an estate drowned or extinct shall be said to have continuance, and where and to what not, 185. a. 338. b.
Where a grant of the services or rent to the tenant shall enure to him by way of extinguishment, 307. a. b. 313. b.
Where the remainder in fee of the tenancy escheats, the seigniory, as to the whole, shall be extinct, 312. b.
Where a bishop is seised of a rent, and the tertenant enfeoffs him and his successor, by the entry of the lord for mortmain the rent is not revived; *secus* where tenant for life grants a rent in fee, and infeoffs the grantee, upon whom the lessor enters for a forfeiture, 338. b.
Where the accession of a freehold *in auter droit* shall extinguish a term which a man hath in his own right; *secus è converso*, 338. b.
Where the release of the lord of all his right to the tenant, and a lessee for years of the seigniory, shall extinguish the seigniory and estate of the lessee

lessee also; *secus* of a release to them and their heirs, 180. a.
Where a lease for years may cease and revive again as to several persons, and where not, 46. a. b.
Where the re-entry of the lessee upon the feoffee of his lessor, shall revive the rent reserved upon the lease, 319. a.
Where the grantee of a rent disseises the tertenant, the regress of the tenant shall not revive the rent, *ibid.*

Extortion. *See* Stat. *W.* 1. *c.* 26.

The derivation and several acceptations of the word, 368. b.
What shall be said extortion in sheriffs or other officers, and what not, 368. b.
The odiousness of the crime, 368. b.

Ey.

What it is, 5. b.

Falsifying of Recoveries. *See* Covin, Forfeiture, Recovery, Stat. of *Gloucester*, *cap.* 11. 21 *H.* 8. *c.* 15. 14 *El.* *c.* 8.

The signification of the word (falsify), 104. b.
What persons may falsify a recovery at the common law, and what not, 146. a. 104. b.
Where and by what matter the issue in tail may falsify a recovery had against his ancestor, and where and by what not, 360. b. 361. a.

Fealty. *See* Acceptance, Allegiance, Seisin.

The etymology of the word, 67. b.
The manner of doing fealty, 67. b.
The difference between the fealty of a freeholder and of a villein, 68. a.
What person and tenant shall do fealty, and what not, 67. b. 68. a. 93. b.
How fealty differeth from homage, 68. a. *per tot. pag.*
The benefits which accrue to lords by accepting fealty, 68. a. 92. b.
Where tenant by fealty shall swear to do all services due, when after fealty done no service is due, 92. a.
To what tenures fealty is incident, and to what not, 23. a. 93. a. 95. b. 96. b. 150. b.
Fealty incident to attornment, 104. a.
Inseparably incident to every reversion, 143. a.

Fee Simple. *See* Devise, Heirs.

The signification and derivation of the word (fee), 1. b. 2. a.
The several sorts of fee simples, 1. b. 9. a.
What words requisite to the passing of a fee simple, 8. b.
How many several ways a fee simple may be purchased, 10. a.
The ampleness of such estate, 18. a.
Where two fee simples may be of the same land at one time, and where not, 18. a. 354. b. 368.
Fee generally, what it shall be intended, 189. a.
A feoffment to one and the heirs of his father, a good fee simple, 220. b.
Fee simple conditional, and the course of its discent at the common law, 19. a.

By the having of what issue such condition said to be performed, and of what not, 19. a.
To what purposes the having of issue was a performance of the condition, and to what not, *ibid.*
Where the sons only, and where the daughters only, were inheritable to such estate, 19. a.
Where the alienation of the donee after issue was a bar to his issue, or the donor, and where not, *ibid.*
A grant to a man and his heirs tenants of the manor of *D.* a good fee simple, 27. a.
A grant by the king of a barony to one and his heirs lords of the manor of *K.* a good fee simple qualified in the dignity, *ibid.*

Fees. *See* Extortion, Office, Wager of Law.

Where notwithstanding the grantor oust his officer, his fee shall continue, and where not, 233. b.
Where in an action by an attorney for his fees, the defendant shall not wage his law, 295. a.
Where the receiving greater or other fees than are prescribed by the statutes shall be extortion, and where not, 368. b.

Felony. *See* Attainder, Relation.

The signification and extent of the word, 391. a.
By pardon of all felonies what crimes anciently, and what at this day are pardoned, 391. a.
What not, 391. a.
The several sorts and degrees of felony, and what forfeiture is incurred by each of them, *ibid.*
Where upon attainder of felony in an appeal, the defendant shall forfeit no lands but those he had at time of the outlawry pronounced; *secus* in an indictment, 390. b.
The punishment of a felon implied in his judgment to be hanged, 392. b.
Where a felon may be a purchaser, and to whose use, 2. b.

Feoffment. *See* Confirmation, Condition, Deeds, Livery of Seisin, Plea, Surrender.

The etymology and signification of the word, 9. a.
The antiquity of a feoffment, *ibid.* 49. b.
What person may make a feoffment, and what not, 42, b. 43. a.
By the delivery of the deed of feoffment, what estate passeth before livery of seisin, 56. b.
Where the feoffment of a moiety or third part of a man's land shall be good without deed, 190. b.
A feoffment of the moiety of a manor to have with an advowson appendant, not good without deed, 190. b.
Where a lease and release shall amount to a feoffment, 207. a.
Where a feoffment shall extinguish a condition or power of revocation, and where not, 237. a.
Where *cestuy que use* and his feoffees after 1 R. 3. and before 27 H. 8. join in a feoffment, whose feoffment it shall be construed, 302. b.
Where tenant for life, and he in the reversion or remainder in fee tail, or for life, join in a feoffment, how it shall be construed, 302. b.

FO

The law will transpose the words rather than it shall not take effect, 217. b.
Why it destroys all wrongful estates, 9. a.
By lessee for years, how it operates, 330. b. 367. b.

Ferdwit.

What it is, 71. a.

Ferlingus. See *Ferlingum Terræ.*

What *Ferlingus* is, 5. b.
What passes by these words, *ibid.*

Fines to the King. *See* Alienation, Amerciament, Copyhold.

The several acceptations in law of the word (fine), 126. b.
Fine to the king, what, *ibid.* 127. a.
The difference between a fine and a ransom, and where they shall be said all one, 127. a.

Fines of Land. *See* Continual Claim, *Dum non Compos,* Entry Congeable, Infant, Remitter, Stat. 4. *H.* 7. *c.* 24.

The description of a fine, and whence so called, 120. b. 121. a. 162. a.
What time was allowed by the common law to make claim after a fine levied, and what at this day, 262. a. 254. b. 326. 373.
What persons were barred by a fine at the common law that could not make claim, and what persons might make claim, and yet were not barred by such fines, 262. b.
Where a fine levied by tenant in tail shall be a bar to his issue, or them in the reversion or remainder, and where not, 372. a. b.
Where a grant and render by fine to a stranger to the writ and conusance, shall be good to pass a voidable estate to him *in præsenti,* 353. a.
Where a feme-covert shall be concluded by a fine, and where not, 46. 381. 382. 353. b.
Where fines working wrong to third persons ought not to be accepted, 383. a.
Fines for alienation taken away, 369. b.

Firma.

The etymology of the word, 5. a.
How called in several counties, *ibid.*
What shall pass by this name, *ibid.*

Folkland.

The meaning of the word, 58. a.

Forcible Entry. *See* Damages.

Force, what and how taken in law, 161. b.
Upon what statute the writ of forcible entry is grounded, and where it lieth, 257. b.
Where divers persons go to make a forcible entry, the violence used by one shall make them all guilty of force, *ibid.*
Where the master cometh with a greater number of servants than usually attend him, his entry shall be deemed forcible, 257. b.
What number of persons may commit a force, 257. a.
Where an act shall be said in law to be done *vi et armis,* or forcibly, 162. a.

FO

Forest, Park, Chase, Warren. *See* Waste.

The description of a forest, 233. a.
The signification and derivation of the word (park), 233. a.
What beasts properly belong to the forest, what to the chase, and park, and what beasts and fowls to the warren, 233. a.
The difference between a chase and a forest, *ibid.*
What act by a keeper of a park shall be a forfeiture of his office, 233. b.

Forfeiture. *See* Attainder, Conditions, Copyhold, Corruption of Blood, Office, *Præmunire,* Relation, *Statute* 14 *El. c.* 8. Surrender.

The signification and derivation of the word, 59. a.
How many several ways a particular tenant may forfeit his estate by alienation, and what act by him shall be said a forfeiture of his estate, and what not, 251. a. b. *per tot. pag.* 252. a.
Where the right of a particular estate may be forfeited, and he that hath but a right shall take advantage of it, 251. b. 252. a.
Where by the forfeiture of a lessee for life, all mean charges and estates by him made, shall be avoided by the lessor, and where not, 233. b. 234. a.
Whether lessee for life forfeits his estate by alienation, the forfeiture shall continue notwithstanding the determination of the estate by limitation, or entry for condition broken, 202. b. 252. a.
Where tenant for life, and he in the remainder for life having the fee expectant upon a remainder in tail, join in a feoffment, this shall be a forfeiture of both their estates to him in the remainder in tail, 302. b.
Where a recovery suffered by tenant for life should be a forfeiture of his estate at the common law and at this day, and where not, 356. a. 362. a.
Where a statute giveth a forfeiture generally against him that wrongeth the duty or interest of another, who shall have this forfeiture, 159. a.
A guardianship in socage or by nature, not forfeitable by outlawry or attainder, 84. b. 88. b.
Where a man hanged by martial law shall not forfeit his land, 13. a.

Forejudger. *See* Mesne, Stat. *West.* 2. *cap.* 9.

The legal acceptation of the word, 100. b.
Where and for what cause the tenant shall forejudge his mesne, and where and for what not, 100. a. b.
The form of a judgment in a forejudger, 100. a.
What persons shall be bound by a forejudger, and what not, 100. a. b.
Where in a writ of mesne by two jointenants, one is summoned and severed, the other shall not forejudge the mense, 100. a.
Where in a writ of mesne against two joint mesnes, one makes default, the tenant shall not forejudge the other, 100. a.

FR

Formedon. *See* Assets, Copyholds, Fines, Tail, Warranty.

Formedon, whence so called, 326. b.
The several kinds of formedons, and where and by whom each formedon lieth, 326. b.
Where a formedon lieth, of a copyhold, 60. a.
Where the discontinuee of tenant in tail makes a lease for life, and grants the reversion to the issue in tail, the issue is for ever barred of his formedon, 297. b.

Frankalmoign. *See* Confirmation.

The description of a tenure by frankalmoign, 93. b. 94. b.
How such tenure was created at first, and how it may be created at this day, 93. b. 99. a.
Where a gift in frecalmoign shall be good without deed, and where not, 94. b.
Where the reservation of a rent upon such gift shall be void, 97. a.
What services such tenant is bound to do, and what not, 95. a b.
What remedy the lord hath for such services, 95. b. 96. a.
Where the tenure in frecalmoign shall continue, notwithstanding the alteration of divine services, and prayers, 95. b.
Where such tenure cannot be of lands in ancient demesne, 97. a.
Where such tenant shall not be charged with a corody, *ibid.*
Upon transferring the seigniory or tenancy in frankalmoign, what service shall be due to the lord or grantee, 98. a. 99. b.
Of what services the lord is bound to acquit his tenant in frankalmoign, and of what not, 99. b. 100. a.
Where such lord shall not disclaim in a writ of mesne, 102. a. 306. b.

Frankmarriage. *See* Consanguinity, Degrees.

The signification of the word, 21. b.
What things of incident to an estate in frankmarriage, 21. b. 219. b.
The differences between a donee in frankmarriage and in special tail, 21. b. 22. a.
What service due by such donee to his donor, 23. a. 97. b.
Where a rent may be given in frankmarriage, 21. b.
The necessity of the word (frankmarriage) to the creation of the estate, 21. b.
How the degrees in frankmarriage shall be computed, 23. b. *per tot. pag.*
Where a gift in frankmarriage to the parties already married shall be good, 176. a.
Where a remainder limited upon such gift shall impeach the estate in frankmarriage, and where not, 21. b.
A devise of lands in frankmarriage void, *ibid.*
A gift *in liberum maritagium* by *cestuy que use* before 27 *H.* 8. no frankmarriage, *ibid.*
Where a rent reserved upon a gift in frankmarriage shall not take effect till the fourth degree past, *ibid.*

GR

Frassetum.

The meaning of it, 4. b.

Freebank.

The meaning of the word, 110. b.

Freehold. *See* Abeiance, Conditions, Estate, Jointenants.

The signification of the word, and whence so called, 43. b.
Where divers freeholds may be derived out of one, and where not, 42. a.
Where an incertain interest in lands shall be deemed in law a freehold, and where not, 42. a.
Where a man may have a freehold in his own right, and a chattel in another's right, *simul et semel:* but not *è converso*, 54. b. 338. b.
Where the alteration of the freehold shall be an alteration of the reversion, 191. b. 192. a. and b.
Where the right of freehold shall drown in a chattel, 266. a.
The description of a freehold in law, 266. b.
Upon what conveyances the purchaser shall be said to have a freehold in law to him before entry, and upon what not, 266. b.
Where a stranger by the acknowledgment *of* the tenant in a *præcipe* to be his villein shall be actually seised of the freehold and inheritance without entry, 266. b.
What actions are maintainable by and against him that hath only a freehold in law, and what not, 358. a. b.
Where a freehold in lands may be defeated by a condition without entry or claim, and where not, 379. a.
To what purposes tenants by statute merchant, *elegit*, &c. are said to have a freehold, and what not, 43. b.

Frith.

The meaning of it, 5. b.

Frustum Terræ.

What it is, 5. b.

Gavelkind. *See* Curtesy.

Gavelkind, whence so called, and where such custom used, 140. a. 175. b.
Where one brother dying without issue, all the brothers shall equally inherit by this custom, as well as sons, 140. a.
Where by such custom the wife shall have dower of the moiety of her husband's lands, 111. a.
Where by the same custom the husband shall be tenant by the curtesy without issue, *ibid.*
A prescription in this custom is not good, 175. b.

Glebe *See* Pastor.

How it may be charged, 342. a. 348. b.

Glyn.

What glyn is, 5. b.

Grand Serjeanty. *See* Serjeanty.

Grange.

The meaning of the word, 5. a.
What passes by this name, *ibid.*

Grants

Grants. *See* Abeiance, Annuity, Assignment Confirmation, Deed, Estates, *Habendum*, Intention of the Parties, Name, Parson, Possibility, Rents.

The description of a grant, 172. a.
What things properly lie in grant, and what in livery, 9. b. 48. a. 85. a. 332. a. 335. b.
What things are grantable over, and what not, 89. a. 214. a. 232. b. 266. a.
Where a thing in suspense may be granted over, and where not, 314. a.
Where grants shall receive construction according to the substance of the deed, and not according to grammatical sense, 146. b.
Where the construction of grants ought to ensue the intention of the parties, 313. a. b.
Where the words of a grant shall be transposed in construction contrary to their order, 217. b.
Where a grant being impossible to take effect according to the letter, the law shall make such construction as by possibility may take effect, 183. b.
Where a grant shall amount to a release, confirmation, surrender, &c., and where not, 301. b. 302. a. 307. a. 313. a. b.
Where by the grant of a manor without (*cum pertinentiis*), a thing regardant and appendant will pass, 307. a.
What shall pass by the grant of the services of tenant in tail, and what not, 150, b. 152. a.
Where a grant of a corody to two men and their heirs shall amount in law to several grants, 189. a.
Where two tenants in common join in the grant of a rent-charge, it shall enure as several grants, 197. a. 267. b.
Where by the grant of a reversion, rents and services shall pass, 151. b. 152. a. 317. a. 324. a. b.
By the grant of (hereditaments) what shall pass, 6. a. 16. a. 383. a. b.
Where by the grant of land a reversion shall pass, 324. b.
Where tenant in tail grants *totum quatum*, what shall pass, 331. a.
A man grants *proximam advocat.* to one, and before the church void, grants *proximam advocat.* to another, the second grant is void, 378. b.
A man grants 3 *presentationes*, and dies, his wife shall have the three, and the grantee the 4th, 379. a.
A grant shall not enure contrary to the express words of it, 313. a.
When it shall enure by way of extinguishment, 307. b.
Grant of the king, how tested, 7. *passim.*

Grava.

What *grava* is, 4. b.

Guardian. *See* Admeasurement, Dower, Marriage, Socage, Wardship, Waste.

The several sorts of guardians, 85. a.
Who shall be guardian of inheritances which lie not in tenure during the minority of the heir, 87. b.
To what purposes the guardian shall be said possessed of his ward before entry or seisure, and to what not, 38. a. b.
How many kinds of guardians, 87. b.
When the father, and not the lord, shall be guardian, 84. a. 88. *passim.*
Guardian by tenure, what he might, and what he might not do, 75. b. *per tot. pag.* 79. *passim.*
——— in chivalry, what profit he had, 81. and 82. *passim.*
Who shall be guardian in socage, and why, 87. and 88. *passim.*
Guardian in socage, how long he shall be so, 87. and 89. *passim.*
——— in socage, when and in what manner he shall account, 89. *passim.*
Guardianship of tenant by chivalry and tenant by socage, to whom they go on the guardian's death, 90. *passim.*

Gurges.

The meaning of it, 5. b.
What passes by this name, *ibid.*

Habendum. *See* Deeds.

The office and force of the *habendum* in a deed, 183. a.
Where it shall be said repugnant in the grant of an estate tail, and where not, 21. a.
Where one named after the *habendum* shall take by the gift, and where not, 7. a. 21. a. 26. b. 378. b.
Where the several limitations in the *habendum* shall destroy the joint implication of the premises, 183. b. 190. b.
Where an *habendum* may enlarge the premises, but cannot abridge them, 299. a.
It may sever a joint estate, 184. a.

Haga.

The meaning of it, 5. b. 56. b.

Haugh and *Hough.*

What they mean, 5. b.

Heir. *See* Annuity, Appeal, Attainder, Chattels, Corruption of Blood, Discent, Entry, Reservation, Voucher, Warranty, Waste.

The etymology and legal acceptation of the word (heir), 7. b. 237. b.
What issue and person may be an heir, and what not, 7. b. 8. a.
Hæres apparens, quis, 8. a.
Hæres astrarius, quis, 8. b.
Where and what chattels the heir shall have after the death of his ancestor, and what not, 8. a. 18. b. 185. b.
Where the words (heirs) shall be necessary to the creation of an estate of inheritance, and where not, 8. b. 9. b. 10. a. 20. a. 21. b. 22. a. 47. a. 193. b. 322. b. 385. b.
Where the word heirs shall be good of itself, and where not without the conjunction of the word, (*his*), 8. b.
The extent and latitude of the word (heirs), 9. a.

Heirs a good name of purchase, 26. b.
Who shall be said the next heir to take by purchase, and who take by discent, 10. b.
Where the heir to take by purchase ought to be a compleat right heir in judgment of law, 24. b. 26. b. 164. a.
Where the ancestor may make his right heir a purchasee, and where not, 22. b.
Where a remainder is limited to the right heirs of a particular tenant, the fee simple shall be said to vest in him presently, and where not, 22. b. 319. b. 376. b.
Where the heir conveying by discent ought to make himself heir to him which was last seised, 11. b. 15. a. 239. b.
Where by the birth of an heir more near, the discent to another shall be defeated, 11. b.
Where the heir of the part of the father shall inherit before the heir of the part of the mother, *& è converso*, 12. a. and b. 13. a.
The difference between an heir in the civil law, and an heir at the common law, 237. b.
Where the sons of an alien born within the ligeance of the king shall not be heirs either to other. The same of the sons of a person attainted; *secus* if born before the attainder, 8. a.
Where and what attainder shall disable the party attainted to inherit, or to have heir, and where and what not, 8. a.
Where the heir shall not be bound by the obligation or warranty of his ancestor without naming, 209. a. 383. b. 384. b. 386. a.
Where a man binds his heirs to warranty or to pay a sum of money without naming himself, such lien shall be void, 386. a.
Where an action of debt shall lie against the special heir, without naming the heir at the common law; *secus* of a voucher by reason of a warranty, 376. b. 386. b.
A gift to a man his heir and successors, how it shall enure, 9. a.
When the heir shall have an action for defacing his ancestor's monument, 18. b.

Heirloom.

What heirloom is, 18. b.
Cannot be devised, 183. b.

Herbage. *See* Jointenant.

What shall pass by the grant of the herbage of land, 4. b.
Where the owner's acceptance of a lease of the herbage of his land by indenture shall be no estoppel as to the land, 47. b.
Where a reservation of rent out of the herbage of land shall be good, 142. a.

Heresy.

Attainder of it doth not forfeit land or corrupt the blood, 391. a.

Heriot. *See* Extinguishment.

How called in the *Saxon* tongue, 185. b.
From what antiquity due to lords, *ibid.*
Where a devise by the tenant of all his goods shall not defeat the lord of his heriot, 185. b.
Where by purchase of part of the tenancy by the lord, a heriot shall be extinct, and where not, 149. b.
Where a heriot shall be paid before a mortuary, 185. b.

Hida Terræ.

What *hida terræ* is, 69. a.

Hiring.

If general, shall be for a year, 42. b.

Hirst and Hurst.

The meaning of them, 4. b.

Holm and *Hulmus.*

What they mean, 5. a.

Holt.

The signification of it, 4. b.

Homage. *See* Fealty.

The etymology of the word, 64. b.
The division of homage, 65. b.
The manner of doing homage, 64. a.
In what respect it is said to be the most honourable and humble service, 65. a.
The league between such lord and tenant, 65. a. 100. b.
Where in doing homage, homage due to the king ought to be excepted, and the penalty for omitting it, 64. b. 65. a. b.
What person may do and take homage, and what not, 65. b. 66. b. 67. a. and b. 69. a. 341. b.
The form of homage by an abbot or other ecclesiastical person, 65. b.
The form of homage by husband and wife jointly, 66. a.
Where and what corporation may do and take homage, and where and what not, 65. b. 66. b. 67. a. 341. b.
Where the husband shall do and take homage alone, and where jointly with his wife, 30. a. 67. a.
Where there are divers tenants of the same land, where all and where but one shall do homage, 67. a. b.
Where and why the tenant shall not be sworn in doing homage, 68. a.
Where homage done to one joint lord shall excuse against the other, 67. b.
The benefit which accrues to lords by receiving homage, 68. a. 92. b.
Where the tenant, notwithstanding homage once done to the lord, shall be compelled to do homage again to his heir, and where not, 103. b.
Where the tenant, upon translation of the seigniory to another, shall be compelled to do homage again, and where not, 104. a. and b.
Where after refusal the lord shall not distrain his tenant for homage until request, 105. a.
By what means fealty shall be separated from homage, and by what not, 150. b. 151. a.
The writ of *homagio capiendo*, and where it lieth, 101.

Homage Auncestrel. *See* Attornment, *Per quæ Servitia*, Recovery, Warranty.

The description of tenure by homage auncestrel, 100. b.

ID

Blood on the lord's side not always requisite to such tenure, 100. b. 102. b.
Where such tenure dráweth to it warranty and acquittal, 101. a. 384. a.
What shall be a good counterplea to a warranty by cause of homage auncestrel, 101. a.
What lands the tenant shall recover in value upon such warranty, 102. a.
The reciprocality of reverence and protection between such lord and tenant, 100. b.
Where such tenant shall be compelled to attorn to the grantee of his lord, and where not, 101. a.
Where the lord by homage auncestrel may disclaim in the seigniory, and where not, 101. b. 102. a.
Where a man may hold by homage auncestrel of a body politic, but not *é converso*, 102. b.
Where such tenure shall remain, notwithstanding the alteration of the name and nature of the corporation, and where not, 102. b.
Where an abbot, bishop, &c. shall not disclaim in a seigniory by homage auncestrel, 102. b. 103. a.
After alteration by the tenant by homage auncestrel, what service shall be due to the lord, 102. a.
What act by the tenant shall be an interruption of the privity between him and his lord, and what not, 103. 202. b.
Where such tenure may belong to knight service, 105. a.

Homicide.

What it is, 287. b.

Hope.

What it is, 5. b.

Horngeld.

The meaning of it, 187, a.

Hors de son Fee.

Where such plea shall be good by the tenant upon a distress and avowry by a stranger who claims the seigniory, and where not, 1. b.

Hospital.

The divers kinds of hospitals, 342. a.
What hospitals were given to the crown by the statute of 27 *H.* 8. 31 *H.* 8. 37 *H.* 8. and 1 *E.* 6. and what not, 342. a.

Hotchpot.

What it is, 176, 177. *passim.*

Howe and Hoo.

The signification of the words, 4. b.

Jampna.

The meaning of *jampna*, 5. a.

Idiot. *See* Condition, *Dum non Compos*, Entry, Heir, Mortgage.

Who properly said to be an idiot, 247. a.
Where an idiot shall be bound by a descent, 247. a.
By what means a feoffment, &c. by an idiot, may be avoided during his life, and by what not, 247. b.
Where a stranger may tender money in performance of a condition to save the estate of an idiot without his consent, 206. b.
Where an idiot ought to sue in proper person, and not by guardian or attorney, 135. b.

IN.

Imprisonment. *See* Entry.

Imprisonment a good cause to reverse an outlawry, 297. b. 259.
Where it shall save a default, 259. b.
Where and how a man in prison may be proceeded against by suits and process of law, 260. a.
How a man in prison ought to be ordered and used, 260. a.
A precedent where after judgment in an appeal against a woman, her imprisonment was respited by reason of pregnancy, 289. a.
A precedent where after judgment in a trespass *quare vi, &c.* against an infant, he was accused of imprisonment by reason of his age, *ibid.*

Incident. *See* Appendant.

Incumbent. *See* Parson, *Quare Impedit.*

The etymology of the word, 119. b.

Indenture.

What it is, and that it may be in the first or third person, and forms of both; and that all the parts make but one deed, 229. and 230. *per tot. pag.*
When it is an estoppel, when not, 45. a. 47. b.

Indictment. *See* Appeal, Felony, Pleading.

The signification and derivation of the word, 126. b.
What certainty requisite in an indictment, 303. a.
Where the indictment shall say (*felonicé*) albeit the offence be no felony, 127. a.
The difference between an appeal and an indictment, 126. b.

Infant. *See* Accompt, Bastardy, Coverture, Dower, Entry, Exchange, Execution, Stat. of *Merton*, *c.* 5. Warranty.

Where an infant may be a purchaser, 2. b.
Where assignment of dower by the heir being an infant, shall be good, and where not, 35. a.
Where by custom at sixteen he may make a lease, 45. b.
Where and for what things the deed or obligation of an infant shall bind him, and where and for what not, 171. b. 172. a.
Where and within what time a fine levied by an infant may be avoided, and where it may be reversed by his heir after his death, and where not, 131. a. 380. b.
Where the breach of a condition in law shall be a forfeiture of the office or estate of an infant, and where not, 233. b.
Where laches in an infant shall be prejudicial to him, and where not, 246. a. b. 380. b.
Where a feme covert shall be prejudiced by laches, where an infant shall not, 146. b.
Where and at what age the act or wrong of an infant

infant in criminal matters shall be imputed to him, and where and at what not, 247. b.
Where a lease for years made by an infant shall be good, 308. a.
Where the release of a debt by an infant shall be good, and where not, 264. b.
What things are avoidable by an infant after his full age, and what only during his nonage, 380. a. b.
Where an action of waste or *cessavit* lieth against an infant, 380. b. 381. a.
Where an infant shall be compelled to attorn in a *quid juris clamat*, or *per quæ servitia*, 315. a.
An infant can contract only for necessaries, 35. b.
Where an usurpation upon an infant shall put him out of possession of the advowson, 344. b.
By what acts an infant in *ventre sa mere* shall be bound, and by what not, 100. b. 244. a. 245. b.
An infant not capable of the stewardship of a court, 3. b.
Not capable to perform grand serjeanty at the coronation, 107. b.
Not capable to be of an inquest, 157. a. 172. b.
Where an infant shall not be amerced for a nonsuit or default, 127. a.
Where upon a judgment against him *quod capiatur*, he shall not be imprisoned, 289. a.
Where an infant shall not be charged in an accompt, 171. b.
Where an infant may do homage, but not fealty, 65. b.
Where an infant ought to sue by *prochein amy*, and defend by guardian, 135. b.
Where a stranger and where the special heir shall take advantage of the infancy of his ancestor, 336. b. 337. b.

Infranchisement. *See* Manumission.

The derivation and several acceptations of the word, 37. b.

Inheritance. *See* Charge, Fee Simple, Heirs.

The extent and signification of the word, and what shall pass by the grant of inheritance, 6. a. 16. a. 383. a. b.
The several sorts of Inheritances, 1. b. 9. a. 49. a. 164. b.
Where a man may have an inheritance moveable in lands, and how such inheritance may be alienedand charged, 4. a. 48. b.
Where an inheritance shall ascend, and where not, 11. a.
New inheritances rejected in law, 13. a. 27. a. 337. b. 379. b.
The ancient course of inheritances not alterable but but by parliament, 27. a.
Where a man shall inherit, where he by whom he conveyeth cannot by possibility, *& è converso*, 25. a.
The blood only of the first purchaser inheritable to lands, 12. a.

Inrolments. *See* Deeds.

Where inrolments ought always to be in parchment, 35. b.
Where an inrolment shall not be pleadable without shewing the orignal deed, 225. b.

Instant. *See* Remainder.

The definition of an instant, 185. b.
Where the law alloweth priority of time in an instant, 185. b.
Where a fee shall be divested, and vest in one person in an instant, 297. b.

Institution. *See* Parson. Plenarty.

The meaning of the word institution, 344. a.

Intention of the Parties. *See* Grants.

Where the construction of acts shall ensue the intention of the parties, and where not, 214. b.
Where the intention of the parties shall operate in the raising and direction of uses, 49. a.
Where the entry of him that right hath into land, shall be guided by his intent, 49. b.
Where a man hath two ways to pass lands, and he intendeth to pass them by one of the ways, yet it shall pass by the other, and where not, 49. a.

Interesse Termini.

What it is, 47. b.
How it may or may not pass, 47. b. 338. b.
To whom it shall go, 47. b.
Is not lost by the lessor's death, 51. b.
Cannot be confirmed, 296. a.
Cannot be enlarged by release, 270. a.

Interest.

The extent and signification of the word, 345. b.
What passeth by the grant of *totum interesse*, ibid.

Intrusion.

What properly said to be an intrusion, and how it differeth from abatement, disseisin, &c. 277. a. b.

Jointenants. *See* Account, Attornment, Charge, *Dum fuit infra Ætatem*, Election, Entry Congeable, Judgment, Presentation, Release, Remitter, Reservation, Stat. *West.* 2. *c.* 23, and 32 *H.* 8. *c.* 32. Surrender, Waste, Warranty.

Jointenants, whence so called, and how they differ from parceners, 180. b.
What things may stand in jointure one with the other, and what not, 188. a *per tot. pag.* 192. b.
Where the parties shall be jointenants, notwithstanding the several and different limitations to each of them, 180. b.
Where there may be a jointenancy albeit no survivorship, 181. a. b.
Where chattels or debts in jointenancy shall survive, and where not, 181. b. 182. a.
Where jointenants may be albeit the estates vest in them at several times, and where not, 188. a.
Where two may have joint estates for their lives, and several inheritances, or the inheritance to one of them, 182. a. b. 183. a. 184. a. 189. b.
To what purposes such inheritance shall be said to be

be executed in the life of the parties, and to what not, 182. b. 183. a. 184. a. b.
Where and by what acts an estate in jointure may be severed, and where and by what not, 182. a. *per tot. pag.* 183. a. 190. a.
Where two may be jointenants of the freehold and fee simple, and tenants in common of an estate-tail the same land, 183. b.
Where the jointenant surviving shall be liable to the charges of his companion, and where not, 184. b. *per tot. pag.* 185. a.
Where the charges of one jointenant, avoidable by his companion, shall be good against himself surviving, 184. b.
Where upon a recovery against one jointenant, execution shall be sued against his companion, 185. a.
Where an estoppel to one jointenant shall not bind his companion surviving, *ibid.*
Where a devise by one jointenant shall be void against his companion, 185. a. b.
Where by the death of the wife, jointenant with a stranger for years, the term shall survive to the other jointenant, and not to the husband, 185. b.
Where a disparagement of the heir by one jointenant shall be a forfeiture of the ward as to both, 80. b.
Where one jointenant of a ward shall be liable to the waste done by his companion, 54. a.
Where an assignment of dower by one jointenant shall be good against his companion, 35. a.
Where upon grant of a rent to two, the election of one to have it as an annuity or rent shall bind his companion, 146. a.
Where a rescous by one jointenant shall make his companion a disseisor, 161. b.
Where each jointenant shall be said to be seised *per my et per tout*, and to what purposes either hath right but to a moiety, 186. a. 350. a.
Where a lease for years by one jointenant for life or in fee, to begin after his death, shall be good against the survivor, and where not, 184. b. 185. b. 186. a. b.
Where a grant of the herbage or vesture of the land by one jointenant shall bind the survivor, 186. b.
Where a presentation to a church by one jointenant shall not put his companion out of possession, 186. b.
Where a partition between jointenants shall be good without deed, and where not, 169. a. 187. a.
Where by a partition between jointenants, a warranty shall be destroyed, and where not, 187. a.
Where husband and wife shall be jointenants, and where by entireties, and where by moieties, 187. a. b. *per tot. pag.*
Where baron and feme and a stranger are jointenants, the sole alienation of the baron shall bar the stranger surviving as to a moiety, and where not, 187. b. 188. a. 327. b.
Where one jointenant or parcener enters or recovers, the whole estate being put to a right, the other shall enter and occupy with him, and where not, 188. a. 364. b.
Where a lease of part of the term by one jointenant for years, shall be a severance of the jointure as to the whole, 192. a. 199. a.
Where a severance of the jointure of the freehold shall be a severance of the reversion, 191. b. 192. a. b.
Where a reservation of the reversion to one jointenant by deed indented upon a lease by both shall not estop the other, 192. a.
Where a lease is made by two jointenants, the remainder in fee to one of them, this shall be a good remainder for a moiety, 192. b.
Where one jointenant makes a lease for his own life, and dieth, no survivor, *quære*, 193. a.
Where the feoffment of one jointenant to his companion and a stranger, shall be good only to the stranger, 335. a.
Where two infants jointenants make a feoffment, by the death of one his right shall survive; *secus* of a feoffment by one solely, 337. a. b.
Where the father jointenant with the son and a stranger, makes a feoffment of the whole with warranty, the stranger surviving shall avoid the whole, 367. a.

Jointure. *See* Dower, Stat. 11 *H.* 7. *cap.* 2.

What shall be a good jointure within the statute of 27 *H.* 8. and what not, 36. b.
Where the wife may wave her jointure, and where not, 36. b.
May be made determinable by the party's own act, 36.

Ireland.

How and when the laws of *England* were first established in *Ireland*, and how afterwards confirmed, and by whom, 141. a. b.

Issue. *See* Pleadings, Verdict.

An issue, and the several kinds of issues, 126. a.
Where an issue generally taken shall refer to the count, and not to the writ, 126. a.
Issue upon a negative pregnant not good, 126. a.
Where two affirmatives shall make an issue, and where not, 126. a.
Where an issue shall be good upon a matter affirmative and negative, albeit it be not in express words, *ibid.*
The form of the entries of issues of the part of the plaintiff, and on the part of the defendant, *ibid.*
What pleas are issues themselves, whereto the plaintiff or defendant cannot reply, 126. a.
Where *modo et forma* shall be of the substance of the issue, and where but matter of form, 281. b. *per tot. pag.*
Where the substance of the issue being found, the verdict shall be sufficient notwithstanding omission of circumstances, 227. a. 282. a.
Where the plea of the party amounts to a general issue, the general issue shall be entered, 303. b.
Issue shall be joined on a traverse when well taken, 126. a.

Judgment. *See* Error, Partition.

The signification and derivation of the word, 39. a. 168. a.
The several sorts of judgments, *ibid.*
Where in a real action by one jointenant or parcener against another, judgment shall not be given in severalty, 167. b. 187. a.

KN

In what actions judgment final shall be given, 294. b.
The form of the judgment, when it is for the tenant or defendant in plea in bar or to the writ, 363. a.
How and by what means every case judicially depending shall receive end, 71. b. 72. a.

Jugum Terræ.

What it is, 5. a.

Juncaria, Joncaria.

What it is, 5. a.
What passes by this name, *ibid.*

Jurus utrum. *See* Parson.

Juror, Jury. *See* Challenge, Statute, Verdict, *W.* 2. *c.* 38. *Artic. sup. Chart. c.* 9. 2 *H.* 5. *c.* 3.

The properties of a juror, 155. a. b.
What person may be a juror and what not, 156. b. 157. a. 172. b.
How they shall be treated if they do not agree, 227. b.
Where a *cestuy que use* shall be a sufficient juror within the stat. of 2 *H.* 5. *c.* 3. 272. b.
Where tenant *pur auter vie*, or the husband seised in his wife's right, is returned on a jury after the death of the wife or *cestuy que vie*, they may be challenged, *ibid.*
Where a witness shall be had in equal respect with a juror, and where not, 6. a.
The jury must give a verdict though no evidence be given, 296. b.

Justices. *See* Court, Eyre.

By what names anciently called, 168. b.
Justices of assise, whence so called, 263. a.
Their office and jurisdiction, *ibid.*
In what cases anciently justices of *nisi prius* might give judgment, and in what not, 263, a.
The names of divers bishops and clergymen that were anciently justices of the king's courts, 304. b.

King. *See* Prerogative.

The etymology of the word (king), and how called in other languages, 65. b.
The style of every king of *England* since the conquest, 7. a. and b.
The several compellations of divers kings of *England*, 7. a.
The several councils of the king, 110. a.
The king may take a fee simple without the word (heirs), 15. b.
——— may reserve rent out of incorporeal inheritances, 47. a.
——— cannot be nonsuit, 139. b.

Knight.

The derivation of the word, and how called in other languages, 74. b.
The dignity of a knight, 107. b.

LA

What shall be said a knight's fee, or *census militaris*, 69. a. b.

Knights Service. *See* Guardian, Marriage, Relief, Wardship.

The description of a knight's service, 74. b.
By what names such service is distinguished in law, 74. b. 75. a. b. 108. a.
To what end this service was created, 75. b.
The respect which the law hath to the supportation of this service, 39. a. b.
The privileges of tenants by knights service, 75. a.
At what age the tenant shall be intendable to perform this service, 74. b. 75. b. 78. b.
What things incident to this tenure, and from what antiquity, 76. a. b. 305. b.
For what cause the law gave the ward and marriage of the heir of such tenant to his lord, 75. b. 76. a.
Where the tenure ceasing the wardship and all other incidents shall also cease, 76. a. b. 248. a.
Where the fruits of knights service being suspended, the tenancy being in a corporation, shall be revived again in the hands of a natural person, 70. b. 99. a.
Where a tenure may be knight's service and no escuage, 82. b.
Where tenure by castleguard shall be knights service, and where not, 82. b. 83. a. 87. a.
Where the tenure shall remain albeit the castle be ruined, 83. a.

Knol.

What it is, 5. b.

Laches. *See* Baron and Feme, Coverture, *Dum non fuit Compos*, Entry Congeable, Ideot, Infant, Fines, Prerogative.

The signification of the word, 246. b. 380. b.
Where laches shall be imputed to a man beyond sea, and where not, 260. b.

Lagaman.

What it is, 58. a.

Lannemanni.

The meaning of it, 5. a.

Lapse. See *Quare Impedit.*

Law.

The several laws used within this kingdom, 11. b.
The division of the law of *England*, 110. b. 115. b. 344. a.
The several names whereby the common law of *England* is called, 142. a.
How the common law and the law of the crown differ, 15. b.
The law spiritual, what, 344. a.
Intendment of law, what, 78. b.
No proof to be admitted against the presumption of law, 373. a. b.
What things the law most favoureth, 124. b.
How the law respects the order of nature, 92. a. 197. b.

The

LE

The ancient rules and course of the law not to be innovated, 282. b.
The commendation of the law of *Englænd*, 97. b.
The delight and facility of the study of the law, 71. a.
Admonitions and directions concerning the study and practice of the law, 70. a. b. 249. b.

Lea and *Ley*.

What they are, 4. b.

Leases, Lessor, Lessee. *See* Confirmation, Release, Rent, Reservation, Stat. 32 *H.* 8. *c.* 28.

The derivation of the word (lease), 43. b.
The several kinds of leases, 45. a. b.
What shall be sufficient words of lease, 45. b. 301. b.
What persons may make leases at this day, which could not by the common law, *et è converso* 44. b.
What things requisite to the perfection of a lease within the stat. 32 *H.* 8. 44. a. b.
What leases shall be good within the statutes of 1 and 13 *Eliz.* and what not, 44. b.
Where a concurrent lease shall be good within those statutes and where not, 45. a.
What shall be said a sufficient certainty whereupon a lease for years may depend, and what not, 42. b.
Where a lease for years may cease and revive again, as to several persons, and where not, 46. a.
To what purposes the party shall be said a lessee for years before entry, and to what not, 46. b. 51. b. 270. a. b.
Where a lease is made to have from the date, or day of the date, or from the making, or from henceforth, &c. where it shall be said to have beginning, 46. b.
Where the deed hath no date, or beareth an impossible date, when the lease shall be said to have commencement, *ibid.*
Where a deed referreth to a void lease, or misrecite a lease *in esse* to have from the ending of that lease, when it shall begin, *ibid*
The signification of the word (term) and the difference *inter terminum annorum et tempus annorum*, 45. b.
Where a lease to the party generally shall be construed to be for the life of the lessor, and where for the life of the lessee, 42. a. 183. a. b.
Where divers persons join in a lease, whose lease it shall be construed, 45. a.
Where a lease for years by tenant in tail shall be void by his death without issue, 45. b.
Where a lease by parson, vicar, &c. before the statute, was void by his death, and where but voidable, 45. b.

Lectures.

The qualities of lectures anciently, and how they differ from our readings at this day, 280. a. b.

Leper.

May be heir, 8. a.
May sue, tho' removed by writ, 135. b.

LI

Lesues et Lesues.

The meaning of the words, 4. b.

Librata Terræ.

What it is, 5. b.
What passes by this name, *ibid.*

Licence. *See* Authority.

Ligeance. *See* Alien, Denizen.

The definition of legiance, 129. a.
The division and several sorts of ligeance, 129. a.

Limitation. *See* Time, Statute.

What shall be said good words of limitation in grants, &c. and the several sorts of them, 334. b 235. a.

Livery out of the hands of the King. See *Primer Seisin.*

Where the heir of the tenant of the king shall sue livery, and where an *ouster le main*, 77. a.
Where the king shall have the mean profits until livery, or *ouster le main* sued by the heir, and where not, *ibid.*
The several kinds of livery, and which shall be the best and most safe for the heir, 77. a.
Where by the livery of a manor an advowson appendant shall pass from the king, without special mention, 77. a.

Livery and Seisin. *See* Authority, Feoffment, Grant.

The description of livery of seisin, 48. a.
The several kinds of livery, *ibid.*
The antiquity of livery, 49. b.
To the passing what estate livery requisite, and of what not, 48. a. 216. a.
What act or words by the lessor or feoffor shall be said a good delivery in deed, and what not, 48. a. 49. b. 56. b. 57. a.
Where a livery expressing one estate referreth to a charter expressing another, or which is void, how it shall be construed, 48. a. b. 222. b.
Where livery referreth to two several charters of different limitations how it shall be construed, 21. a.
Where livery of the one parcel shall be a livery of the other, and where to one feoffee good to the other, and where not, 48. a. 50. a. 253. a. 290. a.
How livery shall be made to pass a moveable inheritance, 48, b.
Livery in law, or within the view, what, 48. b.
Where such livery shall be good, and where not, *ibid.* 253. a.
Such livery by an attorney, void, 52. b.
Such livery not good but to him which takes the freehold, 49. b.
Where a claim shall amount to an entry to perfect a livery within view, and where not, 48. b.
Where livery shall be made of an upper chamber, *ibid.*

MA

What things properly lie in grant, and what in livery, 49. a.
Where a freehold in lands shall pass at the common law without livery, and where not, 49. a. 50. a. b.
Where livery made, another being in possession, shall be good, and where not, 48. b. 369. b.
In what respects a conveyance by livery said to exceed all others, 49. a.
Where a charter of feoffment by disseisee, and a letter of attorney to enter and make livery shall be a good feoffment after livery made; *secus* of a lease for years by deed, and an entry after, 48. b.
Where a livery shall be made to a lessee for years, 49. a.
Where livery to one feoffee in the name of the other shall be good to both, and where not, 49. b. 359. a.
Where livery to one jointenant, lessee for years, shall be sufficient to pass the freehold to him in the remainder, 49. b.
What person may be an attorney to deliver seisin, 52. a.
Where and when the authority of an attorney shall be said to be pursued, and where and when not, 52. a 258. a.
Where the making of livery shall prejudice the title or interest of the attorney as to the land, and where not, 52. a.
Where a letter of attorney may be contained in a deed of feoffment, and where not, and why, 52. b.
Where livery made after the death of the feoffor shall be good, and where not, and why, 52. a. b.
Livery not good to expect *in futuro*, 217. a.
Where the charter is absolute, and livery upon condition, upon which the estate shall operate, 222. b.
Where after an agreement of feoffment is made upon condition, livery is made absolute, how it shall be construed, 222. b.
Where livery relateth to a deed made and dated in a foreign kingdom, what shall operate thereby, 228. a.

Maihem.

The signification and derivation of the word, 126. a. b. 288. a.
The nature and degree of the offence, 127. a.
Where the writ shall say (*felonicè*), albeit the offence be no felony, 127. a.
The punishment anciently in an appeal of maihem, and at this day, 127 a.
A release of actions personal a good plea in maihem, 288. a.
Where a man was indicted for maiming himself, 127. b.

Machicollare and *Machecouare.*

The meaning of the words, 5. a.

Maintenance. *See* Stat. 1. *R.* 2. *c.* 9. 32 *H.* 8. *c.* 9.

The signification and derivation of the word, 368. b.
The several kinds of maintenance, and how punishable, 368. b. 369. a.

MA

Where an action of maintenance lieth for labouring the jury, albeit they give no verdict, or pass against the plaintiff, 369. a.

Manor. *See* Grants, Prerogative, Steward, Trial.

The description a manor, and whence so called 58. a.
How manors began at first, 58. b.
Of what things a manor may consist, 58. a.
The office and duty of the lord of a manor, 59. b.
Where a court-baron holden out of the limits of the manor shall be good, and where void, 58. a.
Where and what things shall pass by the grant of a manor without (*cum pertinentiis*), and where and what not, 121. b.
Where a rent-seck may be parcel of a manor; *secus* of a rent-charge, 150. b. 153. a.
Where a reversion upon an estate-tail shall be parcel of a manor, and pass by the grant of the manor, 324. b.
Where upon a lease of a manor, except parcel, the part excepted shall continue parcel of the manor, and where not, 324. b. 325. a.
Where upon trial of a fact supposed within a manor the *viene* shall come out of the manor, and where out of the town, 125. b.

Manumission. *See* Villein.

The signification and derivation of the word, 137. a.
The several kinds of manumission, 137. b.
By the manumission of a villein *cum tota sequela*, what persons are enfranchised, 3. a.
Where and what actions brought by the lord against his villein shall be an infranchisement to the villein, and where and what not, 127. b. 138. a. b. 136. b.
Where the answer of the lord to the action of the villein shall be an infranchisment to the villein, and where not, 125. a. 138. b.
The solemnity of manumissions anciently, 137. b.
What estate or gift form the lord to his villein shall be an infranchisement to him, and what not, 137. b. 138. a.
Where a void release, or an attornment by the lord to his villein shall have no infranchisement, 138. a.
Where the appeal of the lord against his villein for felony being found against him shall be an infranchisement to the villein, and wherein not, 138. b. 139. b.
Where a neife marrying a freeman shall be infranchised, and for what times, 132. a. 136. b. 137. b.

Marches.

What it is, 106. b.

Marchet.

The meaning of the word, 117. b. 140. a.

Maremium.

The signification and derivation of it, 58. a.

Mariscus and *Mora.*

What *mariscus* and *mora* are, 5. a.

ME

Marriage. *See* Baron and Feme, Coverture, Disparagement, Divorce, Stat. 32 *H.* 8. *c.* 38. Wardship.

Maritagium, quid, et quotuplex, 21. b. 76. a.
Of what respect in the law, 9. b.
Where the marriage of ecclesiastical persons formerly was void, and where but voidable, 136. a.
Where the father shall have the custody, and marriage of his son or daughter, and where not, 84. a. b. 88. b.
Wherefore the law gave the marriages of heirs females to the lord by knights service, 78. b.
Where the lord shall have two years to make a tender of marriage to the heir female of his tenant after her age of fourteen, and where not, 75. a. and b. 78. b.
Where the lord shall have the double value or forfeiture of the marriage, and where not, 79. a. b. 82. b.
Where the executors or administrators of the lord shall have such two years to make a tender, 79. a.
Where the tender of marriage to an heir female before her age of fourteen, shall be good, and where not, 79. a.
Where the lord may tender marriage to the heir already married, and where not, 79. b.
Where the lord shall have the custody of the heir married in the life of his ancestor, and where not, 80. a.
At what age each party married may agree or disagree to the marriage, and at what not, 79. b. 80. a.
Where the lord shall have the single value of the marriage without tender, 82. a.
What remedy the lord hath for the single value or forfeiture of the marriage, 79. a. 82. b.

Marshall.

The derivation of the word, 74. a.
The office of marshall of the king's host, 74. a.
Who first earl marshall, 106. a.
The jurisdiction of the court of the constable and marshall, and according to what law they proceed, 391. b.

Maxim.

What, and whence so called, 11. a. 343. a.
Not to be disputed, 11. a. 67. a. 343. a.
Quod semel est meum, amplius meum esse non potest, 49. b.
Affectio tua imponit nomen operi tuo, 49. b.
Cessante rationem legis cessat lex, 70. b. 356. a.
Omne magis dignum trahit ad se minus dignum, 355. b.

Mayor and Commonalty. *See* Corporation.

Meason.

What, and how favoured in law, 4. b. 54. b. 56. b. 200. b.

Merchants.

How favoured in law, 2. b.
Where the joint debts, &c. of merchants by the death of one shall not survive to the other, 182. a.
Where one joint merchant shall have allowance of his expenses and charges in an account against him by his companion, as receiver, 172. a.

MO

Merger.

One chattel cannot drown another chattel, 273. b.
Where a term for years and a freehold may subsist together, 338. b.

Mesne. *See* Acceptance, Forejudger, Stat. *W.* 2. *c.* 9.

Whence such writ was called and where it lieth, 100. a.
The several judgments in a writ of mesne, 100. a.
The process in such a writ, *ibid.*
Where by purchase of the tenancy by the lord paramount, the mesnalty shall be extinct, 152. b.
Where the lord paramount releases or confirms to the tenant to hold in frankalmoign, or by lesser services, the mesnalty shall be extinct, 152. b.
What remedy the mesne hath for the surplusage of his rent, upon such extinguishment, 153. a.
Where the wife shall have a writ of mesne on an acquittal granted to her husband, 141. a.

Messuagium.

What *Messuagium* is, 5. a. 15. b.

Minera.

The meaning of the word, 6. a.
What passes by it, *ibid.*

Miscontinuance.

The meaning of it, 325. b.

Mise. *See* Right.

The derivation and several acceptations of the word, 294. b.

Modo et Forma.

Modus, the meaning thereof, 201. a. 204. a. 114. b.

Monasteries. *See* Statute.

How many there were in *England*, and by whom founded, 97. *per. tot. pag.*
Some held *per baroniam*, 97. *per. tot. pag.*

Money.

The derivation of the word, 207. b.
Its *synonyma*, and their etymologies, *ibid.*
What shall be said lawful money of *England*, and what not, 207. a. 208. a.
The value of a mark, pound, shilling, &c. anciently, 294. b.

Monk.

In what cases a monk may maintain an action at the common law, and in what not, 132. b.
The several orders of monks and friars formerly in this realm, 132. a.

Monster.

What issue reputed in law a monster, and what not, 7. b. 29. b.

Mortdancester. *See* Estoppel.

Where such writ lieth, 159. a.
Where it lieth not against privies in blood, 242. a.

Where

Where it lieth not against a bastard eigne, 244. b.

Mortgage. *See* Acceptance, Condition, Notice, Payment, Tender.

The signification and derivation of the word, 205. a.
Where a day of payment being limited, a tender by the heir of the mortgagor after his death shall be a good performance of the condition, 205. b. 208. b.
What persons may tender money in performance of a condition in mortgage, and what not, 206. a. b. 208. b. 209. a.
Where payment by a stranger shall be a good performance, and where not, 206. b. 207. a.
Where no place is expressed for the payment of money upon the mortgage, where the tender shall be made, 210. a.
Where no time being expressed, notice of payment shall be given to the mortgagee, 211. a.
Where acceptance of a collateral thing by the mortgagee in satisfaction shall bind him, and where not, 122. b.

Mortmain. *See* Appropriation.

The derivation of the word, 2. b.
What person shall enter for alienation in mortmain, and within what time, 2. b.

Mulier. *See* Bastard.

The several significations of the word, and how taken in the law of *England*, 243. b.

Multitude.

How many made it, 257. a.

Murder. *See* Felony.

The etymology and signification of the word, 287. b.
How it differeth from homicide and chance-medley, 287. b.

Mute. *See* Treason.

Name. *See* Nobility, Purchase.

Where the misprision or alteration of the name shall vitiate a grant, and where not, 3. a.
Where a grant without mention of surname or christian name, or both, shall be good to the grantee, and where not, 3. a.
Where a man is baptized by one name, and after confirmed by another, which he shall use, 3. a.
Where the privileges, &c. of a corporation shall remain notwithstanding the alteration of the name, 102. b.

Niefe. *See* Villein.

Niefe de eu et trene, 25. b.

Nobility. *See* Barony, Valuation.

The several limitations of nobility, and what estate of nobility the king may grant, and what not, 9. b.
When the title and degree of duke, marquess and viscount began in *England*, 69. b.
Earls, barons, &c. how created by a writ in ancient times, and when creations by patents first began, 9. b. 16. b.
What shall be said the relief of a nobleman of each degree, 69. b.
Where a noblewoman by marrying one inferior to her degree shall lose her nobility, and where not, 16. b.
Where a dignity or name of nobility, or office of honour, descends upon divers daughters; how it shall be divided, and which shall have the dignity and execute the office, 165. a.
Issue of duke, earl, &c. or no duke, &c. how triable, 16. b.
Beauchampe king of *Wigk*, 83. b.

Nonage. *See* Infant.

Non Compos Mentis. See *Dum non Compos, &c.*

Nonsuit. *See Retraxit*, Stat, 2 *H.* 4. *c.* 7.

When the plaintiff said to be nonsuit, 138. b.
The several kinds of nonsuit, *ibid.*
In what actions nonsuit after appearance shall be peremptory, and in what not, 239. a.
Where the nonsuit of one demandant or plaintiff shall be the nonsuit of both, and where not, 139. a. 227. b.
What person may be nonsuit, and what not, 139. a.
At what time the plaintiff may be nonsuited, and at what not, 139. a.

Notice.

The several kinds of notice, 309. b.
Notice, an incident inseparable to attornment, *ibid.*
Where the lord shall not be compelled to avow upon the feoffee of his tenant without notice, 269. b.
Where the obligor or mortgagor hath time during his life to pay money, payment at the place without notice shall be no performance, 211. a.
Where the grantee of a reversion shall not take advantage of a condition within 32 *H.* 8, without notice to the lessee, 215. b.
Where a man is bound that *J. S.* shall enfeoff a stranger such a day, notice ought to be given by *J. S.* to the stranger, 211. a.

Nuisance.

Where a man may have a particular remedy by action for public nuisance, and where not, and why, 56. a.
How public nuisances are punishable, *ibid.*

Obligation. *See* Condition, Debt, Releases, Stat. 34 *E.* 3. *c.* 4. Trial.

The legal acceptation of the word, 172. a.
Where obligations made in the third person shall be good, and where not, 229. b. 230. a.
Where an obligation made and dated beyond sea shall be good, and how triable, 261. b.
Where the intermarriage of one feme obligee with the obligor shall extinct the debt as to both, 264. b.

OF

Occupant.

Who said to be an occupant, 41. b.
Of what inheritances occupancy may be, and of what not, 41. b. 388.
How occupancy may be prevented, 41. b. 387. b.
Where an occupant shall be liable to waste and payment of rents, 41. b.
No occupancy against the king, 41. b.

Occupation.

The several significations of the word, and to what properly applied, 249. b.
The writ of *occupavit*, and where it lieth, *ibid.*

Office and Officers. *See* Appendant, Attorney, Stat. 12 *R.* 2. *c.* 2. Nobility. *See* the respective Names of each Officer.

Officers of justice, &c. granted to persons insufficient void, 3. b.
Such offices not grantable in reversion, *ibid.*
Where non-user shall be a forfeiture of an office, and where not, 233. a.
Where offices may be executed by deputy, and where not, 234. b.
Where the grantor may oust his officer at his pleasure, and where not, 233. a. b.
What persons capable of offices of honour, and what not, 107. b. *per. tot. pag.*
What persons capable of the stewardship of a manor, and what not, 3. b. 61. b.
Where the selling or contracting for an office of justice, &c. shall disable the party to be capable thereof, 234. a.
Where and what offices may be entailed, and where and what not, 20. a.
Where a man shall be tenant by the curtesy of an office, 29. b.
What things may be appendant to an office, and shall pass by grant of the office, 49. a.
The office of the king's almoner described, 94. a.
When he may and when he may not be discharged, 233. b.

Office of Inquisition. See Stat. 2 *E.* 6. *c.* 8.

Where the estates of particular tenants shall be saved, albeit they be not mentioned within the office, 77. b.
What remedy for the heir where he is found by the office of fewer years than in truth he is, *ibid.*
What remedy for the true heir, where another is found heir by the office, and where one is found heir in one county, and another in another county, 77. b. 243. a.
What remedy where one is untruly found by office lunatic or dead, &c. *ibid.*
Where upon office found that a person attainted is seised, the party having title may have a traverse or *monstrans de droit*, 77. b.
Where upon an *ignoramus* found by office, it shall be taken to be a tenure *in capite*, and where not, *ibid.*
Where the heir within age shall have a traverse to an office, which falsely finds an immediate tenure of the king, 77. b.

PA

Ordinary. *See* Confirmation, Parson.

The office and duty of the ordinary, and whence so called, 96. a. 344. a.
Where a release of an action by the ordinary shall be good, 292. b.
Where a church donative shall be visited by the patron, and not by the ordinary, 344. a.
Where the king founds a church donative without any special exemption, his chancellor shall visit, and not the ordinary, 344. a.

Ouster le Main. *See* Livery.

Outlawry. *See* Forfeiture, Juror.

The derivation of the word, 122. b.
Why a feme outlawed is called a wave, *ibid.*
Where outlawry in the plaintiff shall disable him to bring an action at the common law, and where not, 128. a.
In what actions outlawry may be pleaded in disability of the person, and in what not, 128. a.
At what age a man may be outlawed, and at what not, 122. b. 128. a.
Where in a plea of outlawry the defendant ought presently to show the record in court, and where he shall have a day over, 128. b.
Where outlawry in a foreign jurisdiction shall not disable the plaintiff at *Westminster*, 128. a.
Outlawry in the executor no disability to bring an action in right of his testator, 128. a.
Outlawry in the mayor no disability to the corporation to bring an action, *ibid.*
In what actions outlawry may be pleaded in bar, and in what not, 128. b.
Where process of outlawry lay at the common law, and in what actions it lieth at this day, 128. b.
How anciently persons outlawed might be put to death by any man, and when that was restrained, 128. b.
The several ways of reversing outlawries, 259. b.
What matters shall be said good causes to reverse an outlawry, and which of them are pleadable, and which not, 259. b. 260. b.
Outlawry no prejudice to the party until return of the exigent, or removal by *certiorari*, 128. b. 228. b.
Where a person outlawed may be a witness, and where not, 6. b.
The form of the judgment upon process of outlawry in the county court, and the form in *London*, and by whom given, 288. b.
When it may be avoided, and how, 128. b.

Out of the Realm.

The meaning of the term, 260. a.

Oxgang.

What it is, 69. a

Panel. *See* Array, Challenge.

The signification of the word, 158. b.

Pardon. *See* Corruption of Blood, Felony.

Pardon after attainder no restauration of blood, 391. b. 392. a.

Where

PA

Where a pardon after the action brought, and before judgment, shall discharge the party of an amerciament, 126. b.

Park. *See* Forest.

Parliament. *See* Statutes.

The derivation of the word, 110. a.
The court of parliament what, and of what members it consisteth, 109. b.
How called in ancient times, and how called at this day in other countries, 110. a.
The antiquity and jurisdiction of this court, 110, a.
The number of sessions of parliament since the Conquest, *ibid.*

Parol Demur. *See* Age.

Where the parol shall demur for the nonage of one parcener, where her sister is of full age, 164. a.

Parson and Patron. *See* Aid, Confirmation, Discontinuance, Leases, Presentation, *Quare Impedit.*

The legal acceptation of the word (parson), and why so called, 300 a.
Who said to be a parson *imparsonee*, 300. b.
To what intents a parson or vicar esteemed in law to have a fee simple, and to what but for life, 67. a. 300. b. 341. a.
What actions a parson may maintain in his politick capacity, and what not, 341. a. b. 342. a.
Where one church may have two persons, and where two incumbents shall be said but one parson in a church, 18. a.
Where two parsons be in debate for tithes above the fourth part, one man being patron of both churches, no *indicavit* lieth, 243. a.
Where a rent granted by the patron and ordinary in time of vacation shall bind the succeeding parson, 343. b.
Where an annuity granted by the parson and ordinary shall bind the successors without assent of the patron, and where not, 343. b. 344. a.
Where the patron and incumbent may charge a donative in perpetuity, 301. b. 344. a.
The fee simple of the parsonage in abeiance, and in no person certain, 342. a. 343. a.
Where by the death of the parson the freehold shall be in abeiance, 342. b.

Partition and Parceners. *See* Age, Damages, Entry Congeable, Estoppel, Jointenants, Judgment, Parol Demur, Release, Rents, Stat. *Gloucest. c.* 6, and 32 *H.* 8. *c.* 32.

Parceners, when so called, 163. b. 164. b.
The description and division of parceners, 163, a.
Of what inheritance coparcenary may be, and of what not, and in what manner partition shall be made, 164. b. 165. a.
Where parceners shall be deemed in law as one heir, and where as several heirs, 163. b. 164. a. 196. b.

PA

To what purposes parceners are said to have several freeholds, and to what but one, 164. a.
Where parceners in several degrees shall join in a real action, and where not, 164. a. 169. a. b.
The several ways of making partition, and what partition shall bind, and by what persons, and what not, 165. b. 166. a. and b. 167. a. 169. a. 170. a. b. 171. a. b.
What act by one parcener shall be deemed in law a division of the coparcenary, and what not, 167. b. 174. b.
The several judgments in a partition, and upon which a writ of error lieth, 167. b. 168. a.
Where upon partition made, the eldest daughter shall have election, and where not, 166. a. b. 167. a. 168. a. b. 186. b.
Where such partition shall be good without deed; *secus* between jointenants, 169. a.
Where a rent, &c. granted for owelty of partition shall be good without deed, and where not, 169. a. b.
Where a rent is granted generally for owelty of partition, out of what land it shall be intended to issue, 169. b.
Where a rent is granted to two coparceners for owelty of partition, or where reserved upon a feoffment in fee, in what nature they shall be said seised of this rent, 169. b.
Where a rent granted by the husband for owelty of partition shall bind the wife, 169. b.
Where partition made between the issue in tail, and her sister not inheritable to the tail, shall bind the issue; *secus* of a partition between issue and a stranger, 170. b.
Where a partition between *bastard eigne* and *mulier puisne* shall bind the *mulier* and her heirs, 170. b. 244. b.
Where a partition in chancery shall be avoided by an infant; *secus* where a writ of partition is brought and judgment had, 171. a.
Where the issue of one parcener upon the not discent of assets shall enter into the moiety of lands in tail allotted to the other parcener, 172. b. 173. a.
Where by a partition against common right, the parcener shall be liable to charges made since the discent, 173. a.
Where by the eviction of part of the land allotted to one parcener, the whole partition shall be defeated, and where not, 173. b. 174. a.
Where the privity between parceners being destroyed, the condition and warranty in law shall be extinct, 174. a.
What shall be said a sufficient continuance of the privity to take advantage of such warranty, &c. and what not, 174. a. b.
Where the feoffee of one parcener shall have aid of the other parceners to deraign a warranty paramount, and where not, 174. a. b.
Where, by whom, and against whom, a writ of partition lay at the common law, and where and by whom it lieth at this day, 175. a. b.
The difference between a partition and exchange, 51. a. 172. b. 176. a.
Parcener by the custom described, 175. b.
The manner of partition in hotchpot, and where such partition shall be made, and where not, 167. a. b. 177. a. 178 b. 179. a. b.
Who ought to be first agent in such partition, and to whom the lands shall descend in the interim, 176. b.

Where

PL

Where after such partition the lands given in frank-marriage shall be of the nature of lands descendible, 177. b.
Where in such partition the value of the lands, &c. shall be accounted as at the time of the partition, and not as at the time of the gift, 179. a.
Upon whom the reversion of such estate in frank-marriage shall descend, 179. a.
Where a partition between three parceners, one to hold in severalty, and the other in parcenary, shall be good, and where not, 180. a.
Where one daughter disseises the discontinuee of her father to the use of herself and her sister, and being ousted by the discontinuee recovers in an assise, by the agreement of the other sister after they shall be jointenants, and not parceners, 374. a.
Where a tenancy by homage descends upon divers parceners, the eldest alone, and where all shall do homage, 67. a. b.

Pascuum, Pastura.

The meaning of the words, 4.

Patents. *See* Grant, King.

Payment.

Where payment of money in shew and appearance and not really, shall be no performance of a condition, 209. b.
Where the mortgagee dying before the day, payment shall be made to his executors, and where to his heirs, 209. b. 210. a.
Where upon condition of payment to one, his heirs and assigns, payment to his executors shall be a good peformance, and where not, 210. a.
Where upon payment of money at several days, an action lieth for not payment at each day, and where not before the last day be past, 47. b. 292. b.

Per quæ Servitia. *See* Attornment, *Quid Juris Clamat.*

Where tenant in tail shall be compelled to attorn in *per quæ servitia*, 316. b.
Where in a *per quæ servitia* the tenant shall not be compelled to attorn until allowance of his privileges, 320. b.
Where upon grant of seignory for life, the remainder in fee, he in the remainder after the death of the tenant for life shall have a *per quæ servitia*, 252. a.

Pew.

What it is, 5. b.

Piracy. *See* Attainder, Felony.

Place.

Obligation may be alleged to be made in any place. 261. b.

Pleadings and Pleas. *See* Departure, Double Plea, Stat. 23 *H.* 8. *c.* 5. 7 *J.* 1. *c.* 5. 36 *E.* 3. *c.* 15.

Placitum, unde, 17. a. 103. a.

PL

The commendation of good pleading, and the means to attain to it, 17. a. 168. a. 303. a.
Pleading a good argument in law, 115. b.
Rules concerning the matter and order of good pleading, 303. a.
The several parts of pleading, and by what names distinguished, 303. b.
Where plea of every man shall be construed most strongly against himself, 303. b.
Things done beyond sea, how to be pleaded, 261. *passim.*
When necessary circumstances implied by law need not be expressed, 303. b. 316. b.
Where a defective plea shall be made good by the plea of the adverse party, and where not, 303. b.
Where surplusage shall vitiate a plea, and where not, *ibid.*
What pleas ought to be averred, and what not, 303. a.
Plea by argument or rehearsal, not good, *ibid.*
What certainty is required in counts, bars, replications, estoppels, &c. 303. a.
Where an inducement to the matter generally alledged in the plea shall be sufficient; *secus* of the matter itself, 303. a.
Where a general allegation of proceedings in ecclesiastical courts, or a matter of record in pleading shall be sufficient, and where not, *ibid.*
What estates in pleading may generally be alleged, and where the commencement of particular estates must be shewed, and the life of the tenant averred, and where not, 303. b.
Where and in what kind of pleading the donee or lessee ought to allege seisin in his donor or lessor, and where *cum dimisit*, or *cum dedit*, &c. 303. a.
Where the party may plead performance of all covenants generally, and where they ought to be specially pleaded, 303. b.
Where the conclusion of a plea (*et issint et sic*) shall be a waver of a special matter, and where not, *ibid.*
Where a thing is done by force of a warranty or authority, it ought to be pleaded, 283. a. 303. b.
Where a special cause of justification or excuse may be given in evidence, and where it onght to be pleaded, 282. b. 283. a. *per tot. pay.*
Where the tenant by his false plea shall lose a benefit or advantage given him by the law, 33. a. 366. a.
How a feoffment in fee and a lease for years ought to be pleaded, 200. b. 201. a.
Where in pleading an estate of freehold, the party shall not plead an entry *secus* of an estate for years, 201. a.
Where in pleading the party shall be said *seisitus in dominico vel de feodo*, and of what things *ut de feodo et jure*, 17. a. b.
The necessity of making a defence in every plea, 127. b.
The form of a defence in a personal action, 127. b.
The effect and consequences of such defence, 127. b.
Where at this day after demurrer, judgment shall be given according to the matter in law, without respect to the imperfection of the pleading, 304. b.
The course and estimation of pleading in the time of *E.* 1. *E.* 2. *E.* 3. *H.* 6. &c. 334. a. b.

PR

Plenarty. *See* Advowson, Parson, *Quare Impedit.*

Where and against what persons plenarty shall be by institution, and against whom not until induction, 119. b. 344. a.
Where and against whom plenarty was a good plea in a *quare impedit* or *darrien presentment* at the common law, and where not, 133. a. 134. a. 344. b.
Where trial of plenarty shall be by the common law, and where by certificate of the bishop, 334. a.

Plight.

Its signification, 221. b.

Plough land.

What it is, 69. a. 86. b.

Possession. *See* Curtesy of *England*, Guardian, Presentation, *Quare impedit*, Right.

Continuance of possession a violent presumption of title, 6. b.
Where a long possession anciently took away a right of entry, 237. b.
Where a possession of a parcel of the land demised shall be a possession of the whole, and where not, 48. b.
Where the possession of a lessee for years shall be the possession of him in the reversion, 15. a. 243. a.
Of what things a man cannot be put out of possession, and of what only at his own election, 306. b. 307. a.
Where divers persons being upon the land, the law shall adjudge the possession in him that right hath, and where not, 368. a.
Where the seizure of the king without cause shall be adjudged the possession of him for whose cause he seized, 245. b.
What shall be a sufficient possession to make the sister or uncle, &c. to inherit, and what not, 11. b. 14. b. 15. a. 281. a.
Of what things and estate a *possessio fratris* may be, and of what not, 14. b. 15. b.
Where there shall be a *possessio fratris* without entry, *et e converso*, 15. a.

Possibility. *See* Grants.

A gift to a man and woman not married, or where one or both of them are married elsewhere, and to the heirs of their bodies, a good tail for the possibility, 20. b. 25. b.
Possibility upon a possibility rejected in law, 25. b. 184. a.

Pound. *See* Distress.

The writ of *parco fracto*, whence so called, and where it lieth, 47, b.
Where the defendant may justify in that writ, and where not, *ibid.*

Præcipe.

The several writs of *præcipe*, 101. b. 139. b.
What words are proper, what not, and how to be ranged in a *præcipe*, 40. a.

Præmunire. *See* Attainder.

Whence such writ so called, 129, b.
The judgment in a *præmunire*, 129. b.

PR

The nature and quality of the offence, 130. a.
What lands, &c. forfeitable by attainder in *præmunire*, and what not, 130. a. 391. a.
Where such attainder shall be a good plea in disability of the person to bring an action, 129. b.

Presumptio.

Quid, et quotuplex, 6. b.
Where the presumption shall stand till the contrary is proved, 67, 373.

Prerogative. *See* Entry, Grants, Queen, Remitter, Wardship, Warranty.

The etymology and signification of the word (prerogative), and by what names called anciently, 90. b.
Where the grant of a reversion to or by the king shall be good without attornment, 109. b. 314. b.
Where the title of the king and a common person concur, the king's title shall be preferred, 30. b.
Where a man being indebted to the king and to a common person, the common person shall be satisfied before the king, and where not, 131. b.
Where the king after seizure of the temporalities shall present to a church which voided in the life of the bishop, 90. a.
Where the king gave land with his cousin in frankmarriage, by the death of the feme without issue, the estate of the husband shall determine; *secus* of a gift by a common person, 21. b.
Where a *quare impedit*, lay by the king at the common law upon an usurpation, but not by a common person, 344. b.
Plenarty in a *quare impedit* no plea against the king, 133. a. 344. b.
Where the king may revoke the presentation after institution, and before induction, 344. b.
In what case the king's grant with a *non obstante* shall dispense with the penalty of a statute, and in what not, and where it shall be good without a *non obstante*, 99. a. 120. a. 234. a.
What shall be said a good plea against the letters patent of the king, and what not, 260. a.
By what act an estate settled in the king shall be devested without petition, or *monstrans de droit*, and by what not, 354. b.
Where an advowson shall pass from the king within the words (*cum pertinentiis*) without express mention, and where not, 77. a.
When an act of parliament shall bind the king without being named, and where not, 43. b. 98. b. 99. a. 120. a.
Where an act done by the king during his nonage shall bind him, 43. a.
Where a gift to the king, without the words (heirs or successors) shall pass a fee simple, 9. b.
Upon such purchase by the king, in what capacity he shall be said seized, 16. a. 190. a.
Where the person of the king shall alter the nature of a descent, 15. b.
Where the grant of the king, wherein he is deceived shall be void, 27. a.
No laches imputed to the king, 41. b. 57. b. 90. b. 118. a. 119. a. 294. b. 344. b.
Where upon a gift to the king, and the heirs of his body, before stat. W. 2, alienation by him before issue, was no bar of the reversion, 19. b.

PR

Prescription. *See* Custom. *Que Estate.*

The definition of a prescription, 113. a.
How it differeth from a custom, 113. b.
The incidents inseparable to a prescription, 113. b.
To what things a man may make title by prescription without charter, and to what not, 114. a. b. 144, a.
Where a title to lands by prescription shall be good, 195. a.
By what means a title by prescription or custom may be lost by interruption, and by what not, 114. b.
Where a prescription or custom may be alleged against an act of parliament, and where not, 111. b. 115. a. b.
How a man ought to prescribe in things which lie in grant, and how in things which lie in livery, 121. a.
What shall be a sufficient continuance to make a title of prescription, and what not, 113. b. 114. a.
Prescription for common, exclusive of the lord, is void, 122. a.
——— for *solum vestorum terræ*, exclusive of the lord, is good, *ibid.*

Presentation. *See* Baron and Feme, Prerogative.

The description and derivation of the word, 120. a.
How many several ways a church presentative may become void, *ibid.*
Where a presentation by parol shall be sufficient, 120. a.
Where one joint-tenant or tenant in common presents, or both present severally, the ordinary may admit or refuse such presentee at his pleasure, 186. b.
Where two parceners present one clerk, and the other two another, the ordinary may refuse both, *ibid.*
Where the presentation of one parcener in the turn of another after partition shall not put the other out of possession, 243, a.
Where the several presentations of parceners shall not make the church litigious, *ibid.*
Presentation in time of war, and admission and institution in time of peace, shall not put the patron out of possession, 24*d*. b.
Where a presentation to a church in time of vacation of an abbathy shall not put the successor out of possession, 263. b.
Where by presentation to a church donative, and admission and institution, the church is forever become presentative, and where not, 344. a.
How donatives first began, and how they may be created at this day, 344. a.
Where the husband shall present to a church, which voided in the life of his wife, 120. a.
Where upon discent of an advowson to divers parceners, the eldest and her assignee shall have the first presentment, 166. b. 186. b.

Presumption.

Sorts of, 6. b.

Primer Seisin. *See* Livery out of the Hands of the King.

Where it shall be due to the king upon the death of his tenant, and where not, 77. a.

PR

What value shall be paid to the king upon livery or *primer seisin*, 77. a.
At what age the king shall have *primer seisin* of the heir of his tenant in socage, 91. b.

Privies and Privity. *See* Attornment, Homage Auncestrel, Parceners, Releases.

The several sorts of privies, 271. a.
What privity between jointenants, what between tenants in common, and what between parceners, 169. a. 200. b.
Where a privity once discontinued shall forever be extinct, 103, a. b.
Where privity is requisite to a confirmation, and where not, 296. a.

Profession. *See* Monk.

When a man shall be said to be professed in religion, 132. a. 136. a.
At what age a man may be professed in religion 137. a.
To what purposes the profession hath the effect of a natural death, and to what not, 132. a. b.
Where and what profession in religion shall disable the party to bring an action, and where and what not, 132. b.
Where the husband and wife may be professed in religion without either's consent, and where not, *ibid.*

Property. *See* Bailiff, Replevin.

The several kinds of property, 145. b.
Where, in a replevin, the claim of property by the defendant shall hinder the delivery of the goods by the sheriff, *ibid.*
Such claim of property by the bailiff or servant of the defendant not available, *ibid.*

Proprietate Probandâ.

When this writ is to be used, 145.

Protections. *Quare Impedit.* Stat. 13 *R.* 2. c. 16.

The several sorts of protections, 130. a.
Protections *cum clausula volumus*, why so called, and the several kinds of them, *ibid.*
Protections *quia profecturus*, and *quia moraturus*, what, and why so called, *ibid.*
For what causes such protections are grantable, and for what not, 130. a.
For what persons such protections are allowable, and for what not, 130. a. b.
In what action or plea a protection cast for one defendant shall put the plea without day for all, and in what not, 130. a.
Where and what protection may be purchased *pendente placito*, and where and what not, 130. b.
At what time a protection may be cast, and at what not, *ibid.*
Where a protection cast at the *nisi prius*, and repealed before the day in bank, shall, notwithstanding save the default of the party, and where not, *ibid.*
For what continuance of time such protection ought to be, 130. b. 254. b.

To

To what places such protections ought to be directed, and to what not, 130. b.
In what actions protections are allowable, and in what not, 131. a.
Under what seal, and to whom they are directed, 131. a.
What persons ought to allow or disallow of them, 131. a.
By whom they may be cast, and in what manner, *ibid.*
By what means they may be avoided, and by what not, 131. a. b.
Where upon a repeal of the protection, a resummons or re-attachment may be had within the year, 131. b.
Protection *quia indebitatus nobis existit*, what, and where it lieth, 131. b.
Protection *cum clausula nolumus*, why, so called, and where it lieth, 130. a. 131. b.
Where a protection shall be allowed against the queen; *secus* against the king, 131. a. 183. b.

Protestation. See *Per Quæ Servitia*, Pleading, *Quid Juris Clamat.*

The description of a protestation, 124. b.
Where a protestation shall avail the party, albeit the issue be found against him, and where not, 125. a. 126. a.
Where the tenant shall not be compelled to attorn without entry of his protestation and allowance of his privileges, 320. b.

Proviso.

When void, 146. a.
The divers senses of the word, 146. b. 203. b.
In voluntary conveyances containing powers of revocation, 237. a.

Pudzeld.

The signification of the word, 233. a.

Purchase. *See* Baron and Feme, Estates, Fee, Freehold, Infants.

The description and derivation of purchase, 3. b. 18. a. b.
What persons are of capacity to purchase, and what not, and who to their own use, and who only to the use of others, 2. a. b. 3. a. and b.
What shall be said a good name of purchase, and what not, 3. a. 22. 24, 27. 163.
The several conveyances of purchase, 10. a.

Purpresture. *See* Abatement.

The etymology and signification of the word, 277. b.

Quare Impedit. *See* Advowson, Nonsuit, Plenarty, Presentation, Release, Stat. *W.* 2. *c.* 5.

What remedy against an usurpation and plenarty at the common law, and what at this day, 344. a. b.
Where and why, at the common law, a *quare impedit* lay of a church in *Wales* in the county next adjoining, 134. b.
Damages at the common law not recoverable in a *quare impedit*, 17. b. 344. b.

Where a *quare impedit* lay at the common law by a common person, and where not, 344. b.
Where and by what means a common person might remove an incumbent at the common law by *quare impedit*, and where and by what not, *ibid.*
Where an usurpation by collation shall not put the patron out of possession; *secus* of him that hath a right of collation, *ibid.*
Where the patron by presenting as procurator to another, shall put himself out of possession, 52. a.
Where an usurpation after judgment and before execution, shall put the recoverer out of possession, 238. a.
Where upon a grant of the three next avoidances, the usurpation of the grantor at the first avoidance, shall not put his grantee out of possession, as to the other two, 249. a.
Where a presentation by one jointenant shall serve for a title in a *quare impedit* brought by the survivor, 186. b.
Where in a *quare impedit* by two tenants in common, the death of one shall not abate the writ, 198. a.
Where a *quare impedit* lieth of a church donative, and the writ shall say, *quod permittat ipsum præsentare, &c.* 344. a.
Where in a *quare impedit* brought within the six months, the incumbent ought to be named, or otherwise he shall not be removed, 344. b.
Where the clerk of the rightful patron being instituted *pendente lite* in a *quare impedit* between the bishop and a stranger, he shall not be removed; *secus* of an usurpation, 344. b.
Where the bishop being named in a *quare impedit* shall not present by lapse *pendente lite*, ibid.
Where in such case time devolving to the metropolitan, or the king, shall collate, albeit they be not named in the *quare impedit*, ibid.
Where the church of the wife becomes void during the coverture, the husband shall maintain a *quare impedit* in his own name, 351. a.
Where the patron being outlawed, a stranger usurps, and six months pass, the recovery of the king in a *quare impedit* shall be a continuance of the advowson to the patron, 363. b.
Conusance not grantable in a *quare impedit*, 134. b.
A release of actions real or personal, a good bar in a *quare impedit*, 285. a. b.
A protection not grantable in a *quare impedit*, 131. a.

Quarentena.

The meaning of the word, 5. b.
Where the wife shall, and where she shall not, have it, 32. b. 34. b.

Quarrels.

By a release of, all actions and causes of actions are released, 292. a.

Queen.

An exempt person from the king, and where she may grant and purchase, sue and be sued without him, 3. a. 133. a.
Her several prerogatives agreeing with those of the king, 133. a. b. 127. a.
Where she partaketh of the condition of common persons, 131. a. 133. b.
Where the queen, albeit she be an alien, or Jew, shall be endowed, 31. b.

RA

Que Estate.

In what things a prescription by a *que estate* shall be good, and in what not, 121. a.
Where a man may plead a *que estate* of a thing that lieth in grant, and where not, 121. a.
By whom, and of what estate such plea shall be good, and by whom, and of what not, 121. a
In what person a *que estate* ought to be alleged, and in what not, 121. b.

Quid Juris Clamat. *See* Attornment, Infant, *Per Quæ Servitia.*

Where the particular tenant shall be compelled to attorn in a *quid juris clamat* upon grant of the reversion, and where not, 318. a.
Where the lessee shall not be compelled to attorn in a *quid juris, &c.* until allowance of his privileges, 320. b.
Where in a *quid juris clamat* by baron and feme, the privileges of the lessee shall be entered of record notwithstanding the coverture; *secus* in case of an infant, 320. b.
Tenant in tail not compellable to attorn in a *quid juris clamat; secus* in a *quæ servitia* or *quem redditum reddit*, 316. b.
Where one parcener grants her estate in a reversion by fine, the conusee shall have a *quid juris clamat* for a moiety, 310. b.
Where the reversion of a rent-charge upon a grant for life is granted over, a *quid juris clamat* lieth against the grantee for life, and not against the tertenant, 311. b.
Where the nonsuit of one plaintiff in a *quid juris clamat* shall be the nonsuit of both, 139. a.

Quod Ei Deforceat. *See* Stat. *W.* 2. *c.* 4.

Where and against whom such writ lieth, 331. b. 354. b.
The form of the writ, 355. a.
Where upon a recovery by default in an action of waste, a *quod ei deforceat* lieth, 355. a. and b.
Where it lieth upon a recovery by default in assise, 355. b.
Where notwithstanding he in the reversion is received upon the default of tenant for life, and a verdict found against him, a *quod ei deforceat* lieth by the tenant, 355. b.
Where it lieth upon a recovery against baron and feme, albeit the stat. *W.* 2, saith against tenant in dower, or for life, 356. a.
Where it lieth not by the wife upon such recovery after the death of the husband, 356. a.

Radmans and *Radchemistres.*

Where they are, 5. b. 86. a.

Ransom. *See* Fines.

What, and whence derived, 127. a.

Rape.

The signification of the word, 123. b.
What offence accounted in ancient time, and how punished, and what at this day, *ibid.*

Rationabili Parte Bonorum.

Where and by whom such writ lieth, and where and by whom not, 176. b.

RE

Ravishment of Ward. *See* Marriage, Stat. *W.* 2. *c.* 35. Wardship.

Where and by whom it lieth, 89. b.
Where it lieth against the sovereign of a house of religion, for admitting the heir to be there professed, 137. a.

Rebutter. *See* Voucher, Warranty.

The signification and derivation of the word, 303. b. 365. a.
Where an assignee shall rebut by reason of a warranty in law, and where not, 384. b.
Where a disseisor, &c. or other tenant not privy in estate, or to the deed, shall rebut, and where not, 389. a.

Recluse. *See* Entry Congeable.

The signification and derivation of the word, 258. b.
Where the entry of a person recluse shall be tolled by a discent without claim, *ibid.*
Where such person shall appear by attorney, where others must in proper person, 258. b.

Record. *See* Court, Outlawry.

Record, what, and whence derived, 117. b. 260. a.
How triable, 117. b. 260. a.
When a record is alterable, and when not, 260. a.
Nul tiel record, no plea against the king's letters patent, *ibid.*
Outlawry, no prejudice until it be of record, 128. b. 288. b.
Where strangers shall take advantage of a record, 352. b.

Recovery. *See* Error, Executor, Falsifying of Recovery, Forfeiture, Remitter, Statutes *W.* 2. *c.* 3. 14 *El. c.* 8. 21 *H.* 8. *c.* 15.

The etymology and signification of the word, 154. a.
What remedy at the common law he in the remainder or reversion had upon a feigned recovery suffered by tenant for life, and what at this day, 356. a. 362. a.
Where upon a recovery against tenant in tail execution may be sued against his issue, and where not, 361. b.
Where a recovery by default against one out of the realm in the king's service shall not be avoided by error, 260. b.
Where the recoverer shall have waste, or distrain for a rent, for which the recoveree could not, and where not, 104. b.
Where no bar to an entail, 360. b.
Lessee for years may falsify a recovery, 46. a.

Recovery in Value. See Execution, Voucher, Warranty.

Where lands by purchase shall be liable to execution in value in case of a warranty by descent and where not, 102. a.
Where the lands which the vouchee had at the time of the voucher, or *warrantia chartæ* brought, shall be liable to execution in value, notwithstanding alienation before judgment, *ibid.*
Where a recovery being had against tenant in tail, and

and his wife who had nothing, upon a recovery over the expenses shall enure to the husband only, 376. b.

Redisseisin.

Where it lieth not upon a recovery in a writ of right close in nature of an assise in ancient demesne, or in an assize of fresh force by bill, 154. a.
When given, and in what case, 154. a.
Where it lieth against one disseisor above, albeit the recovery in assise was against two; *secus* where one disseisor and a stranger redisseise the plaintiff, 154. b.
Where it lieth not against the husband and wife upon a recovery in assise against the wife, but where the wife was plaintiff in the assise, she and her husband may join in the redisseisin, *ibid.*
Where two several redisseisins may lie upon one recovery in assise, *ibid.*
Where it lieth against the disseisor, and his feoffee after the second disseisin, *ibid.*
Where it lieth not against the tenant in the first assise, being no disseisor, albeit he disseises the plaintiff after, 154. b.
Where it lieth upon a redisseisin of parcel of the tenements formerly recovered, *ibid.*
Where it lieth of a rent-seck by surplusage formerly recovered by the mesne as a rent service, 154. b.
Where it lieth by tenant in tail after possibility, &c. upon a recovery by him being tenant in special tail, *ibid.*
Where it lieth upon a redisseisin of a common after a recovery of the land out of which, &c. *ibid.*

Register of Writs.

What, and its antiquities, 16. b. 73. b. 159, a.

Relation. *See* Alien, Attornment, Bargain and Sale, Conditions, Felony, Grants, Leases, Releases.

How the word (*prædict'*) in grants shall have relation, 20. b.
How the word (*eadem*) shall have relation where two things are mentioned before, 20. b.
The relation and force of the word (*inde*), 82. b. 203. a.
Where a feoffment relating to the estate of another shall pass a fee simple without the word (heirs), 9. b.
Where and to what intents an escheat or forfeiture shall relate to the time of the felony committed, and where and to what not, 13. a. 390. b.
Where a relation shall not work a wrong or charge to a third person, 150. a.
Where the relation of an estate gained by wrong shall not defeat an estate subsequent gained by right, 277. b.

Releases. *See* Action, Conditions, Confirmation, Execution, Grants, Relation, Reservation, Waste.

The form of a release, 264. a. b.
The several sorts of releases, 264. a. b.

The proper words of release, and what words shall be said to amount to a release, and what not, 264. b. 306. a.
What act by him that right hath shall be said a release in law of his right or action, and what not, and how it differeth from a release in deed, 164. b.
How many several ways a release may enure, 193. b. 273. b.
Where a release of right to one that hath neither freehold in deed or in law shall be good, and where not, 265. b. 266. a. b. 267. a. 284. a. b.
Where a release of an annuity to the patron in time of vacation shall be good; *secus* to the ordinary, 266. a.
Where privity shall be requisite to the release of a right, and where not, 266. a. 268. a. 275. a.
Where and by what means a disseisee may release his right for life only, and where and by what not, 264. b.
Where by a release of all right in the land, a power or authority shall be determined, and where not, 265. b.
Where such release shall not extinct a future right or possibility, 264. a. b.
Where a release of dower to him in the reversion upon an estate for life shall be good, 264. a.
Where a release to the tenant for life shall enure to him in the reversion or remainder, *et è converso*, and where not, 267. b. *per tot. pag.* 275. a. b. 279. b. 285. b. 297. b.
Where and to what purposes a release to him that hath but a bare right shall be good and available, and where and to what not, 267. a. 268. a. b. 269. a.
How many ways a seigniory, rent or right may be released, 268. a.
Where a release to him that hath no estate or right shall be good, 265. b. 268. a. 269. a.
Where a disseisor makes a release to one and his heirs *pur auter vie*, a release by the disseisee to the heir after the death of the lessee before entry shall extinct his right, 275. a.
Where a release to one disseisor shall enure to the companion, and where not, 194. a. 275. b. 276. a. *per tot. pag.* 378. a.
Where a release by the patron to one usurper shall enure to both, 194. a. 276. a.
Where a release to one feoffee of the disseisor shall enure to both, 194. b. 276. b. 277. a.
Where a release to one trespasser shall be available to his companion, 232. a.
Where a release to the executors shall be a good bar in an action against the heir, 232. a.
Where and to what purposes after a feoffment in fee by the tenant, the release of the lord shall be good to the feoffor, and where and to what not, 269. a. b.
Where such feoffor shall take advantage of a release, by the lord to the feoffee, but not *è converso*, 269. b.
Where a release to the assignee of tenant for life shall be a good plea in an action against the tenant for waste done before the assignment, 269. b.
To what purposes a release to a lessee for years before entry, or to him that hath a future interest, shall be good, and to what not, 46. b. 270. a.
Where a release to one in reversion or remainder for

for years shall be good to enlarge his estate, 270. a.
Where the release by one joint lessee for years to his companion, shall be good before entry, 270. b.
Two grantees of the next avoidance, a release by the one to the other before the church voids, good; *secus* after, 270. b.
Where a release to a tenant at will shall be good to enlarge his estate; *secus* to a tenant at sufferance, 270. b. 271. a.
Where upon a feoffment in trust the feoffor occupies and takes the profits, a release to him by the feoffees shall be good, 271. a. b. 272. a. b.
What shall be said a sufficient privity whereupon a release may enure by way of enlargement of the estate, and what not, 272. b. 273. a. *per tot. pag.*
In what release words of limitation are requisite to the passing of an inheritance, and in what not, 273. b. 274. a. b. 275. a. 280. a.
Where a feme covert is tenant for life, a release to the husband and his heirs shall be good, 173. b. 299. a.
Where a release to tenant by statute merchant, &c. or guardian, which hold over for the value, shall be good to enlarge their estates, 273. b.
Lessee for ten years, the remainder for twenty years, by the release of him in the remainder to the lessee he shall have for thirty years, 273. b.
What privity requisite to a release which enures by way of *mitter l'estate*, 273. b.
Where and to what purposes the release of one jointenant to his companion shall enure by way of *mitter l'estate*, and where and to what not, 273. b.
Where the release of one coparcener of a rent, shall enure to the other by way of *mitter l'estate*, albeit her moiety be in suspense, *et sic è converso*, 273. b.
Where one coparcener of a rent marries the tertenant, and the other releases to the husband and wife, how it shall enure, *quære*, ibid.
Where a release of a right upon condition shall be good; *secus* of a condition upon condition, 274. b.
Where lessee for years is ousted, and he in the reversion disseised, by the release of the lessee to the disseisor, the disseisee may enter; *secus* in case of a lease for life, 175. b. 276. a.
Where a release by one whose entry is lawful to him that is in by wrong, shall purge and take away all mean estates and titles; *secus* where his entry is not lawful, 266. b. 277. a. b. 278. a.
Where a release to the feoffee of lessee for life of the disseisor shall exclude the disseisor of his entry, 276. b.
Where a release to one feoffee of such lessee shall bar the disseisor as to both, 277. a.
Where the feoffee of a disseisor upon condition makes a feoffment over, a release by the disseisee to the second feoffee shall extinct the condition; *secus* of a release to the first feoffee, 277. b.
Where the release of the disseisee to a disseisor to the use of another, shall take away the agreement of *cestuy que use*, 277. b.
Where two disseisors release to their disseisor, and after disseise him, the release of the disseisee to one or both of them, shall not exclude the second disseisor to re-enter, 278. a.

To what purposes the release of the disseisee to one disseisor shall be said to enure by way of entry and feoffment, and to what not, 194. b. 278. a. b.
Where acts done to or by the disseisor shall not be avoided by the alteration of his estate, by the release of the disseisee, 278. a. b.
Where an alien disseisor is indenizened, by the release of the disseisee to him, the king shall not have the land; *secus* if he were the feoffee of a disseisor, 278. b.
Where the lord disseises his tenant and is disseised, the release of the tenant to the second disseisor shall not revive the seigniory; *secus* if the lord and a stranger had disseised the tenant, and the disseisee released to the stranger, 278. b.
Where a release shall be said to enure totally by way of extinguishment, and where only as to some purposes, 279. b. 280. a. 313. b.
Where a release to one jointenant shall enure to his companion, and where not, 194. a. b.
Where a release by one jointenant or parcener to his companion shall be good, and where not, and how such release shall enure, 193. a. *per tot. pag.* 318. a.
Where the feme mesne and the tenant intermarry, and the lord paramount releases to the husband and wife, how it shall enure, *quære*, 208. a.
Where a release which enures by way of extinguishment may admit of a limitation, and where not, 280. a.
When by the release of the lord to his tenant of all his right in the land, the seigniory shall be extinct without words of inheritance, 280. a.
Where one release shall enure to extinguish several rights in one and the same land, 280. a.
Where the release of the lord of all his right to the tenant, and a lease for years of the seigniory, shall extinguish the seigniory and estate of the lessee also; *secus* of a release to them and their heirs, 280. a.
Where in mixt actions a release of all actions real or personal shall be a good bar, 285. a. b.
Where in an assize by three jointenants a release of actions personal by one to the disseisor shall not bar his companion, 285. a.
Where in a writ of ward by two, a release by one to the defendant shall enure to the benefit of his companion for the whole, 285. a.
Where a release of actions personal shall be a good bar in actions real where damages are to be recovered, and where not, 285. a. b.
Where a release of all actions to the disseisor or his tenant for life shall not extend to his feoffee or him in the remainder, 275. b. 285. b. 286. a.
Where such release shall not prejudice the heir of the disseisee of his action after the death of his ancestor, 285. b.
Where a release of actions real shall be available only to the tenant, 285. b. 286. a.
Where a release of all actions shall bar a right, and where not, but the party notwithstanding may enter or seize, 268. a. b.
Where a release of actions real before the statute of uses, was a good plea by the pernor of the profits, 287. a.
Where a release of all actions, appeals or demands, shall be a good bar in an appeal of death; *secus* of

R E

of a release of all actions real and personal, 287. b. 288. a. 291. b.

Where a release of actions personal shall be a good bar in an appeal of mayhem, 288. a.

Where a release of all actions shall be a good plea in a writ of error or attaint, and where not, 288. b. 289. a.

By a release of demands what things are released, 291. a. 292. a. 392. b.

Where by a release of quarrels all actions and causes of actions are released, 292. a.

Where a release of all actions shall discharge an obligation before it be broken; *secus* of a covenant, 292. b.

Where by a release of all actions a rent at a day after, or an annuity not behind, is not released, 292. b.

Where he in the remainder in tail releases to the tenant for life in possession of all his right, what shall pass, 345. b.

Relief. *See* Debt, Serjeanty, Stat. of *Magna Charta*, c. 2.

Relief what, and whence derived, 76. a. 83. a. b.

What the relief of a knight and each nobleman was by the common law, and what now by the statute, 76. a. 69. b. 83. b. 106. a.

The relief of the tenant who holdeth by the entire fee of a knight's moiety or third part, 83. a. b. 106. a.

The remedy which the lord hath for his relief, and where an action of debt lieth for relief, and where not, 83. a.

Where the lord by knight service shall have both wardship and relief of the same heir, and where neither, 83. b.

Where the heir within age shall pay relief, and where not, *ibid.*

Where the successor of an abbot or bishop shall pay relief, and where not, 84. a. 99. a.

Where the lord shall have relief of the heir enfeoffed by collusion, 84. a.

The relief of a tenant in socage, 90. b. 91. a.

Where the rent is *ten shillings* or a pair of spurs, what relief shall be paid, and who shall have the election, 90. b. 91. a.

Where the rent is not annual, what relief shall be paid, 91. a.

At what time the relief of such tenant shall be due to the lord, and where the lord shall not distrain till a certain time, 91. a. 92. a.

Where the heir of *cestuy que use* shall pay relief, 91. a.

Of what service a relief shall be due, and of what not, 91. b. 93. a.

Remainder. *See* Entry Congeable, Heir, Instant, Prerogative, Releases, Remitter, Reversion, Waste.

Remainder what, and whence derived, 49. a. 143. a.

Where it shall pass without deed, 49. a. 143. a.

Where a remainder may depend without a particular estate, 298. a.

Where the defeating of the particular estate shall defeat the remainder, and where not, *ibid.*

A rent granted to the tertenant for life, the remainder in fee, a good remainder, 298. a.

R E

Where the rent is granted *pur auter vie*, the remainder in tail to *cestuy que vie*, a good remainder, 298. a.

Where by the grant of a remainder a reversion shall pass, 299. b.

Where the execution of a particular estate upon a fine *sur grant et render*, shall be an execution of the remainder, 354. b.

Where a remainder not vesting at the time of the particular estate created by livery shall be good, and where not, 264. a. 377. b. 378. a.

Remitter. *See* Appendant, Charge, Entry, Congeable, Fines, Jointenant, Warranty.

The etymology and description of a remitter, 347. b.

The incidents to a remitter, 348. a.

Where a remitter shall operate upon a freehold in law descended before entry, 348. a.

Where tenant in tail disseises his discontinuee, his issue shall be remitted, notwithstanding the infancy or coverture of the discontinuee, 348. a.

Where tenant in tail enfeoffs his issue within age, he is remitted; *secus* of a use remitted to him upon a feoffment, 348. b. 350. b. 351. b.

What charges by the issue shall be avoided by a remitter, and what not, 349. a.

Where an usurpation shall work a remitter, 194. a.

Where the issue in tail within age enters, or intermarries with the discontinuee, he is remitted; *secus* if of full age, 202. b. 350. b.

Where a right without an action, or an action without a right, shall work no remitter, 348. a. 349. b. 356. a.

Where tenant in tail suffers an erroneous recovery, and disseises the recoveror, and dies, his issue is not remitted, 349. b.

Where a stranger usurps upon a purchaser of an advowson, and grants to him in fee, who dies, his issue is not remitted, 349. b.

Where a moiety of the lands discontinued descending upon the issue in tail shall be a remitter only for the same moiety, 350. a.

Where tenant in tail enfeoffs his issue within age and a stranger, no remitter to the issue but for a moiety, 350. a.

Where the husband discontinues, and retakes to himself and his wife during his life, the feme is remitted, 350. b. 351. b.

Where an infant or feme covert shall be remitted against their deed indented, or acceptance by fine, 353. a.

Where upon a discontinuance by the husband by fine, a grant and render to the wife shall be a remitter to her, albeit she be no party to the writ, or conusans, 353. a.

Where baron and feme tenants in special tail levy a fine at the common law, and retake in fee, the feme is not remitted, but her issue upon the discent shall, 353. a.

Where the issue in tail of full age takes husband, a lease to her and her husband by the discontinuee shall be a remitter, 353. b.

Where a man shall be remitted against his own discontinuee and reprisal, 354. a.

Where a remitter to the particular estate shall be a remitter to all in the reversion or remainder, 354. b.

Where

Where a remitter to the particular estate shall be a remitter to the reversion, notwithstanding a mean remainder be barred during the discontinuance, 354. b.

Where a remitter to the particular estate shall devest a remainder or reversion settled in the king during the discontinuance, *ibid.*

Where after a recovery by default against a feme, a lease to her and her husband shall be a remitter to the feme, 335. a. 356. a.

Where the discontinuee of the husband enfeoffs the husband and wife and a stranger, the wife is remitted to a moiety, 356. b.

Where the discontinuee of the husband makes a lease to the wife, the disagreement of the husband shall not oust the feme of her remitter, 356. b. 357. a.

Where the wife being remitted during the coverture, may after the death of her husband wave her remitter, and where not, 357. a.

Where tenant in tail to him and his heirs females discontinues, and retakes in fee, and dies, having a daughter, the son born after shall not devest the remitter, 357. a.

Where covin in the husband and wife to disseise the discontinuee, and enfeoff them, shall hinder the remitter to the wife, 357. a.

Where tenant in tail and his issue disseise the discontinuee to the use of the father, who dies, the issue is not remitted against the discontinuee, albeit he be against all others, 357. b.

Where one jointenant is of covin to disseise the heir of their disseisor, and enfeoff them, the other being not privy to the covin is remitted for his part, 357. b.

Where the husband discontinues and retakes for life, the remainder to his wife, by the death of the husband the wife is remitted before entry, and cannot wave, 358. a. b.

Where a freehold in law accruing to the issue in tail or disseisee by survivorship, or by reason of a remainder, shall work a remitter, and where not, 358. b. 359. a. and b.

Where an abbot or bishop discontinues, and retakes in fee by licence, the successor shall be remitted and defeat the mean charges, 360. a. b.

Where a remitter shall be wrought by a matter *in pais* albeit the discontinuance groweth by matter of record, 355. a. 356. a. 361. b.

Where in a formedon or writ of entry the tenant pleads non tenure or disclaims, by the entry of the issue in tail or disseisee, they are remitted before judgment, 362. a. 363. a.

Where a claim *in pais* shall not hinder a remitter; *secus* of an indenture, or a claim of record, 363. b. 364. a.

Where a man of full age having a right of entry takes an estate he is remitted, *secus* of a right of action, 363. b. 364. a.

Where a remitter to one jointenant shall be a remitter to his companion, and where not, 364. b.

Rents. *See* Annuity, Appendant, Apportionment, Confirmation, Discontinuance, Disseisin, Distress, Extinguishment, Fealty, Grants, Manor, Reservation, Seisin, Stat. 32 *H.* 8. *c.* 37. Suspension.

The derivation of the word, 141. b.

The division of rents, 141. b.

Rent service, what, 87. b. 141. b. 142. b.

Such rent distrainable of common right, 142. a. b.

How such rent may become seek, 150. a. b. 151. a.

To what purposes such rent become seek shall be said to participate of the nature of a rent service, and to what not, 150. b. 153. a. 154. b. 309. b.

Out of what things a rent may be granted or reserved, and out of what not, 47. a. 142. a. 144. a.

Where a tenure being by homage, fealty, and rent, by a recovery or grant of the rent, the homage and fealty shall pass, and where not, 151. a.

Rent charge, what, 243. b. 144. a.

Where a grant to distrain shall amount to a rent charge, 146. b. 148. a. 308. a. b.

Where words in a grant shall amount to a rent charge, albeit there be no express words of charge or distress, 147. a.

Where in a grant of a rent a *proviso* not to charge the person of the grantor shall be good, and where not, 146. a. *per tot. pag.*

Where in such a grant a *proviso* not to charge the land shall be void, 146. a.

Where the person of the grantor shall be charged with a rent charge, notwithstanding a *proviso* to discharge his person, 146. b.

Rent seek, what and whence so called, 143. b. 144. a.

Where a rent is granted out of one manor with a clause of distress in another, what rent it shall be, and how construed. 147. a. *per tot. pag.*

Where a rent is granted out of two acres, with a clause of distress in one, or to two persons with a distress to one, what rent it shall be construed, 147. b.

When it shall go to the heir, when to the executor, 200. a.

Where the same rent may be both charge and seek, *diversis temporibus*, 147. b.

Where a rent in fee is granted out of lands in fee and a term for years, or solely out of a term for years, how it shall be construed, *ibid.*

Where a man seised of twenty acres grants a rent of 20*s. percipiend' de qualibet acra*, how it shall be construed, 147. b. 267. b.

Where the bargainor and bargainee join in the grant of a rent, how it shall be construed before, and how after enrolment, 147. b.

Where a rent granted for owelty of partition shall be good without deed; *secus* of a rent of owelty of exchange, 169. a.

What real actions lie for the recovery of a rent charge, or seek after seisin, 160. a.

Where money given in seisin of a rent before the day, shall not be abated out of the rent, 315. a.

Replevin. *See* Property, Stat. *Marlb. cap.* 22.

The etymology of the word (replevin), 145. b. 161. a.

Where such writ lieth, *ibid.*

How many ways goods may be replevied, 145. b.

Where a replevin brought by him that had no property in the goods at the time of the taking shall be good, and where not, 145. b.

RE

Where a man may have a replevin of goods not distrained, 145. b.
The several pledges the sheriff ought to take in a replevin, 145. b.
Where a replevin lieth notwithstanding a grant to keep the goods distrained against gages and pledges, 145. b.
Where a replevin lieth notwithstanding the property once tried and found for the defendant, 145. b.
Where the beasts of several men are taken, they shall not join in a replevin, 145. b.
In a replevin property to the plaintiff and a stranger, or where there be two plaintiffs, property to one of them a good plea, *ibid.*

Report.

What, and whence derived, 293. a.

Request. *See* Condition, Demand, Dower.

What shall be a sufficient request by the wife to entitle her to damages in a writ of dower, and what not, 32. b.
Where an estate is to be made upon request by force of a condition, by whom, when, and where such request ought to be made, 220. a.

Resceit. *See* Stat. *W.* 2. *c.* 3. *Glocester*, *c.* 11.

The etymology and signification of the word, 192. b. 352. b.
Where a feme being received shall plead, and advantage shall be taken against her as a feme sole, and where not, 353. a.
Where in an action of waste against the husband and wife, upon the default of the husband the wife shall be received, 355. a.
Where he in the reversion shall be received upon the default of tenant for life, albeit the statute speaketh of a remainder, 356. a.

Rescous.

The description and derivation of rescous, 160. b.
Where the cattle distrained go into the house of the owner, the not delivery of them shall be esteemed in law a rescous, 161. a.
Where the owner may make rescous of a distress taken without cause, and where not, 47. b. 160. b. 161. a.
Where rescous shall be a disseisin of a rent service, and where not, 160. b. 161. a.
Where the lord distrains his tenant in the highway within his fee, the tenant may make rescous, 161. a.
Where the tenant may make rescous upon a distress of the lord taken out of his fee, and where not, 161. a.
Where the party not guilty may make rescous upon an arrest of the sheriff for felony, and where not, 161. a.

Reservation. *See* Annuity, Condition, Confirmation, Jointenants, Rents.

The derivation of the word, 142. b. 143. a.
What shall be said good words of reservation, 47. a. 144. a.

RE

The difference between an exception and a reservation, 47. a.
To what person the reservation ought to be made, and where it shall be good to a stranger to the land, and where not, 47. a. 143. b. 213. a. and b.
Where a reservation to his heirs without any thing to the party himself shall be good, and where not, 99. b. 213. b. 214. a.
Reservation to a man, or his heirs, how it shall be construed, 214. a.
Where a rent reserved to one jointenant shall be good also to his companion, and where not, 47. a. 192. a. 214. a. 318. a.
Where a rent is reserved generally, to what persons it shall extend, 47. a.
Where the special reservation of the party shall destroy the general intendment of the law, 23. a. 47. a. 305. b.
What things the lord may reserve for rent, and what not, 91. b. 142. a.
Upon what estate a rent-service may be reserved at this day, and upon what not, 142. b. 143. a.
Where a rent reserved upon a bargain and sale shall be good, 144. a.
Where a rent may be reserved upon a release, and where not, 193. b.
Where a reservation shall amount to a grant, and where not, 170. a. 143. b. 144. a.
Where an entry for condition broken cannot be reserved to a stranger, 214. b.
Where tenant for life and he in the reversion join in a lease for life reserving a rent, how it shall enure, 214. a.
Where the lord releases to his tenant by fealty and rent, saving or reserving to him his rent, what rent it shall be construed, 150. a.
Reservation at *Michaelmas* and our *Lady-day*, upon a lease made in *February*, shall be construed at our *Lady-day* and *Michaelmas*, 217. b.

Responsalis.

The signification of the word, 128. a.

Resummons.

The nature of such writ, and where it lieth, 135. b.
The several kinds of resummons, *ibid.*
Where after judgment that the tenant shall go without day, the plaintiff may continue the cause by a resummons or re-attachment, and where not, 135. b. 363. a.

Retraxit.

A *retraxit*, what, and how it differeth from a nonsuit and departure, 138. b. 139. a.
The several sorts of *retraxit*, and the form of entering them, 139. a.

Retainer.

If general, shall be for a year, 42. b.

Reve.

The signification and derivation of the word, 61. b.
The office and duty of a reve, 62. a.

Reversion. *See* Appendant, Remainder.

The etymology of the word, 142. b.

The

RI

The description of a reversion, 22. b.
Where an use after divers particular estates is limited to the right heirs of the feoffor, it shall be said in him as a reversion, 22. b.
Where a man makes a gift in tail or lease for life, the remainder to his right heirs, it shall be in him as a reversion, 22. b.
Where a feoffment is made to the use of the feoffor in tail, and after to the feoffee in fee, the feoffee hath no reversion, *ibid.*
What reversion shall be accounted assets, and what not, 173. a.
Where a reversion upon an estate tail shall be a sufficient countenance of privity between parceners to take advantage of a warranty or condition in law, 175. b.

Reviver. *See* Extinguishment.

Revocation. *See* Prerogative, Uses.

By what acts a power to revoke uses shall be extinct and defeated, and by what not, 237. a. 215, 237, 265. b.
Where a power of revocation may be apportioned, and where not, 237. a.

Richel [Judge.]

Attempt to create a perpetuity, 377. b.

Right. *See* Corporation, Releases.

The signification and extent of the word (right), 158. b. 265. a. 345. a. b.
The several kinds of right, 266. a. 345. b.
Common right, what, and how taken, 142. a.
Where the law more respecteth a less estate by right, than a greater by wrong, 42. b.
A right cannot die, 279. b.
The several natures of writs of right, 158. b.
Where in such writ the demandant ought to allege seisin within time of limitation; *secus* in case of the king, 294. a. b.
The several times of limitation in a writ of right, 114, b. 115. a.
By what means a future right may be barred, and by what not, 265. a. b.
Where a recontinuance of a right of possession out of the hands of him that hath the absolute right shall draw with it the mere right to the land, and where not, 266. a. 278. b. 279. a. 283. b.
Where in a writ of right the mere right shall be preferred before the right of possession, 279. a. b. 283. b. 284. a.
Where a writ of right lieth for a rent, 160. a.
What shall be said a sufficient seisin to maintain a writ of right, and what not, 210. b. 281. a. *per tot. pag.* 293. a.
Where judgment final shall be given in such writ, albeit the grand assise give not their verdict upon the mere right, 295. b.
The form of the judgment in a writ of right, *ibid.*
Within what time claim ought to be made for the avoidance of such judgment, 254. 262. a.

Riot. *See* Forcible Entry.

How many persons may make one, 257. a.

SE

Robbery. *See* Appeal.

The acceptation and derivation of the word, 288. a.

Ruscaria.

The meaning of *ruscaria*, 5. a.

Saliva.

What *saliva* is, 4. b.
What shall pass in a grant by that name, *ibid.*

Scire facias. *See* Stat. *W.* 2. *c.* 45. 32 *H.* 8. *c.* 5.

Such writ whence so called, and where it lieth, 290. b.
A release of actions, a good bar in a *scire facias*, 290. b. 291. a.
Where and upon what judgment the tenant having a warranty, and a recovery being had against him, shall have a *scire facias* upon assets descended after, and where not, 366. a.
Where in such writ the tenant shall recover the land lost, and where the assets descended, 366. a.

Scutagium. *See* Escuage.

The meaning of the word, 68. b. 75. a.

Seals. *See* Protection.

The antiquity of sealing charters, 7. a.
When sealing with arms began, *ibid.*
Inheritances passing under the great seal of *England*, shall be descendible according to the common law of *England*, 9. a.

Seisin. *See* Bastard, Conditions, Curtesy, Dower, Possession, Stat. 32 *H.* 8. *c.* 2. Villenage.

The signification of the word, 153. a.
The several sorts of seisins, 29. a.
Where a seisin of parcel shall be a sufficient seisin in law to have an assise for the whole, 153. a. 315. a.
What shall be said a sufficient seisin of a rent to have an assise, and what not, 159. b. 160. a. 314. b. 315. a.
Where seisin of a rent by the lord before his feoffment of the manor, shall not enable him to bring an assise after entry for a condition broken, 202. b.
To what purposes the seisin of a rent shall be a seisin of the reversion, and to what not, 15. a.
Where seisin of a rent by the hands of one jointenant shall be good for all, 315. a.
Where the seisin of homage or fealty shall be a seisin of all other services, 68. a.

Selda.

The signification of *selda*, 4. b.

Selio terræ.

What it means, 5. b.

Sequatur sub suo Periculo.

Whence so called, 101. b.
Where the writ lieth, *ibid.*

Serjeanty.

The description of tenure by grand serjeanty, and why so called, 105. b.
How it differeth from escuage, 105. b. 106. a. and b.
The special properties of this service, 105. b.
The holding by what offices shall be said grand serjeanty, 106. a.
Where tenure by cornage shall be grand serjeanty, and where not, 107. a.
The relief of a tenant by grand serjeanty, 106. b.
Where such tenant may take a deputy, and where not, 107. a.
Tenure *invenire hominem ad guerram infra 4 Mariæ*, grand serjeanty, *ibid.*
What persons are capable to perform the service in person, and what not, 107. b. *per tot. pag.*
The incidents and fruits of this service, 108. a.
Tenure by that petit serjeanty described, 108. a.
Such tenure but socage, *ibid.*

Services. *See* Appendant, Apportionment, Extinguishment, Fealty, Grants, Homage, Knight's Service, Rents, Seisin, Tenure.

Servitium, quid, et quotuplex, 65. a.
What said to be foreign service, 68. b. 69. b. 74. b.
Where a corporal service may be performed by deputy, and where not, 70. a. b. 83. a. 107. a. b.
What corporal services may become seck, and what not, 151. a.

Shaw.

What shaw is, 4. b.

Sheriff. *See Elegit*, Execution, Stat. *W.* 2. *c.* 19.

The etymology of the word, 109. b. 168. a.
Whence called viscount, 168. a.
His office and duty, *ibid.*
The antiquity of this office, and how called anciently, 168. a.

Shire.

The derivation of the word, 50. a. 168. a.
From what antiquity this kingdom divided into shires, 168. a.
County, whence so called, 50. a.

Simony. *See* Stat. 31 *El. c.* 6.

How odious in law, 17. b. 89. a. 344. b.
Disables the clerk for ever, 120. a.

Socage. *See* Escuage, Guardian, Relief, Stat. *Marl. c.* 17. 4 and 5 *Annæ.*

The etymology of the word, 86. a. b.
Tenure in socage described, 85. b.
How such tenants were anciently called, 86. a.
What tenure which is not knights service shall be said a tenure in socage, and what not, 86. a. 87. a.
What things incident of common right to such tenure, 91. a.
What person may be capable of a guardianship in socage, and what not, 88. b.

Where a guardian in socage shall have a ward by cause of ward, 88. b.
What the next chosen of part of the mother shall be guardian in socage before the next of part of the father, *et è converso*, 22. a. 88. a.
Where two are in equal degree of affinity to the heir, which shall be guardian in socage, 88. a.
Where he shall be guardian, to whom there may be any possibility of descent, 88. b.
The difference between the common and civil law in that point, 88. b.
Where such guardian cannot forfeit or dispose of his interest, 88. b. 89. a.
Where he shall not present to the benefice of the heir, 17. b. 89. a.
At what age the heir shall have an account against guardian in socage, 89. a.
For what things he shall be accountable, 88. a. 89. b.
What allowances he ought to have upon his account, 89. a.
Where upon such account no *capias* lieth against the guardian, *ibid.*
Where a stranger shall be charged a guardian in socage, 89. b.
Where the guardian occupying after the heir accomplish his age of fourteen, shall be charged in an account as bailiff, 90. a.

Sokemans and *Sokmanni.*

The meaning of the words, 5. b. 86. a.

Solinus et Solinum Terræ.

What they are, 5. a.

Stadium Terræ.

The signification thereof, 5. b.

Stagnum.

Quid, and what passes by it, 5. a.

Stanlaw.

The etymology of the word, 4. b.

Statutes.

Concerning Statutes in General. *See* Prerogative, Prescription.

Rules observable in the construction of statutes, 381. a. b.
The preamble a good mean to find the meaning of a statute, 70. a.
The equity of a statute, what, 24. b.
Where cases within the same mischief shall be taken within the same remedy of a statute, 76. a. 77. b. 290. b. 365. b.
Where a penal statute shall be taken by equity, and where not, 46. b. 154. a. 236. a. 268. b. 54. b.
What shall be said a statute or act of parliament, where the king only is mentioned, and where not, 98. a. b.
Where the statute law and common law meet, which shall be preferred, 49. a.
Where a statute shall be extended by equity to other persons than are named therein, 290. a.

Where

Where a statute speaking of a reversion shall extend to a remainder, *et e converso*, 280. b. 356. a.
Where a statute shall extend by equity to other actions than are mentioned, 54. b. 365. b.
Where a statute shall extend by construction to another manner of title or conveyance than is mentioned, 326. a. 365. b.
Where the generality of the words of a statute shall be restrained by equity, and construction made against the letter, 272. a. b. 290. a. 360. a. 365. b. 366. a. 381. b.
Where the recital of a statute in other words shall be good, and where not, 98. b.
Shall never be construed to prejudice an innocent person, 360. a.
What is one, what not, is to be determined by the judges, 98. b.
Is most naturally expounded by some other part of itself, 383. b.

Magna Charta, Edit. Anno 9 *Regis H.* 3.

The divers applications in law of this statute, 81. a.
The several times it hath been confirmed, 81. a.
No other but a confirmation of the common law, 81. a. 115. b.
Judgment or statute against this charter, void, 81. a.
Why said to be made 20 *H.* 3, when in truth it was 9 *H.* 3. 43. a.
Magna Charta, c. 2, of reliefs, 36. a. 83. b. 106. a.
——— c. 4, of waste, 53. b.
——— c. 7, of quarantines, 32. b.
——— c. 11, of common pleas, 71. b.
——— c. 20, of castleguard, 70. a.
——— c. 29, of wager of law. Who said to be *ballivus* within this statute, 168. b.
——— c. 32, of alienation of part of the tenancy, 43. a.
——— c. 36, of mortmain, 2. b.

Merton, Edit. 20 *Regis H.* 3.

Merton, c. 1, of dower, 32. b.
——— c. 3, of redisseisin, 154. a. and b.
——— c. 5, of usury against an infant, 246. b.
——— c. 9, of wards, 76. a. 80. a. 81. a.
——— c. 8, of limitation, 114. b. 115. a.

Marlbridge, Edit. 52 *Regis H.* 3.

Marlbridge, c. 17, of wards, what shall be said *legitima ætas* within this statute for the heir to have an account against the guardian in socage, 89. a.
——— c. 22, of replevins, 145. b.
——— *c. ult.* which giveth a writ of entry in the *post*, 238. b. 239. a.

Westm. 1. *Edit. Anno* 3 *Regis E.* 1.

Westm. 1, c. 13, of rapes, 123. b.
——— c. 21, of waste by guardians, 53. a.
——— c. 26, of extortion, 368. b.
——— c. 36, of *ayde pur file marier et faire fits chivaler*, 162. b.
——— c. 38, of limitation, 114. a. 115. a.
——— c. 40, of counterplea of voucher, 358. b.

Glocester, Edit. Anno 6 *Reg. E.* 1.

Glocester, c. 1, of damages, 359. b. 360. a.
——— c. 3, of collateral warranty, and the exposition of the several parts of this statute, 365. a. b. 366. a. 381. a. and b. 382. a. and b. 383. a. and b.
——— c. 5, of waste, 53. b. 54. b. 200. b. 247. b. 355. b.
——— c. 6, of *mortdancestor* given to the heirs of several degrees from the common ancestor, 164. a.
——— c. 11, of resceit of tenant for years, &c. and its exposition, and to what persons it extendeth, 46. a. *Vide* Stat. 21 *H.* 8. c. 15.

De Religiosis, Edit. Anno 7 *Regis E.* 1.

De Rel. cap. 1, of mortmain, 2. b.

Acton Burnell, Edit. Anno 11 *E.* 1.

Acton Bur. cap. 1, of recognizance, 289. b.

West. 2 *Anno* 13 *Reg. E.* 1.

Westm. 2, *cap.* 1. *De donis conditionalibus*, and what alienations are restrained by this statute, and what not, 18. b. 19. a. 24. a. 223. b. 224. a. 262. a. 327. b.
The occasion of making this statute, and the commendation of the makers thereof, 19. a. 392. b.
Westm. 2, *cap.* 3, of *cui in vita*, and the resceit of femes, 280. a. 352. b. 353. a. 355. a. b. 356. a.
——— *cap.* 4, which giveth a *quod ei deforceat*, and the exposition of it, and to what persons and actions it extendeth, 331. b. 354. b. 355. a. and b. 356. a.
——— *cap.* 5, of *quare impedit* and *darrein presentment*, 344. b.
——— *cap.* 9, of forejudger of mesnes, and to what persons this statute extendeth, and to what not, 100. a. b.
——— *cap.* 12, of auditors and account, 89. a. 295. a.
——— *cap.* 13, of appeals, 139. b. 289. a.
——— *cap.* 18, of *elegit* and executions and how the sheriff ought to demean himself therein, 289. b.
——— *cap.* 21, of *cessavit*, 154. a.
——— *cap.* 23, of waste by jointenants and tenants in common, 200. b.
——— *cap.* 24, of a writ of entry in *consimili casu*, 54. b.
——— *cap.* 26, of double damages in a redisseisin, 154. a.
——— *cap.* 35, of ravishment of ward, 136. b.
——— *cap.* 38, of jurors, 158. a.
——— *cap.* 45, of execution by *scire facias* after the year, 291. a.

De Mercatoribus, Edit. Anno 13 *Reg. E.* 1.

De Mercatoribus, cap. 1, of recognizance, and the exposition of the parts of this statute, 286. b. 290. a.
Anno 18 *E.* 1, *quia emptores terrarum*, 43. b. 98. b. 143. a.
Anno 28 *E.* 1, *artic super chart. cap.* 9, of jurors, 152. a.

ST

Stat. *Edit. Tempore Regis E.* 3.

Anno 1 *E.* 3. *cap.* 12, of alienations without licence, 43. b.
Anno 25 *E.* 3. *cap.* 19, of protections, *quia indebit'*, 131. b.
Anno 31 *E.* 3. *cap.* 11, of administrators, 133. b.
Anno 34 *E.* 3. *cap.* 15, of alienations without licence, 43. b.
Anno 34 *E.* 3. *cap.* 16, of nonclaim, 262. a.
Anno 36 *E.* 3. *cap.* 15, of counts not abating for want of form, 304. b. *Vide title* Pleadings.
Anno 38 *E.* 3. *cap.* 4, of obligations in the third person made void, and to what bonds construed to extend, and to what not, 229. b. 230. a.

Stat. *Edit. Temp. Regis R.* 2.

Anno 1 *R.* 2. *cap.* 9, of feoffments for maintenance, 369. a.
Anno 2 *R.* 2. *cap.* 10, of assises *in confinio comitatus*, 154. a.
Anno 9 *R.* 2. *cap.* 2, of villeins, 124. b. 125. a.
Anno 12 *R.* 2. *cap.* 2, of placing officers of justice, 134. a.
Anno 16 *R.* 2. *cap.* 5, of *præmunire*, 130. a.

Stat. *Edit. Temp. Regis H.* 4.

Anno 1 *H.* 4. *cap.* 6, concerning grants by the king, and what persons are restrained by this act, and what not, 133. a.
Anno 2 *H.* 4. *cap.* 7, of nonsuits, 139. b.
Anno 4 *H.* 4. *cap.* 17, of age to enter into religion, 157. a.

Stat. *Edit. Temp. Regis H.* 5.

Anno 2 *H.* 5. *cap.* 3, of jurors, and how expounded by equity, 272. a. b.

Stat. *Edit. Temp. Regis H.* 6.

Anno 8 *H.* 6. *cap.* 9, of forcible entry, 257. b.

Stat. *Edit. Temp. Regis H.* 7.

Anno 4 *H.* 7. *cap.* 17, of the wardship of the heir of *cestuy que use*, 84. b.
Anno 4 *H.* 7. *cap.* 24, of fines, 262. a. 326. a. 372. a. b.
Anno 11 *H.* 7. *cap.* 20, of discontinuance of women's jointures, and what shall be said an alienation of the wife within the statute, and what not, 326. b. 365. b. 366. a. 381. a.
Anno 19 *H.* 7. *cap.* 15, of uses, 91. a. 117. a.

Stat. *Edit. Temp. Regis H.* 8.

Anno 7 *H.* 8. *cap.* 4, of avowries by recoverors, 104. b.
Anno 21 *H.* 8. *cap.* 4, of sale of lands by executors, 113. a.
Anno 21 *H.* 8. *cap.* 15, of falsifying recoveries by lessees for years, and of avowries by the recoverors, 46. a. 104. b.
Anno 21 *H.* 8. *cap.* 19, of avowries, and the exposition of several parts of the statutes, 268. b. 312. a.
Anno 23 *H.* 8. *cap.* 3, of attaints, 294. a.

ST

Anno 23 *H.* 8. *cap.* 5, of giving the special matter in evidence by an officer authorized by the commission of sewers, 213. a.
Anno 23 *H.* 8. *cap.* 9, of recognizance and statute-staple, and the exposition of the parts of this statute, 289. b. 290. a. *Vide* Stat. 32 *H.* 8. *cap.* 5.
Anno 26 *H.* 8. *cap.* 13, of forfeiture of lands for treason, 372. b. 392. b.
Anno 27 *H.* 8. *cap.* 10, of uses, 187. b. 237. a. 272. a. 287. a.
Anno 27 *H.* 8. *cap. eod.* of women's jointures, and what shall be said a good jointure with this statute, and what not, 36. b. *per tot. pag. Vide tit.* Dower.
Anno 28 *H.* 8. *cap.* 15, of trial before commissioners, for piracy, robbery, &c. upon the sea, 391. a.
Anno 32 *H.* 8. *c.* 1, and 34 *H.* 8. *c.* 5, of wills and wardships, and the exposition of the several parts of these statutes, 76. a. 78. a. *per tot. pag.* b. 111. b. *per tot pag.*
Anno 32 *H.* 8. *c.* 2, of limitations, and what actions and services shall be said within the statute, and what not, 115. a.
Anno 32 *H.* 8. *c.* 5, of extents and executions, and the exposition of the several parts of this statute, 298. b.
Anno 32 *H.* 8. *c.* 7, of tithes, and the remedy for them, 159. a.
What shall be said a pretensed right or title within this statute, and what not, 369. a.
What persons may buy or sell a pretensed right or title within this statute, and what not, 369. a. b.
Of what estate such pretensed right may be, *ibid.*
By what way or means such person may gain such pretensed right or title, and by what not, 369. b.
Anno 32 *H.* 8. *c.* 28, of leases by tenants in tail, husband and wife, and spiritual corporations, and what things requisite to the perfection of such leases, and what not, 44. a. and b. 338. a.
Anno 32 *H.* 8. *c. eod.* of discontinuance of the wife's estate by the husband, and the exposition of the several clauses in this branch of the statute, 326. a. *per tot. pag.*
Anno 32 *H.* 8. c. 31, of recoveries suffered by tenants for life, 362. a. *Vide* Stat. 14 *Eliz. c.* 8.
Anno 32 *H.* 8. *c.* 32, of partition between jointenants and tenants in common, and the exposition of the parts of this statute, 169. a. 173. a. b. 187. a.
Anno 32 *H.* 8. c. 33, of descents which take away entries, and the exposition of the several parts of this statute, 238. a. 265. a. *Vide tit.* Entry Congeable.
Anno 32 *H.* 8. *c.* 34, of conditions, and the exposition of the several parts of this statute, and what person shall take advantage of the condition within this statute, and what not, 215. a. b.
Anno 32 *H.* 8. c. 36, of fines, 372. b. *Vide* Stat. 4 *H.* 7. *c.* 24.
Anno 32 *H.* 8. c. 37, of remedy for the arrearages of rents, and the exposition of all the parts of this statute, 162. a. and b. *per tot. pag.* 351. b.
Anno 32 *H.* 8. c. 38, of marriages, 235. a.
Anno 32 *H.* 8. *c.* 46, and 33 *H.* 8. *c.* 21, concerning the erection of the court of wards, 77. a.
Anno 34 *H.* 8. *c.* 5, of wills and wards. *Vide* Stat. 32 H. 8. *c.* 1.
Anno 34 *H.* 8. *c.* 20, of recoveries against tenant in tail,

tail, the reversion or remainder in the king, and the exposition of the several parts of this statute, 335, a. 372. b. 373. a.
Anno 35 *H.* 8. *c.* 2. of trial of treason committed out of the realm, 261. b.

Stat. *Edit. Temp. Regis E.* 6.

Anno 2 *E.* 6. *c.* 6, of remedies for subtraction of prædial tithes, 159. a.
Anno 2 *E.* 6. *c.* 8, concerning the finding of offices, and the several benefits arising by the same statute, 77. b. *per tot. pag.* 245. a.
Anno 3 & 4 E. 6. *c.* 4. of pleading a *constat* or *inspeximus* of the king's letters patents, 225. b. *Vide* Stat. 13 *Eliz. c.* 6.

Stat. *Edit. Temp. Reginæ Eliz.*

Anno 13 *Eliz. c.* 6, of pleading a *constat* or *inspeximus* of the king's letters patents, 225. b. *Vide* Stat. 3 & 4 *E.* 6. *c.* 4.
Anno 13 *Eliz. c.* 10, of leases by ecclesiastical corporations, and the exposition of the parts of this statute, and why made, 44. a. and b. *Vide* Stat. 32 *H.* 8. *c.* 28.
Anno 13 *Eliz. c.* 15, against fraudulent conveyances, *&c.* and how it shall be extended by equity, 76. a. 290. b.
Anno 14 *Eliz. c.* 8, of feigned recoveries suffered by tenant for life, 280. b. 356. a. 362. a.
Anno 18 *Eliz. c.* 10, of leases by spiritual persons, 44. a. and b. *Vide* Stat. 32 *H.* 8. *c.* 28. and 13 *Eliz. c.* 10.
Anno 12 *Eliz. c.* 4, of fraudulent conveyances, *&c.* and who shall be said a purchaser within this statute, and who not, 3. b. 290. b.
Anno 27 *Eliz. c.* 6, of jurors, 272. b.
Anno 31 *Eliz. c.* 6, of simony, and the exposition of it, 120. a.

Stat. *Edit. Temp. Regis Jacobi.*

Anno 1 *Jac. c.* 3, of estates made to the king by bishops, 44. a. *Vide* Stat. 13 *Eliz. c.* 10. and 18 *Eliz. c.* 10.
Anno 7 *Jac. c.* 5, of giving a special matter in evidence by the king's officers, 283. a. *Vide* Stat. 23 *H.* 8. *c.* 5.

Statute-Merchant and Staple. *See* Execution, Stat. *Acton Burnell*, Stat. *De Mercatoribus*, Stat. 32 *H.* 8. *c.* 5.

Stethe or *Stede.*

What it is, 4. b.

Steward. *See* Courts.

The etymology and signification of the word (seneschal), 61. a. b.
The office and duty of a steward of a manor, 61. b.
The retainer of a steward of a court, good without deed, *ibid.*
In what courts the steward is judge, and in what not, 58. a.

Stowe.

What it is, 4. b.

Summons and Severance. *See* Detinue.

Summons, what and whence derived, 158. b.
The several kinds of summons, and by what persons it ought to be made, *ibid.*
Severance what, and the divers sorts of severance, 139. b.

Surrender. *See* Copyhold, Waste.

The description of a surrender, 337. b.
The several kinds of surrenders, 338. a.
Where and how a future interest may be surrendered, 338. a.
Where and of what things a surrender shall be good without deed, and where and of what not, 338. a.
Where the acceptance of a void estate shall be a surrender, 218. b.
Where the feoffment of a particular tenant to him in the reversion or remainder shall amount to a surrender, 42. a. 252. a.
Where tenant for life and he in the reversion join in a feoffment by parol, this shall be a surrender of the tenant, and the feoffment of him in the reversion, 302. b.
Where tenant for life makes a lease for his own life to his lessor, the remainder to his lessor and a stranger in fee, this shall be a surrender for one moiety, and forfeiture for the other, 355. a.
Where and to what respects a particular estate after surrender shall be said to have continuance, and where and to what not, 338. a. b.
Where a surrender to one jointenant shall enure to both, 192. a. 214. a.
Where a surrender upon condition shall be good, 218. b.
Where a freehold and inheritance may be conveyed by surrender in court, 59. b.

Suspense. *See* Curtesy, Discent, Extinguishment, Grants, Knight Service, Warranty.

The signification and derivation of the word, 313. a.
Where a seigniory or rent-service may be suspended in part, and *in esse* for part, and where not, 148. b.
To what purposes a seigniory suspended in part of the estate shall be said to continue, and to what not, 314. a.
Where a thing in suspense in the ancestor shall take effect by discent in his heirs, 313. a. b.
Where the debtor makes the debtee his executor, the debt is in suspense, 264. b.
Where by the intermarriage of a feme executrix with the debtor, the debt shall be in suspense, *ibid.*

Tail. *See* Attornment, Conditions, Devise, Discontinuance, Entry Congeable, Heirs, Leases, *Præmunire*, *Quid Juris Clamat*, Recoveries, Stat. 4 *H.* 7. *c.* 24. 32 *H.* 8. *c.* 28. 32 *H.* 8. *c.* 36. 34 *H.* 8. *c.* 20. 26 *H.* 8. *c.* 23. Warranty.

The etymology and derivation of the word (tail), 18. b. 22. a.

TA

The division of estates tail, 19. b.
The description of a tenant in general tail, 19. b.
The description of a tenant in special tail, 20. b.
What things may be intailed, and what not, 19. b. 20. a. 392. b.
Where an estate tail may be created without the word (heirs), 20. b.
Where it may be created without the word (body), 20. b.
Where without the word (engendered), 20. b.
What things incident to an estate tail, 224. a.
Where by a gift in tail a reversion is settled in the donor, 22. a. b.
Where the will of the donor in estates tail shall be observed, and where not, 20. b. 21. a. 24. b.
Where a man shall inherit *per formam doni*, who is not issue of the body of the donee, 20. b. 26. b. 220. a.
The tenure between such donor and donee, and where the tenant shall hold as his donor holds over, and where not, 23. a.
A gift to a man and a woman not married, or where one or both are severally married, and to the heirs of their bodies, a good tail, 20. b. 25. b.
Where a man may convey an estate to himself in tail, 22. b.
A gift to a woman and two men, and the heirs of their bodies, how it shall enure, 25. b. 184. a.
A gift to two husbands and their wives, and the heirs of their bodies, how it shall enure, 25. b.
A gift to one and his heirs, to have to him and the heirs of his body, *& è converso*, what estate, 21. a.
A gift to a man and the heir of his body, *et uni hæredi ipsius hæredis*, a good tail, 22. a.
Where the issue male inheritable *per formam doni*, ought to convey himself by males, and the female by females, 25. a. 377. a.
Where upon a gift the husband shall take in special tail, and the wife nothing, or but for life, *& è contra*, and where construction shall be made according to the inclination of the word (heirs), 26. a. *per. tot. pag.*
A gift to the husband and wife, and the heirs of the body of the survivor, what estate, and when said to vest, 26. a.
A gift to a man and his heirs of the body of such a feme a good tail, and they shall be intended to be gotten by the donee, 26. b.
A gift to a man and the heirs of the body of his father a good tail; *secus* of a gift to him and the heires of his body, &c. 26. b. 27 a.
A gift to a man and his heirs males or females, a fee simple; *secus* of a devise, 27. a.
A gift to one and the heirs males of his body, with condition to revert if he die without heirs females of his body a void condition, 164. a.
A gift to a man to have to him and the heirs males of his body and to him and the heirs females of his body, how it shall be construed, 377. a.
Where and what leases by tenant in tail shall bind his issue at this day, and where and what not, 44. a. b.
Where a charge in fee by tenant in tail upon the land, shall bind his issue, and where not, 343. b.
What actions in the realty tenant in tail may have, and what not, 326. b.
What act or conveyance was a bar to an estate-

TA

tail at the common law, and what at this day, 372. a. b.
Where an estate tail may be barred at this day, notwithstanding a reversion or remainder in the king, and where not 372. b. 373. a. 375. a.
A recovery in a writ of right or *cessavit*, no bar. 373. a.
A release by tenant in tail, no bar to his issue of a warranty intailed, attaint, or writ of error, 20. a. 392. b. 393. a.

Tail after Possibility of Issue Extinct.

The description of a tenant in tail after possibility, and why so called, 27. b. 28. a.
The privileges which such tenant hath above those of a lessee for life, 27. b. 28. b. 316. a.
The qualities of his estate agreeing with those of a lessee for life, 28. a.
Where his assignee shall not have those privileges, 28. a. 316. a.
By what means such estate may be created and altered, and by what not, 28. a.
What persons may be tenants after possibility, and what not, 28, b.

Taini and *Tainland.*

What they are, 5. b. 86. a.

Tallage.

What persons are freed by law from tallage, 31. a, 75. a.

Tenant.

Description of the word, 1.

Tenant at Will, and Sufferance. *See* Emblement, Release, Stat. 6 *Anne*, *c.* 18.

The description of a tenant at will, 55. a.
What shall be said a determination or countermand of the will of the lessor, and what not, 55. b. 57. b.
What shall be said a determination in law of the will of the lessee, and what not, and why, 55. b. 57. a.
What profit such lessee shall have which comes by his own manurance after the will determined, and what not, 55. b. 56. a.
Where he shall have the corn, and where not, and why, 55. a. b.
The remedy which he hath to come by the corn or other goods after the will determined, 55. a. 56. a.
Where a tenant at will shall be punished for waste, and where not, 57. a.
Cannot determine his will before or after the day of payment, 55. b.
What remedy the lessor hath for a rent reserved upon a lease at will, 57. b.
The difference between a tenant at will by the common law, and by the custom, 62. b. 63. a. 93. b.
Who properly said to be a tenant at sufferance, 57. b. 271. a.

Where the termor continuing in possession after his estate ended, shall be a tenant at sufferance, or a disseisor, at the election of his lessor, 57. b.
The difference between a tenant at will and at sufferance, *ibid.*
Where a gardian in chivalry holding over his estate, shall be an abator, 271. a.

Tenants in Common. *See* Accompt, Grants, Jointenants, Partition, Stat. *West.* 2. *c.* 23. 32 *H.* 8. *c.* 32. 4 and 5 *Annæ*, *Quære Impedit*, Waste.

Tenancy in common described, and whence so called, 188. b.
Where a gift to two in their politick capacities, or to one in his politick and another in his natural capacity, shall enure to them in common, 189. b. 190. a.
Where a man may be tenant in common with himself, and where with himself and another, 190. a. 193. b.
Where a verdict finds that a man hath *duas partes manerii in tres divisas*, this shall not be intended in common; *secus* where it is *dividendas*, 190. b.
Where tenants in common may be by prescription, 195. a. b.
Where and in what actions tenants in common shall join, and where and in what they ought to sever, 195. b. 196. a. 197. a. b. 198. a. b.
Where in an action by two tenants in common, the release of one to the defendant shall go in benefit to his companion, 197. b.
Where a joint action between tenants in common shall survive and where not, 198. a.
Where tenants in common may make partition, and what partition between them shall be good, and what not, 190. b.
Where tenants in common may be of chattels, 198. a. b. 199. a.
Where and what actions one tenant in common may have against his companion, and where and what not, 199. b. 200. a. and b.

Tender and Refusal. *See* Avowry, Condition, Homage, Marriage, Mortgage.

The signification of the word (tender) 211. a.
Where upon tender of money, &c. a refusal by the party shall be a perpetual bar to him for the same money, and where not, 207. a. *per. tot. pag.* 209. a. b.
Where a tender and refusal without *uncore prist* shall be a good plea in debt upon an obligation, and where not, 207. a.
Where a tender of money in bags, without showing or telling shall be sufficient, 208. a.
Where a tender and refusal shall give a third person a title of entry or forfeiture, and where not, 209. a.
Where no place is expressed in the condition for payment of money or performance of other acts, where tender and performance ought to be made, 210. a. b. 211. a. b. 212. a.

Tenellare or *Tanellare*.

The signification of the words, 5. a.

Tenure. *See* Reservation, Stat. *Magna Charta*, *cap.* 23, and for each Tenure see its proper Title.

The several acceptations in law of the word (tenure), 1. a.
By a grant of all tenements what shall pass, 6. a. 19. b. 154. a.
Where the tenant might alien parcel of his tenancy before the statute of *quia empt. terrarum*, and where not, 43. a.
The division of tenures, 95. a.
The tenure between the donor and donee in tail, since the statute of *Westm.* 2. and how construed, 23. a. 143. a.
What said to be a tenure in *capite*, and whence so called, 108. a.
Where a tenure may be of the king as of his person, and no tenure in *capite*, 108. a.
Tenure by cornage, what, 106. b.
Tenure to be *vantrarius regis donec usus fuerit pari solearum pretii* 4 *d.* 69. b.
Tenure to be a hangman, 86. a.
Tenure of all lands was originally from the king, 65. a.
Cannot be immediately of several lords, 83. a 150. b.
Cannot be of one lord by doing service to another, 83. a. 150. b.

Testament. *See* Devise, Executors.

The etymology of the word, 322. b.
Testamentum quid et quotuplex, 111. a.
The favourable exposition of testaments, 112. a.
Where land shall pass by wills nuncupative, and where not, 111. a.
Where a waranty may be created by a will, and where not, 368. a.
At what age an infant may make a will, and at what not, 89. b.

Testimonies. *See* Challenge, Evidence, Juror.

What person capable to be a witness, and what not, 6. a. b.
Where the witnesses shall be joined to the inquest for the trial of a deed, 6. b.
In what cases a woman admitted to be a witness, and in what not, 6. b. 25. a.
Where the party to the usurious contract shall not be a witness in an information against an usurer, 6. b.

Tillage.

The commendation of agriculture, and how respected in law, 85. b.
How husbandmen anciently were called, 5. b.
The inconveniences which come to the commonwealth by converting tillage into pasture, 85. b.

Time. *See* Condition, Day, Stat. *Merton*, *c.* 8. *West.* 1. *c.* 38. 32 *H.* 8. *c.* 2. 1 *Jac.* 1.

What said to be time of limitation, and the several sorts of it to several purposes, 114. b. 115. a.
The time of limitations in actions anciently, and at this day, 115. a.

What

TR

What said to be time of memory, 113. b. 114. a. 115. a.
Where, and to what purposes the law hath limited a year and a day to be a legal and convenient time, 254. b.
Retainer of a servant generally, for what time it shall be construed, 42. b.
What time sufficient to gain a name by reputation, and what not, 3. b.

Tithes. *See* Stat. 32 *H.* 8. *c.* 7. 2 *E.* 6. *c.* 6.

How they became temporal inheritances, and the several remedies for them at this day in the temporal courts, 159. a.

Title. *See* Right.

The derivation and description of a title, 345. b.
The generality of the word, and how every right is a title, but not *è contra*, 345. b. 347. b.
Where by the release of a right, a title is released, *sic è converso*, 345. b.

Town.

What it is, 115.

Traverse. *See* Issue, Office, Pleading, Stat. 2 *E.* 6. *c.* 8.

Where a traverse shall be admitted on a traverse, and where not, 282. b.
Traverse of the place, how to be, *ibid.*

Treason. *See* Accessory, Attainder, Escheat, Felony, Stat. 26 *H.* 8. *c.* 13. 35 *H.* 8. *c.* 2.

Where the party arraigned for treason stands mute he shall have judgment by attainder as if he were convicted, 391. a.
An intent to murder the queen, treason, 133. b.

Trespass. *See* Continual Claim, Release, Stat. 6 *Annæ*, *c.* 15.

Transgressio, quid et unde, 57. a.
Trespass, *quare consanguineum et hæredem cepit*, by whom it lies, and against whom, and against whom not, 84. a.
Where it lieth by the copyholder against his lord, 60. b. 61. a.
Where the abbot and monk shall have trespass for beating the monk, 132. b.
Where the lessor shall have trespass against his lessee at will, or his assignee before entry, 57. a.
No accessories in trespass, 57. a.

Trial. *See* Baron, Bastardy, Challenge, Demurrer, Juror, Nobility, Plenarty, Record, Stat. 35 *H.* 8. *c.* 3. *Venire*, Verdict.

Trial, *quid et quotuplex*, 124. b. 125. a.
The antiquity of trial by twelve men, 155. b.
How the law delighteth in the number of twelve, 155. a.

VE

Trials otherwise than by a jury of twelve men, 74. a.
In trials from what place the jury ought to come, and from what not, 125. a. b.
Where upon issue of heir or not heir, trial shall be where the birth is alleged, and not where the land lieth, *et è converso*, 125. b.
Upon issue *quod rex non concessit*, &c. trial shall be where the land lieth, and not where the letters patent bear date, *ibid.*
Where the matter extendeth into a place at common law, and a place within a franchise, where it shall be tried, *ibid.*
Where one defendant pleads to the writ, and the other to the action, which shall be tried first, *ibid.*
Where the plea of one defendant being to part, and the plea of the other to the whole, that which goeth to the whole shall be tried first, and where not, 125. b.
Where a matter alleged out of the realm may receive trial, and how, 261. a. b.
Where the original act is done within the realm, and part out of the realm, upon which issue is taken, how this shall be tried, and whence the jury shall come, 161. b.
How murder done in a foreign country may be tried and punished here, 74. a. 161. a.
Where one dies within the realm upon a wound given out of the realm, how it shall be tried, 74. b.
In what cases a certificate shall amount to a trial, 74. a.
How, and by whom the reasonableness of a thing shall be tried, 56. b. 59. b. 62. a.
Where a nobleman being arraigned shall be tried by his peers, 156. b. 294. a.
Of things done beyond sea, how to be, 261.

Twaite.

What *twaite* is, 4. b.

Vaccaria.

The signification of it, 5. b.

Valuation. *See* Dower, Livery, *Primer Seisin*, Marriage.

The estate, revenue, and valuation of a duke, earl, baron, &c. 69. a. 83. b.
The revenue and valuation of a knight, 68. b. 69. a.
The livelihood and valuation of a yeoman, 69. a.

Venire. *See* Trial.

Ventre Inspiciendo.

The form of such writ, and where it lieth, 8. b.

Verdict. *See* Attaint, Issue, Trial.

The signification and derivation of the word, 226. a.
The several kinds of verdicts, 226. b. 227. b. 228. a.
The form of a general verdict, 226. b.
When a bar, 278. b.
Where a special verdict may be found upon a slight point in issue, 226. b.

A verdict

A verdict finding a matter incertainly, not good, 227. a.
Where a verdict finds part of the issue, and nothing for the residue, it shall be insufficient for the whole; *secus* where it finds more than the issue, 227. a.
Where an estoppel or a warranty may be found by verdict, 227. a.
Where the jury may vary from their verdict, and where not, 227. b.
Where a verdict found against the letter of the issue shall be good, and where not, 114. b.
Where the delivery of a letter, or other writing of evidence to the jury after their departure from the bar, shall avoid the verdict, and where not, 227. b.
Where the jury may give a privy verdict, and where not, 227. b.
A jury sworn and charged in case of life and member cannot be discharged before verdict, *ibid.*
In what actions and upon what issues a special verdict may be given, 227. a. b.
Where a general verdict in a matter in law shall be good, 228. a.

Vestura Terræ.

What passes by it, 4. b.

Village. *See* City, Custom, Manor, Trial.

The description of village, and whence so called, 115. b.
Where the village or town shall be said in law to continue, notwithstanding the decay of the houses, 115. b.
The number of towns in *England* and *Wales*, 116. a.
Every village a borough, but not *e converso*, 115. b.
Where *nul tiel ville* is pleaded, whence the jury shall come, 125. b.

Villenage and Villein. *See* Continual Claim, Freehold, Manumission, Prescription.

The etymology of the word, 116. a.
The description of a tenure in villenage, 116. a.
How villeins were anciently called, 116. a.
How villenage first began, 116. b.
Where a freeman may hold in villenage, 116, a. b. 117. b.
The divers kinds of villeins, 117. b. 120. a. b.
What inheritances, or other things of a villein, his lord shall have, and what not, 117. a.
Where a lessee at will or for years, &c. shall have the perquisite of his villein in fee, *ibid.* 124. a. b.
In what right a bishop, &c. shall be said seised of the perquisite of his villein, 117. a. 124. b.
Where by the entry of the lord upon his villein tenant in tail, his issue shall be barred for ever, 117. a.
Where an alienation, escheat, or discent of the lands of a villein, shall bar the title of his lord, before entry, 118. a. b.
Where a disseisin to the villein shall prejudice the lord of his entry, and where not, 118. b.
What shall be said a sufficient claim or seisure by the lord, to vest in him the property of his villein's goods, and what not, 118. b. 145. b. 283. a.
Where laches of entry or seisure shall not prejudice the king of the lands or goods of his villein, 118. a. 119. b.
Where the lord may justify his entry into land, to make claim to a reversion, or other profit of his villein, 119. a. b.
What shall be said a sufficient claim by the lord, to vest in him the advowson of his villein, and what not, 119. b. 120. a.
Villein regardant described, and whence so called, 120. b.
Who said to be a villein in gross, 120. b.
How a man ought to prescribe in a villein regardant, and how in a villein in gross, 121. a.
What confession in a court of record shall make the party a villein, and what not, 122. b.
Where the father is a villein, and the mother free, *et e contra*, how their issues shall be reputed in law, 123. a.
A bastard no villein, unless by his own confession, 123. a.
Where and what actions a villein or niefe shall maintain against their lord, and where and what not, 123. b. 124. a. 126. b.
In what cases the villein shall be privileged against the seisure of his lord, albeit he is not infranchised, 136. a. b. 137. b.
Where an action lieth by the lord against the husband for marrying his niefe, and where not, 136. a. b.
Where and what charges of the villein upon his land are voidable by the lord after entry, and where and what not, 184. b.
Where and by what means the lord may be disseised, or dispossessed of his villein, and by what not, 306. b. 307. a.
Where the disseisee may seise his villein regardant, before re-continuance of the manor, to which, &c. and where not, 307. a.

Virgata Terræ.

What it is, 5. a. 69. a.

Visitor.

What power he has, 96. a.
Who he is, 345.

Void and Voidable, 341. b.

Voucher. *See* Bastard, Recovery in Value, Stat. *W.* 2. *c.* 40. Warranty.

The etymology and signification of the word, 101. b.
The several sorts of vouchers, 102. a.
The several process against the vouchee, and upon what default after process judgment shall be given against the tenant, and upon what not, 101. b. 393. a.
Where upon judgment given against the tenant, he shall have judgment over, against the vouchee, and where not, 101. b. 393. a.
Where the tenant, after he hath been impleaded, and judgment given, shall have a *warrantia chartæ*, or vouch again, and where not, 102. a. 393. a.
Where the warranty descends upon the heir at common

common law, and the land to a special heir, the tenant may vouch both, 370. a. b.
Where the special heir shall join with the heir at common law to deraign a warranty paramount, and to whom the recompense in value shall enure, 376. b.
Where and how a man or his assignee may vouch, by reason of a warranty annexed to a release or confirmation where nothing passed, 385. a. b.
Where a man may vouch himself by reason of a warranty, 390. a. 384. b.
Where the wife being received shall vouch her husband *et è converso* the husband himself and his wife, albeit the warranty be in suspense, 390. a.
Where and how an infant *in ventre sa mere* may be vouched, 390. a.
Where the feoffee may vouch as of lands discharged of a rent charge or seek: *secus* as of lands discharged of a rent service, 388. b. 380. a.
Where a purchaser shall vouch as heir, 384. b.

Uses. *See* Intentions, Revocations, Stat. 4 *H.* 7. *c.* 17. 19 *H.* 7. *c.* 15. 27 *H.* 8. *c.* 10.

The definition of an use, 272. b.
The several ways whereby uses may be raised, 271. b.
Where there may be two uses *in esse* of the same land at the same time, and where not, 271. b. 272. a.
What persons may be seised to the use of others, and what only to their own use, 19. b.
What shall be said a sufficient consideration of blood to raise an use, and what not, 123. a. 237. a.
Where uses shall ensue the nature of the land, 23. a.
Where by the same conveyance an old use is revoked, a new may be created, 237. a.
Where a feoffment is made to the use of a last will, or of such persons as shall be named in a last will, in whom the use may be said to repose in the *interim*, 111. b. 112. a. 271. a. b.
What is a sufficient consideration to raise an use, 270. a.
An unlimited use, when it remains in the feoffee, 272. a.
Gives *cestuy que use* neither *jus in re* nor *jus ad rem*, 272. b.
Cestuy que use hath no remedy but in a court of equity, 272. b.

Usurpation. See *Quare Impedit*, Presentation.

The several acceptations of the word, and how it differeth from a disseisin, intrusion, &c. 277. a. b.
Of an advowson, how it operates, 402. a.

Wager of Law.

Wager of law, what, and the manner of it, and whence so called, 294. b. 295. a.
Where it lieth, and in what actions, and where and in what not, 172. b. 295. a. *per tot. pag.*
Where the husband and wife shall wage their law for the debt of the wife before coverture, 172. b.

What persons may wage their law, and what not, 172. b. 295. a.
Where a man shall wage his law of another man's deed, and where not, 295. a.

Wales.

The etymology of the word, 175. b.
The principality of *Wales* holden anciently of the crown of *England*, 97. a.

War. *See* Entry Congeable, Presentation.

What shall be the time of peace, and what the time of war, and how it shall be tried, 249. a. b.
The ancient manner of serving the king in his war, 71. a.
Natives more serviceable for the war than strangers, 69. a.
Rules and observations in art military, 71. a.

Wardship. *See* Guardian, Marriage, Relief, Stat. 4 *H.* 7. *c.* 17. 32 *H.* 8. *c.* 1.

Where the heir of disseisee shall be in ward before recontinuance of his estate, 76. b. 270. a.
Where the heir shall be in ward, albeit his ancestor died not seised, nor without the homage of the lord, 76. a.
Where by the determination of the estate or tenure of the heir, the wardship shall cease, 76. a. b. 248. a.
Where the heir being remitted, or recovers in a *formedon* or *non compos mentis*, &c. shall be in ward, 76. b.
Where the lord shall have a double wardship for the same land, 76. b.
Where the heir of tenant in tail shall be in ward notwithstanding a discontinuance, and to whom, 76. b. 77. a. 78. a.
Where the king, by reason of wardship, shall have the custody of lands holden of other lords, and inheritances which lie not in tenure, and where not, 77. a.
Where the heir at this day shall be in ward, notwithstanding a conveyance over by his father in his life, and where not, 78. a. *per tot. pag.*
Where the heir shall be in ward upon a conveyance by his ancestor, for the advancement of his wife or children, or payment of his debts, and where not, 78. a. *per tot. pag.*
Where a conveyance by the grandfather to the son shall cause wardship, and where not, 78. a.
Where the son shall be in ward, albeit nothing descend, 78. b.
Where the lord shall have the wardship of the land, notwithstanding the marriage of the heir in the life of his ancestor, 75. a. 79. a.
Where a man hath a double title to wardship, one as father, and the other as guardian in chivalry, or socage, in which he shall be said to be in, 84. b. 88. b.
Where the heir of a tenant in socage shall be in ward, 176. a.
Where wardship may be granted without deed, and where not, 85. a. *per tot. pag.*

Wardwit.

What it is, 83. a.

WA

Warranty. *See* Assets, Discontinuance, Estoppel, Rebutter, Recovery in Value, Release, *Scire Facias*, Stat. *Gloucest. c.* 3. 11 *H.* 7. *c.* 20. Voucher.

The description of a warranty, 365. a.

The several kinds of warranties, 363. a. 364. b.

To what things a warranty may extend or be annexed, and to what not, 101. b. 366. a. b. 389. a.

Upon what conveyances a warranty may be created, and upon what not, 371. a. b. 286. a.

What words are requisite to the creation of a warranty in deed, 383. b. 384. a.

Where the word (heirs) is requisite to the creation of a warranty of inheritance, and where not, 47. a. 378. a. 383. b. 384. b. 385. b.

Where no person is mentioned in the clause of warranty, to whom it shall be intended, 383. b.

What words shall amount to a warranty in law of a freehold or chattel, and to what estate a warranty in law is said to be annexed, and to what not, 384. a. b.

Where the word (*dedi*) implied a warranty of inheritance at common law, and where only for the life of the donor, 384. a.

When it shall not bar the king, 19. b.

Where a warranty express shall not take away a warranty in law, 384. a.

The description of a warranty which commences by disseisin, and why so called, 366. b.

Where a warranty, albeit the disseisin be mediate or to another person, shall be said to commence by disseisin, and shall not bar the heir, 366. b. 367. a.

Where a warranty annexed to a feoffment many years after the disseisin shall be said to commence by disseisin, and where not, 367. a. 369. b. 371. a.

Where a warranty upon a feoffment to barretors or extortioners, whereby the tenant waves the possession, shall be said to commence by disseisin, 368. a. 369. b.

Where a third person shall take advantage of a warranty commenced by disseisin to another, 367. a.

A warranty commencing by intrusion, abatement, &c. no bar, 367. a.

Where a warranty annexed to a feoffment *de facto* shall bind the parties, and be good against all but him that right hath, 367. a. b.

The description of a lineal warranty, and why so called, 370. a. 371. a. 375. a.

Where a warranty lineally descending shall be collateral, 370. b. 371. a. 374. b. 376. a. 379. b.

Where a warranty collaterally descending shall be lineal, 370. a. 371. b.

Where the same warranty shall be collateral in respect of some persons, and lineal in respect of others, 371. b. 372. a. 373. b.

Where a warranty shall be lineal to the heir, albeit he conveyeth not his descent from him that made the warranty, 371. a. b.

Where a lineal warranty shall be a bar to a fee simple, but not to an estate tail without assets, 374. a. b. 393. b.

Where baron and feme tenants in special tail discontinue, the warranty of either shall be lineal to the issue and no bar, 373. a.

WA

Where and why a collateral warranty shall be a bar to an estate-tail, and the reversion of the donor, 373. a. 374. b.

Where a warranty shall bar a future right, 365. a. 388. b.

Where a warranty descending in one right, shall bar the heir claiming in another; *secus* of an estoppel, 365. b.

Where a collateral warranty shall not bar a right by succession, 370. a. b.

No bar to a title of entry, 379. b. 389. a.

Where a warranty descending upon an infant or feme covert shall be a bar, and where not, 380. a.

Where the warranty of tenant by the curtesy shall be a bar to the issue at this day, and where not, and what remedy the heir or his issue hath against the alienee, 379. b. 365. a. b. 366. a. 381. a. b. 382. a. b. 383. a. b.

Where the warranty of the husband, being not tenant by the curtesy, shall be a bar to the issue of the wife, and where not, 366. a.

Where the warranty of tenant in dower was a bar at the common law, and how restrained at this day, 365. b. 374. b. 380. a. 381. a.

Where the king shall be barred of a right of possibility of reverter, by the collateral warranty of a subject, and where not, 19. b. 370. b.

Where a warranty descending upon the wife shall hinder her disagreement to an estate made during the coverture, 388. b.

Where a collateral warranty descending upon the issue in tail before the discent of the right shall be a bar to him, and where not, 388. a. b.

Where a warranty shall bar, albeit the estate was not put to right at the time of the warranty made, and where not, 388. b. 389. a.

A collateral warranty is no bar in a writ of dower, or *causa matrimonii prælocuti*, 389. a.

Where tenant in tail to him and his heirs males, the remainder to him and his heirs females, discontinues with warranty, such warranty is lineal to both, and shall bar neither, 377. a.

Where after a discontinuance, a warranty descending upon two daughters, where only one is inheritable to the estate, shall be a bar to the daughter inheritable for the whole, 373. b.

Where tenant in tail dies having two daughters, and one enters and makes a feoffment with warranty, this shall bar the other sister, as to her part, but not as to the part of the feoffor, 373. b. 374. a.

Where a warranty shall descend only to the heir at the common law, 376. a. 386. a. b. 387. a.

Where two brothers being by divers venters, the eldest releases with warranty to the disseisor of the uncle, and dies without issue, after the death of the uncle, the entry of the younger is congeable, notwithstanding the warranty, 387. a.

Where the father upon a mediate descent shall not be bound, or take advantage of a warranty made by or to the son, 11. b. 12. a.

Where the heir shall be bound to a warranty to which his ancestor never was, and where not, 385. b. 386. a.

Where the special heir shall join with the heir at the common law to deraign a warranty paramount, and how the recompense in value shall enure, *ibid.*

Where by warranting the land, all rents, &c. suspended

WA

pended or discharged at the time, are also warranted, and where not, 366. b. 388. b. 389. a.
Where notwithstanding lands especially bound to warranty, the person also of the feoffer shall be bound, 102. b.
Where the condition of an obligation is to defend the lands of the obligee, by an ouster of a stranger, the condition is broken; *secus* of a condition to warrant the lands, &c. 384. a.
Where a warranty may be defeated in part, and stand good for other part, 367. b. 393. a.
Where a warranty made by an infant and one of full age shall be void against the infant, and good for the whole against him of full age, 367. b.
Where a lease for life is made upon condition to have fee with a warranty *in forma prædict'* by the increaser of the estate, the warranty shall increase; *secus* of a lease for years upon such condition, 378. a.
A lease for years, the remainder in fee with warranty *in forma prædict'*, such warranty void to both, 378. b.
A lease to two, the remainder to him that first dies with a warranty *in forma prædict'*, by the death of one, his heir shall have the warranty, 378. b.
Where land by purchase shall be liable to execution in value, in case of warranty by descent, and where not, 102. a.
Where upon a warranty for life the recovery in value shall be in fee, and where but for life, 383. b. 387. a.
Where an assignee shall take advantage of a warranty in law, and where not, and where by way of voucher and where only by rebutter, 384. a. b.
Where a warranty in law and assets shall be a good bar in formedon, 384. b.
What person shall take advantage of a warranty in deed, as assignee by way of voucher, and what not, 384. b. 385. a. b. 390. a.
Where an assignee of part of the land or estate shall vouch as assignee, and where not, and by what means he may take advantage of the warranty, 385. a.
Where a gift in taile is made with warranty to the donee, his heirs and assigns, who makes a feoffment and dies without issue, the feoffee shall not vouch or rebut; *secus* of such a gift before the statute *de donis*, &c. 385. a.
Where a warranty may be raised upon a release or confirmation where nothing passes, and where the party shall take advantage of such warranty by way of voucher, and where not, 371. b. 385. a. b. 337. a.
Where a warranty shall not amend or enlarge an estate, 385. b.
Where the estate being avoided before or after the warranty descended, the warranty annexed is defeated also, 366. a. 367. b. 388. b. 389. a. and b.
Where by a re-feoffment of the feoffer, a warranty to the feoffee, his heirs, and assigns, is defeated; *secus* of a feoffment to the feoffer, and his wife, 389. b. 390. a.
Where such feoffee enfeoffs one of his feoffors, the warranty continues, 390. a.
Where a lease for life or gift in tail to the feoffor shall be a suspension of the warranty during the estates, 390. a.

WA

Where a suspended warranty and assets descending upon the issue in tail, together with the lands discontinued, shall hinder a remitter, 390. a. b.
Where by attainder of felony or treason, a warranty shall be defeated, 390. b. 391. b.
Where tenant in tail releases to his dissseisor with warranty, and after is attainted and pardoned, the warranty shall be void as to his issue before the pardon, but a bar to his issue born after, 391. b. 392. a.
Where a seigniory is granted with warranty, by the escheat of the tenancy, the warranty is defeated, 392. b.
Where a collateral ancestor releases with warranty, and enters into religion, by his deraignment after the warranty is defeated, 392. b.
What works in a release shall extinguish a warranty, and what not, 391. b. 392. b.
Where after a release of the warranty to one feoffor, the feoffee shall vouch the other for a moiety; the same where one jointenant releases, his companion may vouch, 393. a.
Where there shall be two recoveries in value upon one warranty, and where not, 393. a.
Where a warranty lineal and assets descending upon the issue in tail, shall be no bar to his issue after alienation of the assets; *secus* if the issue had been barred in a formedon, by reason of such warranty and assets, 393. b.

Warreccum or *Warrectum Terræ.*

The signification of them, 5. b.

Warren. *See* Forrest.

Waste. *See* Attaint, Parson, *Quod ei Deforceat*, Release. Stat. *W.* 2. *c.* 23. Writs.

The etymology of the word, 52. b.
The divers kinds of waste, 53. a.
The several writs of waste, 54. a.
Against what persons an action of waste lieth, and against what not, 53. a. b. 54. a.
What shall be said waste in houses, 53. a. b.
Where destruction of fruit trees shall be waste, and where not, 53. a.
What shall be said waste in a park, dovehouse, &c. 54. a.
What shall be said waste in trees, and in what trees waste may be done, *ibid.*
Where digging of gravel, mine, &c. shall be waste, and where not, 53. b. 54. b.
The suffering of land to be surrounded, waste, 53. b.
Conversions of arable land into wood, *et è contra*, waste, *ibid.*
What shall be said waste in fences, *ibid.*
What waste *in hominibus*, 53. b.
How waste, destruction, and exile differ, 53. a. b.
By what persons an action of waste lieth, 53. b.
Where the heir shall have an action for waste done in the life of his ancestor, and where not, 53. b. 198. a.
What shall be said a good plea in an action of waste, and what not, 53. a. b. 54. b. 285. a.
Where, by the alteration of the reversion, waste committed before shall be dispunishable, 53. a.
Against what persons a prohibition of waste lay at the common law, and against what not, *ibid.* 316. a.

Where

WA

Where waste lies against tenant by the curtesy, or in dower after assignment, and where not, 54. a. 316. a.
Where an action lieth against the assignee for waste done before the assignment, and where not, 54. a.
Where the tenant shall be punished for waste done by a stranger, and where not, *ibid.*
Where the wife shall be punished for waste done in the life of her husband, *et è converso*, 54. a.
Where an occupant shall be punished for waste, *ibid.*
Where a mean remainder or reversion shall be an impediment to bring an action of waste, and where not, 54. a. 273. 299. b. 338. b.
Where waste lieth against a guardian in chivalry, and the penalty in such action, 54. a.
Destruction to what value shall be said waste, 54. a.
For waste *sparsim*, all the land shall be recovered, *ibid.*
Where tenant for life shall join in an action for waste, 42. a. 53. b.
Where one jointenant or tenant in common, for life or in fee, shall have an action of waste against his companion, and where not, 200. b.
What interest is given to the lessee by the clause, (without impeachment of waste), 220. a.
Where the lessor recovering in an action of waste, shall avoid all mean estates and charges made by the lessee, and where not, 233. b. 234. a.
Where the heir shall have an action for waste done in the life of his ancestor, which the ancestor himself could not, 247. b.
Where the acceptance of a surrender by the lessor after waste done, shall conclude him of his action of waste, 285. a.
Where in an action of waste by tenants in special tail, the death of one without issue shall abate the writ, 285. a.
Where a parson, vicar, &c. shall have an action of waste, 341. a.
Where by the release of him in the remainder in tail to tenant for life of all his right, he shall not have an action of waste; *secus* where he in the reversion in fee makes such release, 345. b.
Where tenant in tail leases for his own life, an action of waste lieth against the lessee, 345. b.
In waste the place wasted the principal, and not damages, 98. a. 355. b.
Where in an action of waste by two, the release of one shall bar the other, and where not, 355. b.
Where in an action of waste summons and severance lieth, and where not, 355. b.
Where an action of waste lieth, albeit the lessor had nothing in the reversion at the time of the waste committed, 356. a.
Where *riens en le reversion* shall be a good plea by the lesse in an action of waste, and where not, 356. a.

Way.

The several kinds of ways, 56. a.
What remedy for a disturbance in a public or private way, and what not, 56. a.

YE

Were and *Were.*

The meaning of the words, 127. a. 287. b.

Wit or *Wita.*

The signification of the words, 187. a.

Witness. *See* Evidence, Testimony.

Woodgeld.

What it is, 234. a.

Words. *See* Exposition of Words.

Worscot.

What it is, 71. a.

Worth.

What it is, 56.

Writs. *See* Action, Annuity, Amerciament, Disseisin, *Quare Impedit*, and each Writ under its proper Title.

Brief, *unde?* 73. b.
The description of a writ, 73. b.
The several sorts of writs, 73. b.
Where writs may be maintained *quia timet*, before any molestation, 100. a.
Where the writ shall be general and the count special, 26. b. 53. a. 54. b. 344. a.
Upon what plea to the disability of the person the writ shall abate, and upon what not, 133. b. 134. a. 135. b.
Where an action well begun determineth in part by the act of law, the writ as to the whole shall abate, and where not, 285. a.
Where the profession of the tenant or defendant in religion *pendente placito* shall not abate the writ, 248. b.
Where the deprivation of the defendant shall abate the writ; *secus* of a resignation, *ibid.*
Where several writs of customs and services lie for the deforcement of one and the same service, 154. a.
Writ *de ingressu sine assensu capituli*, whence so called, and where it lieth, 325. b.
The writ *ex gravi querela*, where it lieth, 111. a.
Do domo reparanda, where it lieth, 56. b. 200. b.
Of error, &c. attaint, &c. follow the nature of the original writ, 139. a.
Of error on a statute, how to be, 54. b.

Year and a Day. *See* Day, Time.

How they are to be computed, 254. b.
In what cases this time is prescribed by law, 254. a.

Dedit Deus his quoque finem.

INDEX OF CASES

CITED IN

MR. HARGRAVE AND MR. BUTLER'S NOTES.

ABBOT and Hallett (Zouch d.) v. Parsons 247. b. n. 1.
Abraham v. Bubb 27. b. n. 2.
Acton de Gilbert's case 115. a. n. 15.
Adams v. Savage 216. a. n. 2.
Aiscough's case 8. b. n. 3. 148. b. n. 2.
Albanie's case 342. b. n. 1. III.
Alexander v. Alexander 258. a. n. 1. 379. b. n. 1.
Aike and Aimon v. Hunkin 155. a. n. 3.
Allicock's case 78. a. n. 1.
Allen's case 205. b. n. 1.
Allen v. Abraham 60. a. n. 1.
Allen v. Heber 12. b. n. 2.
Allen v. Papworth 351. a. n. 1. VI.
Alsop v. Stacey 123. b. n. 1, 2.
Ames v. Cooke 15. a. n. 5.
Amherst v. Dawling 205. a. n. 1.
Andrew's case 123. b. n. 1.
Andrew (Doe d.) v. Hutton 241. a. n. 4.
Anglesea (earl of) v. Ram 190. b. n. 4.
Anonymous, Exchequer 1809 113. a. n. 2.
Anthony's (prior of) case, 60. b. n. 4.
Aprice's case 28. a. n. 4.
Archer's case 22. b. n. 4. 28. a. n. 8.
Archer v. Snapp 202. a. n. 3.
Arden v. Michell 35. b. n. 7.
Arnold v. Kempstead 36. b. n. 6.
Arthur v. Bokenham 265. a. n. 1.
Arundel's case 190. a. n. 2.
Arundell's (earl of) case 115. a. n. 15.
Arundell's (countess of) case 129. b. n. 4.
Ascough's case 148. b. n. 2. 150. a. n. 3.
Ash v. Rogle 60. b. n. A.
Ashby v. White 81. b. n. 2. 109. b. n. 2. 391. a. n. 2. IV. 5.
Ashenhurst's case 24. b. n. 3.
Aston v. Aston 220. a. n. 1.
Atkins v. Montague 27. b. n. 6.
Atkins's case 57. a. n. 3.
Atkinson v. Baker 298. a n. 1.
Atkyns (Taylor d.) v. Horde 153 b. n. 7. 266. b. n. 1. 272. a n. 1. I. 3. 330. b. n. 1.
Atherton v. Pye 195. b. n. 1.
Attorney General v. Bowyer 205, a. n. 1.
Attorney General v. Buller 205. a. n. 1.
Attorney General v. Parnther 246. b. n. 1.
Attorney General v. Philips 205. a. n. 1.
Attorney General v. Scot 208. a. n. 1.
Attorney General v. Vigors 205. a. n. 1.
Aulnager's (the) case 120. a. n. 4.

B.

Bacon's case 78. a. n. 2.
Bacon v. Bacon 12. a. n. 7.
Baker v. Willis 28. b. n. 1.
Baker v. Denham 59. a. n. 6. 60. a. n. 2.
Baker v. Morecomb 225. a. n. 1.
Baker v. Hacking 335. a. n. 2.
Ballett v. Sprainger 208. a. n. 1.
Bamfield v. Wyndham 208. a. (208. b. 13th ed.) n. 1.
Banbury's (lord) case 11. b. n. A. 16 b. n. 3.
Banks v. Sutton 208. a. n. 1.
Barclay's (lord) case 21. b. n. 2.
Barclay (lord) v. Countess of Warwick 21. b. n. 3.
Barker v. Gyles 198. b. n. 4.
Barker v. Keat 49. a. n. 1.
Barrel v. Sabine 205. a. n. 1.
Bartholomew v. May 208. a. (208. b. 13th ed.) n. 1.
Basket v. Basket 225. a. n. 1.
Baskerville's case 119. a. n. 1.
Bassett v. Bassett 11. b. n. 4.
Bath's (bishop of) case, 46. b. n. 10.
Bath (earl of) v. Abney 59 b. n. 8. 60. a. n. 1.
Battey v. Trevillian 12 b. n. 2. 112. a. n. 2.
Beaumont's case 28. b. n. 1.
Beckford v. Wade 262. a. n. (B.) 325. a. n. 1.
Bedell v. Constable 88. b. n. 15.
Bedell's case 20. b. n. 2. 49. a. n. 1.
Bedford's (earl of) case 46. a. n. 6. 22. b. n. 3. 46. b. n. 2.
Bedford's (countess of) case 22. b. n. 3.
Bedingfield's (Ann) case 39. a. n. 3.
Beecher's case 161. a. n. 4. sect. 1 & 5.
Belford v. Rows 33. a. n. 2.
Bentley's (Dr.) case 94. a. n. 5.
Berkley's case 19. a. n. 2.
Berrington v. Packhurst 254. b. n. 1.
Bettisworth's case 48. b. n. 8.
Beverley's case 88. b. n. 16.
Bevil's case 154. b. n. 4.
Bewick v. Whitefield 218. b. n. 2.
Beynon v. Gollins 290. b. n. 1. XIV. 3.
Bingham's case 152. b. n. 4.
Bishop of London v. Fytche 206. b. n. 1.
Bishops (the seven) case 120. a. n. 4.
Bishop of Litchfield's cause, or English case of Commendam 120 a. n. 4.
Blackleach v. Small 48. b. n. 8.
Blackasper's case 45. a. n. 7.
Blandfore & ux. & Dymock (Doe d.) v. Applin 272. a. n. 1. VII. 2.
Blaxton v. Heath 46. b. n. 3.
Blencowe (Crusoe d.) v. Bugby, 223. b. n. 1. 308. a. n. 1.
Blodwell v. Edwards 3. b n. 1.
Blundell v. Baugh, 57. a. n. 3. 271. a. n. 2. 330. b. n. 1.
Blount's case 380. b. n. 1.
Bodmin v. Vandebendy 208. a. n. 1.
Bodvill's (sir John) case 285. a. n. 1.
Bole v. Horton 373, b. n. 2.
Bonifaut v. Greenfield 290. b. n. 1. IX.
Boon v. Cornforth 18. b. n. 7.
Boothby v. Vernon 28. a. n. 8.
Boraston's case 224. b. n. 1.
Boteler v. Allington 290. b. n. 1. VIII.
Boudon's (viscountess) case 38 b. n. 1.
Bowes's (Sir Tho.) case 270. b. n. 1.
Bowles's (Lewis) case 154. b. n. 5.
Bowman v. Yates 24. b. n. 3.
Bradbury v. Wright 143. b. n. 5.
Braybrooke v. Inskip 205. a. n. 1.
Brediman's case 146. a. n. 3. 311 a. n. 1. 316. b. n. 1.
Bredon's case 42. a. n. 6.
Brend v. Brend 208. a. n. 1.
Brewster's case 55. b. n. 7.
Bridgewater v. Egerton 18. b. n. 7.
Bromley v. Littleton 82. b. n. 4.
Brooke's case 26. b. n. 4.
Brookes v. Brookes 26. b. n. 4.
Broome v. Monk 206. a. n. 1.
Broughton v. Errington 86. b. n. 6.

Broughton v. Langley 272. a. n. 1. VIII. 2. 290. b. n. 1. VIII.
Brown's case 10. b. n. 2. 48. b. n. 6.
Brown v. Taylor 12. b. n. 2.
Brown v. Barkham 24. b. n. 3.
Brown v. Gibbs 208. a. n. 1.
Brown (Doe d.) v. Wilkinson 270. b. n. 1.
Brown's (sir Anth.) case 270. b. n. 1.
Bruce v. Bruce 79. b. n. 1.
Bruerton's case 47. a. n. 7. 148. b. n. 5.
Buckler's case 48. b. n. 1. 49. a. n. 4.
Buckingham's (duke of) case 110. a. 165. a. n. 9.
Buckridge v. Ingram 6. a. n. B.
Buckworth v. Thirkell 241. a. n. 4. 272. a. n. 1. V.
Bullock v. Thorne 342. b. n. 1. VI. 1.
Bund v. West 216. a. n. 2.
Bunting v. Williamson 391. a. n. 2. III. 2.
Burchett v. Durdant 24. b. n. 3. 272. a. n. 1. VIII. 1. 290. b. n. 1. VIII.
Burden v. Burville 195. b. n. 1.
Burgess v. Wheate 191. a. n. 5. 290. b. n. 1. XIV. 272. a. n. 1. II.
Burglacy v. Ellington 222. b. n. 2.
Burgoin v. Spurling 60. a. n. 2. 62. a. n. 1.
Burley v. Read 47. a. n. 14.
Burnaby v. Griffin 351. a. n. 1. VI.
Burtenshaw v. Weston 164. a. n. 2.
Burting v. Stonard 290. b. n. 1. XVI. 1.
Bushell's case 155. b. n. 5.
Butler v. Baker 187. b. n. 2.
Butler v. Ridgely 42. a. n. 6.
Butler v. Duncomb 237. a. n. 1. I.
Butt's case 147. a. n. 2. 147. b. n. 2.
Byng's (admiral) case 110. a. n. 5.

C.

Calvin's case 2. b. n. 6. 122. b. n. 4. 2. b. n. 1. 2. b. n. 9. 120. a. n. 3. 120. a. n. 4. 141. b. n. 2.
Campbell v. Leach 53. b. n. A. 272. a. n. 1. VII. 2.
Cannel v. Beeby 25. a. n. 3.
Cannel v. Buckle 264. b. n. 2.
Capell's case 87. a. n. 1.
Carr v. lord Errol 327. a. n. 2. II. 2.
Carew's (sir Peter) case 58. b. n. 4.
Carlos and Shuttlewood v. lord Dormer 239. a. n. 1.
Carpenter v. Collins 55. b. n. 16.
Carpenters (the six) case 160. b. n. 4.
Carr v. Singer 60. b. n. 1.
Carrel's case 88. a. n. 1.
Carrick (Ros.) v. Barton 205. a. n. 1.
Cart v. Marsh 18. b. n. 4.
Cart v. Rees 351. a. n. 1. I.
Carter v. Barnardiston 191. a. n. 1.
Carter v. Strathan 214. a. n. 1.
Carter v. Tash 241. b. n. 1.
Carye's case 26 b. n. 4.
Casborne v. Scarfe 205. a. n. 1.
Cashborn v. English 29. a. n. 6.
Caswall (Geo.) *ex parte* 272. a. n. 1. VII. 2.
Catley's (miss) case 88. b. n. 16.
Chadock v. Cowley 224. b. n. 1.
Chamberlain v. Ewer 41. b. n. 1.
Chamberlain of England (case about the office of *great*) 20. a. n. 1.
Champernon's case 23. a. n. 2.
Chandos (duke of) v. Talbot 237. a. n. 1. III.
Chaplin v. Chaplin 298. a. n. 2.
Chapman v. Brown 272. a. n. 1. VII. 2.
Chase v. Box 176. b. n. 8.
Cheddington's (rector of) case 48. b. n. 5.
Cheslyn v. Smith 351. a. n. 1. V.
Chesman v. Nainby 206. b. n. 1.
Chester's (bishop of) case 44. a. n. 1.
Chester (earldom of) 165. a. n. 4.
Chesterfield (earl of) v. Janssen, 4. a. n. 1.
Chichester (prebend of) v. Earl of Arundel 115. a. n. 15.

Child

Child v. Bailey 20. a. n. 5.
Child v. Stephens 208. b. n. 1.
Chudleigh's case 44. b. n. A. 180. b. n. 7. 214. a. n. 1. 272. a. n. 1. II. IV. V. 290. b. n. 1. III. IV.
Churche's case 77. a. n. 1.
Church v. Cudmore 88. b. n. 16.
Cissor (Matilda the wife of Robert) her case 133. a. n. 2.
Clare's case 58. b. n. 3.
Clark v. Smith 12. b. n. 2.
Clarke's case 77. a. n. 1.
Clarke v. Pistor 351. a. n. 1. VI.
Clarke v. Samson 384. a. n. 1.
Clay v. Sharpe 205. a. n. 1.
Cleer's case 78. a. n. 2.
Cleere's (sir Edward) case, 112. a n. 1. & 2. 216. a. n. 2. 272. a. n. 1. VII. 2.
Clerk of the court of wards case 120. a. n. 4.
Clench v. Witherly 205. a. n. 1.
Clun v. Turner 60. a. n. 3.
Coggs v. Barnard 89. a. n. 9. 89. b. n. 3.
Colchin v. Colchin 60. a. n. 2.
Cole v. Levingstone 195. b. n. 1.
Cole v. Gibson 206. b. n. 1.
Collins v. Plummer 379. b. n. 1.
Collingwood v. Pace 8. a. n. 2. 8. a. n. A. 12. a. n. 7.
Conesby v. Ruskey 58. b. n. 7.
Constable's (sir Henry) case 261. a. n. 1.
Colt and Glover v. bishop of Litchfield 120. a. n. 4.
Commendams, case of 110. a. n. 5. 112. a. n. 1.
Commendam, Irish case of 120. a. n. 4.
Commendam, English case of 120. a. n. 4.
Cook's case 158. b. n. 1.
Cook v. Young 44. a. n. 1.
Cook v. Arnham 208. a. (208. b. 13th ed.) n. 1.
Cooke v. Cooke 205. a. n. 1.
Cope v. Cope 208. a. (208. b. 13th ed.) n. 1.
Corbet's case 223. b. n. 1. 379. b. n. 1.
Cordall's case 28. a. n. 7. 239. b. n. 3.
Cornish v. Cawsey 46. b. n. 9.
Cornish v. Mew 208. a. n. 1.
Cornwall's (earl of) case 19. b. n. 1.
Cotton v. Clifton 207. a. n. 2.
Cotterel v. Hampson 290. b. n. 1. XIV. 2.
Cottrell v. Purchase 295. a. n. 1. 236. b. n. 1.
Coulson v. Coulson 376. b. n. 1. V. 6.
Counder v. Clerke 24 b. n. 3.
County of Oxford, case of 58. b. n. 4.
Cousb v. Lambert 82. b. n. 1. 34. b. n. 1.
Cox v. Chamberlain 272. a. n. 1. VII. 1.
Crane v. Taylor 45. a. n. 2.
Crawley's case 78. a. n. 2.
Cray v. Cray 36. b. n. B.
Cray v. Willis 36. b. n. 7.
Cremer v. Burnet 58. b. n. 7.
Crocker v. Kelsey 28 b. n. 1.
Cromwell's case 327. a. n. 2. II. 3.
Cropp v. Hambleton 202. a. n. 3.
Crossing v. Scudamore 49. a. n. 1.
Crusoe, d. Blencowe v. Bugby 308. a. n. 1.
Culpepper's case 17. b. n. 4.
Culpepper v. Aston 290. b. n. 1. XIV. 2.
Customs, case of 120. a. n. 4.
Cutler v. Coxeter 290. b. n. 1. XIV. 2.
Curson (sir John) and sir John Ferrers v. Sir Richard Fermor, 338. b. n. 4.

D.

Dacre v. Dacre 21. a. n. 4.
Dale's case 41. b. n. c. 6.
Dampert's case 249. a. n. 2.
Daniel v. Upley 112. a. n. 6.
Darbison v. Beaumond 24. b. n. 3.
Darcye's case 82. a. n. 1. 53. b. n. 1.
Dashwood's (Sir Fras) case 165. a. n. 6.

Davers v. Selby 33. b. n. 10.
Davidson v. Foley 223. b. n. 1.
Davis v. Powel 47. a. n. 11.
Davies v. Speed 216. a. n. 2.
Dawes v. Ferrers 24. b. n. 3. 25. a. n. 3.
De Acton's (Gilbert) case 115. a. n. 15.
Delaware's (lord) case 16. b. n. 2.
De Mandville's (John) case 376. b. n. 1. V. 5.
Denny's (sir Walter) case 44. b. n. 3 & 4. 52. b. n. 5.
Dennye's (sir Edward) case 44. b. n. 9.
De Percy's (Henry) case 115. a. n. 15.
Derby (earl of) v. Eyton and Price, 121. a. n. 1.
Derby v. Hunter 44. b. n. A.
Devonshire's (earl of) case 172. b. n. 9.
Dicker v. Noland 52. b. n. 4.
Dick's case 48. b. n. 6.
Dickson v. Waller 18. b. n. 2.
Dickson v. Marsh 182. b. n. 2.
Digge's case 342. b. n. 1. III.
Dispensation, case of 120. a. n. 4.
Dixe's (alderman) case 60. a. n. 2.
Dixon v. Saville 31. b. n. A.
Dixson v. Saville 208. a. n. 1.
Doctor and Student, case of 213. b. n. 1.
Doe v. Cooper 195. b. n. 1.
Doe v. Prestwidge 384. b. n. (N).
Doe, d. Andrew v. Hutton 241. a. n. 4.
Doe v. Hutton 14. b. n. 6.
Doe v. Prosser 330. b. n. 1.
Doe, d. Willis v. Martin 241. a. n. 4.
Dolman v. Smith 208. a. (208. b. 13th ed.) n. 1.
Dormer's case 20. b. n. 2.
Dormer v. Fortescue 265. a. n. 2.
Dormer v. Parkhurst 330. b. n. 1.
Dow v. Golding 60. a. n. 5.
Downman's case 155. b. n. 5.
Drake v. Munday 47. a. n. 7 & 9.
Drury v. Drury 36. b. n. 7.
Dudley v. Dudley 208. a. n. 1.
Dudney v. Glyde 32. b. n. 4.
Duncombe v. Wingfield 269. b. n. 1. 347. b. n. 1. 348. b. n. 1. 349. a. n. 1. 353. b. n. 1.
Duncomb v. Duncomb 239. b. n. 3.
Dutchy of Lancaster, case of 43. b. n. 1. 16. a. n. 2.
Dyer v. Dyer 290. b. n. 1. X.
Dymock and others (Doe d.) v. Applin 272. a. n. 1. VII. 2.

E.

Earle v. Greenough 52. a. n. 2.
Earl (Farmer d.) v. Rogers 338. a. n. 1.
Eastcourt v. Weekes 63. a. n. 1.
Eaton and Monox v. Laughter 225. a. n. 1.
Edes v. Knotsford 48. b. n. 7.
Elmes's case 115. a. n. 8.
Edwards v. Slater 203. b. n. 1.
Elvis's (sir Wm.) case 249. a. n. 2.
Eldridge v. Knott 261. a. n. 1. 262. a. n. (B.)
Elliott v. Merryman 290. b. n. 1. XIV. 1, 2.
Ellis v. Atkinson 351. a. n. 1. VI.
Egleton's case 88. b. n. 13.
Elmer v. Thackers 355. a. n. 1.
Ely's (lord) case 246. b. n. 1.
Endsworth v. Griffiths 205. a. n. 1.
Englefield's case 300. a. n. 2.
Errington's case 18. a. n. 4.
Eton college, case of 50. b. n. 1. 51. b. n. 2.
Evans's case 46 b. n. 3.
Evan's (Allen) case 391. a. n. 1. IV. 2.
Evans v. Aprichard 28. a. n. 4.
Evans v. Ascu 45. a. n. 1.
Evans and Kiffins v. Askwith 120. a. n. 4.
Ewer v. Corbett 290. b. n. 1. XIV. 1.
Exeter's (bishop of) case 68. a. n. 3.

F.

Fabrigas v. Mostyn 155. b. n. 5. 391. a. n. 1. sect. 3.
Farmer v. Dalling 161. a. n. 4. sect. 4.
Farmer, d. Earl v. Rogers 338. a. n. 1.
Farringdon's (John) case 24. b. n. 3.
Fenner v. Williams 55 b. n. 16.
Fenwick's case 110. a. n. 5. 111. a. n. 3.
Fermor's case 330. b. n. 1.
Ferrer's (sir Henry) case 16. b. n. 8.
Ferrers (sir John) and sir John Curson v. sir Richard Fermor, and others 338. b. n. 4.
Fisher v. Wigg 190. b. n. 4.
Fitton's case 35. b. n. 6.
Fitzgerald v. Lord Fauconberg 272. a. n. 1. VII. 2.
Fitzherbert's case 49. a. n. 4.
Fitzwilliam's case 185. b. n. 1. 272. a. n. 1. VII. 2.
Flavell v. Ventrice 241. a. n. 4.
Fleetwood's (sir Gerard) case 209. a. n. 1.
Floyer v. Lavington 205. a. n. 1.
Foley v. Burnell 290. b. n. 1. XII.
Fonnereau v. Fonnereau 299. b. n. 1.
Foquett v. Worsley 195. b. n. 1.
Ford v. Hoskins 59. b. n. 6.
Ford v. lord Ossulston 24. b. n. 3. 25. a. n. 3.
Fortescue v. Abbott 224. b. n. 1.
Foster's (sir Wm.) case 115. a. n. 5.
Fox v. Collier 45. a. n. 1.
Fox v. Markham 35. b. n. 7.
Foy v. Hinde 379. b. n. 1.
Frampton v. Gerrard 123. a. n. 8.
Francia's case 158. b. n. 2.
Francis v. Wyatt 47. a. n. 14.
Franck's (sir Leventhorpe) case 26. a. n. 3.
Francklyn v. Fern 205. a. n. 1.
Franklin v. Cooper 19. b. n. 3.
Franklin's case 155. b. n. 5.
Franklyn v. Myn 60. a. n. 3.
Fraser v. Baillie 351. a. n. 1. V.
Fredymock v. Perryman 155. a. n. 3.
French v. Chichester 290. b. n. 1. XIV. 2.
Fretchville case 16. b. n. A.
Frogmorton v. Wharrey 24. b. n. 3. 26. a. n. 3.
Fuller v. Terrey 59. a. n. 1.
Fulwood's case 154. a. n. 11. 190. a. n. 2.
Fulgeam's case 32. a. n. 5.

G.

Gage or Gray v. Acton 264. b. n. 2.
Gall v. Noble 59. b. n. 1.
Gally v. Selby 205. a. n. 1.
Galton v. Hancock 208. a. (208. b. 13th ed.) n. 1.
Gardener v. Griffith 205. a. n. 1.
Garfoot v. Garfoot 113. a. n. 2.
Garnons v. Kenton 35. b. n. 6.
Garshore v. Chalie 36. b. n. B.
Garth v. Cotton 27. b. n. 2. 218. b. n. 2.
Gaskin v. Gaskin 190. b. n. 4.
Gates (the wife of sir John) her case 41. a. n. 3.
Gay v. Fielder 35. b. n. 6.
Gee's case 44. a. n. 1.
Gerrard's (lady) case 31. b. n. 6.
Gerrard v. Boden 144. b. n. 1.
Gibson v. Tenant 36. a. n. 7.
Gilbert v. Witty 195. b. n. 1.
Gloucester's (bishop of) case 44. a. n. 1.
Gloucester (bishop of) v. Wood 44. b. n. 7.
Gloucester's (earl of) case 123. b. n. 1, 2.
Godwin v. Munday 237. a. n. 1. I.
Goffe v. Thurston 35. b. n. 6.
Goodhill v. Brigham 241. a. n. 4.
Goodiar v. Clerke 271. b. n. 1. V.
Goodright v. Cator 254. b. n. 1.
Goodright v. Forrester 330. b. n. 1.
Goodright v. Pulleyn 20. b. n. A.

Goodright v. Wells 12. b. n. 2.
Goodtitle v. Layman 191. a. n. 1.
Goodtitle, d. Norris, and others v. Morgan and David 290. b. n. 1. XV.
Goodtitle v. Weston 25. a. n. 3.
Goodtitle v. Whitby 224. b. n. 1.
Goring v. Goring 53. b. n. B.
Gossage v. Tayler 26. a. n. 3. 218. b. (219. a. 13th ed.) n. 3.
Gower v. Grosvenor 18. b. n. 7.
Gower v. Mead 208. a. (208. b 13th ed.) n. 1.
Grantham v. Hawley 55. a. n. 5.
Gravenor's case 54. b. n. 4.
Graves's case 53. a. n. 3.
Gray's (lord) case 15. b. n. 3.
Gray or Gage v. Acton 264. b. n. 2.
Green v. Bury 60. a. n. 1.
Green v. Stephens 195. b. n. 1.
Greenwood v. Tyler 26. b. n. 2. 48. b. n. 1.
Gregory v. Badbourne 48. b. n. 2.
Gregson v. Harrison 308. a. n. 1.
Grendon v. the bishop of Lincoln 120. a. n. 4.
Greville v. Bracebridge 290. a. n. 1.
Grey v. Richardson 29. a. n. 3.
Griesley's case 161. a. n. 4. I.
Griffith's (Sarah) case 247. a. n. 2.
Grigby v. Cox 351. a. n. 1. VI.
Grindal's case 44. b. n. 2.
Guy v. Dormer 271. b. n. 1. VII. 2.
Guy v. Rey 58. b. n. 4.
Gwilliam v. Rowel 113. a. n. 2.
Gwyn v. Hook 25. a. n. 3.

H.

Hainsworth v. Pretty 12. b. n. 2. 240. b. n. 3.
Hale's (lord) case 23. b. n. 1.
Hale's (sir Edward) case 120. a. n. 3. 4.
Hall v. Brooker 208. a. (208. b. 13th ed.) n. 1.
Hall v. Digby and others 190. b. n. 4.
Hall v. Mather 35. b. n. 6.
Hall v. Potter 206. b. n. 1.
Hall v. Terry 237. a. n. 1. I.
Halsted v. Vanleyden 210. b. n. 1.
Hamlen v. Hamlen 59. a. n. 4.
Hampden's case 89. a. n. 16. 156. a. n. 5.
Hamstead v. Oldham 145. b. n. 1.
Hancock v. Field 291. b. n. 1.
Hannan v. Roll 232. a. n. 1.
Harcourt v. Pole 214. a. n. 1.
Harpur's case 25. b. n. 1.
Harris and Hales v. Nichols 166. b. n. 2, 3.
Harrison v. Burwell 235. a. n. 1.
Harvey v. Aston 237. a. n. 1.
Harvey v. Ashley 36. b. n. 7.
Hassel v. Hamerton 59. a. n. 4.
Harrison (in the matter of) an infant 191. a. n. 1.
Hatton's (lord) case 115. a. n. 15.
Havergill v. Hare 203. a. n. 3.
Hawes's case 32. b. n. 4.
Hawes v. Hawes 190. b. n. 4.
Hayes v. Bickerstaff 384. a. n. 1.
Hayward v. Fulcher 36. a. n. 5.
Helyar's case 49. b. n. 5.
Heneage (Doe d.) v. Heneage 327. a. n. 2. II. 2.
Hennings v. Paucharden 48. b. n. 1.
Hereford (bishop of) v. Story 45. a. n. 3.
Herring v. Brown 342. b. n. 1. VI. 2.
Heyward's (sir R.) case 49. a. n. 1.
Hickmot's case 232. a. n. 1.
Higham, *ex parte* 351. a. n. 1. III.
Hill v. Adams 208. a. n. 1.
Hill v. Geed 235. a. n. 1.
Hill v. Giles 26. b. n. 4.
Hinde's case 48. b. n. 6.
Hinde v. Lyon 12. b. n. 2.
Hitcham's case 57. b. n. 1.
Hobby's case 8. a. n. A. 12. a. n. 7.
Hodgkins v. Robson & Thornborow 148. b. n. 1.
Hodgkinson's case 22 b. n. 4. 26. b. n. 3.
Hodgekinson v. Wood 14. a. n. 6.

Hodgson v. Rawson 237. a. n. 1. I. II.
Hoe's case 52. b. n. 2.
Holland's case 17. b. n. 5.
Holland (sir Thomas) v. Bonis 272. a. n. 1. VI. 2.
Holmes v. Meynell 105. b. n. 1.
Holt's (sir Thomas) case 18. a. n. 4. 19. b. n. 1.
Holt v. Ward 79. b. n. 2.
Hogan v. Jackson 191. a. n. VI. 10.
Hone v. May 220. b. n. 1.
Hooker v. Hooker 28. a. n. 8. 239. b. n. 3.
Hoole v. Bell, 162. a. n. 4. 162. b. n. 1.
Hoole v. Sales 290. b. n. 1. XV.
Hopkins v. Robinson 122. a. n. 6.
Hopkins v. Hopkins 11. b. n. 4. 272. a. n. 1. VII. 2. 317. a. n. 2. II. 2.
Horne v. Lydiard 88. b. n. 14.
Hovey v. Blakeman 351. a. n. 1. VI.
Howard v. Bartlett 235. a. n. 1.
Howard v. Cavendish 37. a. n. 2.
Howard v. Harris 205. a. n. 1. 208. a. n. 1.
Howe v. Whitebanck 210. a. n. 1.
Howel v. Price 208. a. n. 1. 208. a. (208. b. 13th ed.) n. 1. 2dly.
Hughes's case 58. a. n. 1.
Hughes v. Robotham 338. b. n. 1.
Hulm v. Heylock 240. b. n. 2.
Hulme v. Tenant 351. a. n. 1. VI.
Humberston v. Humberston 272. a. n. 1. VII. 2.
Humble v. Bill 290. b. n. 1. XIV. 1.
Hume v. Burton 246. b. n. 1.
Hungate's (Ann) case 247. a. n. 2.
Hungerford v. Havyland 93. a. n. 2.
Hungerford v. Hungerford 208. a. n. 1.
Hunt v. Gilbert 33. b. n. 10.
Hunter v. Galliers 223. b. n. 1.
Huntingdon (earl of) v. lord Mountjoy 165. a. n. 1.
Huntley's case 121. a. n. 1. 213. b. n. 1.
Hurst v. the earl of Winchelsea 12. b. n. 2.
Hussey's case 24. b. n. 3.
Hussey v. Moore 161. a. n. 4. I.
Hutchins v. Foy and Gover 237. a. n. 1. I.
Hutchison's case 247. a. n. 2.
Hutton's (sir Christopher) case 209. a. n. 1. V. 1.
Hynde's case 147. b. n. 5.

I. & J.

Jackson's case 49. a. n. 1.
James v. Hailes 208. a. n. 1.
James v. Richardson 24. b. n. 3.
Jebb v. Abbott 290. b. n. 1. XIV. 3.
Jefferey's case 62. a. n. 1.
Jefferies's case 59. b. n. 3.
Jemmot v. Cowley 203. a. n. 3.
Jenkins v. Kemishe 272. a. n. 1. VII. 2.
Jenkins v. Young 272. a. n. 1. VI.
Jennings v. Ward 205. a. n. 1.
Jermyn v. Arscot 223. b. n. 1.
Ingram's (sir Arthur) case 120. a. n. 3.
Johnson's case 121. a. n. 1. 157. b. n. 8.
Johnson v. Morris 13. b. n. 2.
Johnson v. Norway 13. b. n. 2.
Jones v. Gwyn 161. b. n. 4.
Jones v. Morgan 239. b. n. 3.
Jones v. Morgan 376. b. n. 1. IV.
Jones (lady) v. lord Say and Sele, 290. b. n. 1. VIII. 376. b. n. 1. V. 5.
Jones v. Smith 115. a. n. 8.
Jordan v. Savage 36. b. n. 3. 5.
Isham v. Morris 47. b. n. 11.
Islington (probis hominibus de), case of grant by the crown 3. a. n. 3.
Ithell v. Beane 290. b. n. 1. XIV. 1.

K.

Keat v. Allen 206. b. n. 1.

Keckwich's case 131. a. n. 1.
Keene v. Dickson 21. a. n. 4.
Keeche v. Hall 205. a. n. 1.
Kellow v. Kowden 11. b. n. 3.
Kenn's case 243. a. n. 2.
Kent v. Hartpool 28. a. n. 8.
Kettleby's case 32. a. n. 3.
Kibbett v. Lee 272. a. n. 1. VII. 2.
Kimp v. Cruwes 47. b. n. 3.
King James's case 16. a. n. 1.
King (the) v. the bishop of Norwich, 120. a. n. 3.
King v. Beny 45. a. n. 8.
King v. Dryden 159. a. n. 2.
King v. Hobbs 52. b. n. 2.
King v. Holland 2. b. n. 2.
King v. Knollys 16. b. n. 3. 20. a. n. 3.
King v. Lord 59. b. n. 2.
King (the) v. the Mayor and Burgesses of Lyme Regis 303. a. n. (B.)
King v. Melling 203. b. n. 1.
King v. Poole 155. b. n. 5.
King v. Rumball 224. b. n. 1.
King (the) v. Smith (1804), 209. a. n. 1. V. 1. 290. b. n. 1. XV.
King (the) v. Smith (1810) 209 a. n. 1. V. 1.
King v. Withers 237. a. n. 1.
Kingston upon Hull (mayor of) v. Horner 261. a. n. 1. 262 a. n. (B).
Kinnersley v. Orpe and others 308. a. n. 1.
Kirkham v. Thompson 365. b. n. (A).
Knoll's case 53. a. n. 3.

L.

Lake v. Barker 58. b. n. 4.
Lambert's case 34. b. n. 1.
Lampett's case 20. a. n. 5.
Lancaster (case of the dutchy of) 16. a. n. 2. 43. b. n. 1.
Lancaster's (earl of) case 249. b. n. 1.
Lane v. Cotton 89. b. n. 3.
Lane v. Dighton 290. b. n. 1. X.
Lane v. Pannell 26. a. n. 3. 218. b. (219. a. 13th ed.) n. 3.
Lanoy v. duke and duchess of Athol 351. a. n. 1. II.
Lawrence v. Lawrence 36. b. n. 1. 6.
Latham v. Atwood 55. b. n. 1.
Law (Silvester, d.) v. Wilson 290. b. n. 1. VIII.
Lee's case 58. b. n. 7.
Lee v. Boothby 58. b. n. 7.
Lee v. Muggeridge 351. a. n. 1. V.
Lee v. lord Vernon 290. b. n. 1. XI.
Leeds (duke of) v. Munday 205. a. n. 1.
Legge v. Archer 249. a. n. 2.
Leicester's (earl of) case 342. b. n. 1. VI. 2.
Le Neve v. Le Neve 290. b. n. 1. XIII.
Leonard's (Sampson) case 165. a. n. 7.
Leonard's case 49. a. n. 1.
Lewing's (Hugh) case 247. a. n. 2.
Ley's case 181. b. n. 5. 206. a. n. 1.
Leyfield's (doctor) case 35. b. n. 6.
Lichden v. Winsmore 338. b. n. 3.
Like v. Beresford 351. a. n. 1. III.
Lilburne's (John) case 68. a. n. 6.
Lilburne's (John) trial for treason 155. b. n. 5.
Little v. Heaton 202. a. n. 3.
Lloyd v. Carew 327. a. n. 2. II. 1.
Lloyd v. Evelyn 203. b. n. 1.
Lloyd v. Gregory 43. a. n. 1. 45. a. n. 4.
Locton v. Locton 113. a. n. 2.
Lomax v. Holmden 244. a. n. 2.
Long v. Heming 122. a. n. 1.
Lovell v. Barnes 113 a. n. 2.
Lovelace's (lord) case 115. a. n. 15.
Lovie's (Leonard) case 216. a. n. 2.
Lowther v. Condon 237. a. n. 1. I.
Lucye's (sir Richard) case 16. b. n. 8.
Luttrell v. Weston 59. a. n. 4.
Luttrell's case 87. a. n. 1.

M.

Machel v. Clarke 331. a. n. 1.
Macaulay v. Philips 351. a. n. 1. III.
Mackenzie v. Robinson 205. a. n. 1.
Magd. Coll. case 373. a. n. 2.
Magennis v. Mac Cullogh 338. a. n. 1.
Major v. lord Coventry 187. a. n. 2.
Mandeville's case 26. b. n. 2. 376. b. n. 1. V. 5.
Manlove v. Ball and Bruton 205. a. n. 1.
Manne's case 235. a. n. 1.
Manning's case 20. a. n. 5.
Mansel's case 174. a. n. 4.
Mansel v. Mansel 290. b. n. 1. V. 4.
Marche's (countess of) case 33. a. n. 4.
Marlborough's (duke of) will 379. b. n. 1.
Marlborough (duke of) v. lord Godolphin 272. a. n. 1. VII. 2.
Marlow v. Smith 205. a. n. 1.
Martin v. Martin 79. b. n. 1.
Martin v. Strachan 12. b. n. 2.
Martyn v. Rew 58. b. n. 5.
Martyne v. Hardie 47. b. n. 10.
Matthew v. Whetton 59. a. n. 4.
Matthewson v. Trott 240. b. n. 2.
Maund's case 48. a. n. 5. 144. a. n. 1. 144. b. n. 1.
Maundrell v. Maundrell 208. a. n. 1. 216. a. n. 2. 241. a. n. 4.
Mansfield's case 33. a. n. 8.
May v. Hook 246. a. n. 1.
Mayor of London v. Alford 240. b. n. 2. 327. a. n. 2. II. 3.
Mead v. lord Orrery 290. b. n. 1. XIV. 1.
Mellor v. Lees 205. a. n. 1.
Melton's case 28. b. n. 1.
Menfield's case 78. a. n. 3.
Metcalfe's case 139. b. n. 1. 168. a. n. 2.
Mildmay's (sir Anthony) case 19. b. n. 2. 223. b. n. 1. 379. b. n. 1.
Miller v. Manwaring 35. b. n. 7. 46. b. n. 10.
Mitchell v. Reynolds 208. a. n. 1.
Molton v. Hutchinson 271. b. n. 1. VII. 2.
Money and others v. Leach 155. b. n. 5.
Monopolies, (case of) 120. a. n. 4.
Montfort v. lord Cadogan 290. b. n. 1. XI.
Mones v. Hush 351. a. n. 1. VI.
Moor's case 20. b. n. 2.
Moor v. Row 295. a. n. 1.
Moor v. Musgrave 46. b. n. 9.
Moore's (sir William) case 163. b. n. 4.
Moore v. Parker 299. b. n. 1.
Moody v. Walters 290. b. n. 1. V. 4.
More's (Margery) case 187. b. n. 2.
Morgan, *ex parte* 205. a. n. 1.
Morris v. Maule 26. b. n. 8. 172. b. n. 4.
Mosdell v. Middleton 206. b. n. 1.
Mosely v. Taylor 31. b. n. 8.
Moss v. Gallimore 205. a. n. 1.
Mostyn v. Fabrigas 391. a. n. 2. IV. 5.
Mounson v. West 156. a. n. 1, 2.
Mount and Hodgken 46. b. n. 10.
Moyle's case 53. a. n. 8.
Mundy v. Mundy 33. a. n. D.
Muschamp's case 223. a. n. 1.
Mytton and Lutwich 111. b. n. 5.

N.

Needham's case 18. a. n. 4. 232. a. n. 1.
Needler v. the bishop of Winchester 120. a. n. 4. 247. a. n. 2.
Newcastle (duke of) v. lady Lincoln 290. b. n. 1. XII.
Newcomb v. Bonham 205. a. n. 1.
Newman v. Newman 15. a. n. 4. 29. a. n. 3.
Newport (earl of) v. sir Henry Mildmay 380. b. n. 1.
Nichols's case 180. b. n. 2.
Nicholl v. Nicholl 271. b. n. 1. VII. 2.

Nicholson v. Gower 38. b. n. 1.
Nightingale v. Lawson 290. b. n. 1. XI.
Nokes's case 384. a. n. 1.
Norfolk's (duke of) case 20. a. n. 5. 327. a. n. 2. II. 1.
Norris's (lord) case 35. b. n. 6.
Norris and others (Goodtitle d.) v. Morgan & David 290. b. n. 1. XV.
North v. Cox 122. a. n. 6.
Norton v. Simmes 206. b. n. 1.
Nosle v. Foot 168. a. n. 2.
Nottingham's (earl of) case 271. a. n. 2.

O.

Oats v. Frith 213. b. n. 1.
O'Brian (Revan) v. Knivan 95. a. n. 4.
Office of lord Chamberlain, case of 15. b. n. 3.
Okey and others, case of 157. b. n. 8.
Oldis's (doctor) case 74. b. n. 1.
Oldfield's case 153. a. n. 2.
Olive v. Richardson 33. a. n. D.
Omichund v. Barker 6. b. n. 2. 172. b. n. 1.
Oneby's (major) case 155. b. n. 5.
Ormond's case 31. a. n. 4.
Ossulstone's (lord) case 27. a. n. 4.
Owen's case 155. b. n. 5.
Owen v. App-Rees 45. a. n. 4.
Owen v. Price 48 b. n. 1.
Oxford (earldom of) 27. a. n. 5.
Oxon Commoners case 58. b. n. 4.

P.

Packington v. Packington 220. a. n. 1.
Page v. Haywood 271. b. n. 1. V.
Pagett's case 218. b. n. 2.
Pain's case 19. a. n. 2.
Paine's case 19. a. n. 3.
Palmer's case 53. a. n. 10, 11.
Palmer v. Wilder 82. b. n. 1.
Paradine's case 18. a. n. 4.
Parker's case 60. a. n. 1.
Parker v. Sir John Lawrence 232. a. n. 1.
Parkes v. White 351. a. n. 1. VI.
Parkyns's (sir William) case 156. a. n. 5.
Parrot's (Herbert) case 247. a. n. 2.
Parsons v. Pearse 48. b. n. 5.
Parson's (Richard) case 235. a. n. 1.
Patteshul's case 60. b. n. A.
Pawlett v. Attorney General 205. a. n. 1.
Pawlet v. Pawlet 237. a. n. 1. I.
Peake v. Tucker 122. a. n. 7.
Pearson v. Humes 206. b. n. 1.
Pease v. Styleman 210. a. n. 1.
Peck v. Channel 335. a. n. 2.
Pelham's (Sir William) case 325. a. n. 1.
Pendrel's case 126. a. n. 2.
Pendrell v. Pendrell 244. a. n. 2.
Penhay v. Hurrell 216. a. n. 2.
Penn v. Meade 155. b. n. 5.
Penn v. Peacock & ux 342. b. n. 1. V.
Pennington's case 235. a. n. 1.
Penrice's case 32. b. n. 4.
Percy's (Henry de) case 115. a. n. 15.
Periman v. Pierce 10. b. n. 2.
Perkins v. Sewell 121. a. n. 1.
Perkins v. Micklethwaite 195. b. n. 1.
Perkins v. Pecke 182. b. n. 2.
Perrot's (Herbert) case 247. a. n. 2.
Perry (Roe d.) v. Jones 265. a. n. 1.
Perryn or Perrin v. Blake 342. b. n. 1. 376. b. n. 1. I. III. V. 5.
Peryman's case 49. a. n. 6. 59. n. 1.
Phillybrown v. Ryland 391. a. n. 1. IV. 5.
Pickering's (Thomas and Margaret) case 115. a. n. 5.
Pierce v. Leversage 52. b. n. 7.
Pierce v. Win 379. b. n. 1.
Piers v. Piers 220. a. n. 1.
Pierson v. Hughes 368. b. n. 1.
Pigott v. Clarke 156. b. n. 1.
Pimb's case 13. a. n. 7.
Pincke v. Curteis 290. b. n. 1. VIII.

Piper v. Masters 15. a. n. 5.
Pitt v. Jackson 272. a. n. 1. VII. 2.
Pitt v. Pelham 113. a. n. 2.
Pitfield's case 237. a. n. 1. I.
Platt (lady) v. Sleap 338. b. n. 3.
Plowden v. Oldford 46. a. n. 7.
Plunkett v. Holmes 28. a. n. 3.
Pockley v. Pockley 208. a. (208. b. 13th ed.) n. 1.
Podger's (Margt.) case 251. a. n. 1.
Polydore Virgil's case 46. b. n. 7.
Poole v. Nedham 18. a. n. 4.
Pool's case 379. b. n. 1.
Popham v. Bampfield 272. a. n. 1. VIII. 1.
Porter's case 236. a. n. 1.
Porter v. Porter 59. b. n. 5.
Portington's (Mary) case 223. b. n. 1. 379. b. n. 1.
Post nati, case of the 133. a. n. 1.
Powel's case 32. a. n. 9.
Powel v. Weeks 32. a. n. 9.
Potter v. North 122. a. n. 6.
Precenter of Paul's case 44. b. n. 3. 6. 8. 47. a. n. 3.
Prewet v. Drake 32. a. n. 6.
Price v. Perrie 205. a. n. 1.
Pride v. the earls of Bath and Montague 244. b. n. 1.
Prince's (the) case 13. a. n. A. 98. b. n. 1. 120. a. n. 4. 159. b. n. 1. & 2.
Purbeck's (lord) case 16 b. n. 2. n. A. 20. a. n. 3.
Purefoy v. Rogers 28. a. n. 8. 191. a. n. 1.
Pybus v. Mitford 24. b. n. 3. 216. a. n. 2.
Pybus v. Smith 351. a. n. 1. VI.
Pye v. Gorge 290. b. n. 1. V. 4.

Q.

Queen Elizabeth v. an illegitimate child of sir John Perrot 123. a. n. 8.
Quick's case 152. b. n. 4.

R.

Radnor (lady) v. Vandebendy 208. a. n. 1.
Radnor (lady) v. Rotherham 208. a. n. 1.
Radwell (John) v. Henry Radwell 123. b. n. 1, 2.
Randal v. Jenkins 111. a. n. 5.
Ratcliffe's case 10 b. n. 2. 11. a. n. 1. 12 b. n. 2. 88. b. n. 14. 157. b. n. 8.
Rawe v. Chichester 290. b. n. 1. XI.
Rawlin's case 41. b. n. 1. 135. b. n. 1.
Rayner's cases on tithes 159. a. n. 4.
Read and Morpeth v. Errington 330. b. n. 1.
Read (Doe d.) v. Reed 205. a. n. 1. 5thly.
Recusant's holding an office, case of dispensation with a statute against a 120. a. n. 4.
Reed v. Dawson 161. b. n. 4.
Reeve v. Long 298. a. n. 3.
Rennington's (the widow) case 235. a. n. 1.
Repps v. Bonham 26. a. n. 3.
Requishe v. Requishe 247. a. n. 2.
Rex v. Budd 209. a. n. 1. V. 2.
Rex v. Horne 303. a. n. (B.)
Reynish v. Martin 237. a. n. 1.
Richards v. lady Bergavenny 22. a. n. 4.
Richards v. Chambers 351. a. n. 1. V.
Richards (Smith d.) v. Clyfford 342. b. n. 1. VI. 1.
Richmond's case 47. a. n. 8.
Richmond (duke of) v. earl of Cadogan 195. b. n. 1.
Roach v. Wadham 272. a. n. 1. VII. 2.
Roake v. Kidd 290. b. n. 1. V. 4.
Robinson v. Comyns 325. b. n. 2.
Robinson v. Hardcastle 379. b. n. 1. 272. a. n. 1. VII. 2.
Robinson (Frogmorton, d.) v. Wharrey 26. a. n. 3. 218. b. n. 3. II.
Rochester's (dean of) case 17. b. n. 4.
Roger v. Scudamore 220. b. n. 1.
Rogers v. Skillicorne 290. b. n. 1. XIV. 3.
Rolt v. Somerville 218. b. n. 2.
Rolt v. lord Somerville 220. a. n. 1.

Rooke v. Richards 46. b. n. 8.
Roscarrick v. Barton 205. a. n. 1.
Ross (lord) case of 165. a. n. 7.
Rous v. Artois 58. b. n. 6.
Rowald's (Edward) case 136. a. n. 2.

S.

Sacheverel's case 53. b. n. 7.
Sacheverell v. Frogatt 47. a. n. 8.
Salop's (countess of) case 57. a. n. 1.
Salter's case 41. b. n. 4.
Salter v. Kidgly 231. a. n. 1.
Sammes & Payne's case 241. a. n. 4.
Savill v. Roberts 161. a. n. 4. IV.
Sands v. Drury 58. b. n. 9.
Saunders's case 43. a n. 1. 45. a. n. 4.
Say and Seele (lord) v. Lady Jones, 290. b. n. 1. VIII.
Scamler's case 3. b. n. 4.
Scholastica's case 223. b. n. 1.
Scot v. Brewster 45. a. n. 1.
Scott v. Scott 12. b. n. 2.
Scott v. Tyler 237. a. n. 1.
Scribblehill v. Brett 206. b. n. 1.
Scrogg's case 3. b. n. 3.
Sellenger's case 115. a. n. 15.
Selwin v. Browne 264. b. n. 1.
Sergison, *ex parte* 205. a. n. 1.
Sergison's case 13. a. n. B.
Seven bishops, the case of 120. a. n. 4.
Seymour's case 373. b. n. 2.
Seys v. Price 36. b. n. 7.
Shaftesbury's (lord) case 88. b. n. 15.
Shapland v. Smith 290. b. n. 1. VIII.
Sheddon v. Patrick 79. b. n. 1.
Sheir v. Penter 44. b. n. 7.
Sheffield (lord) v. Ratcliffe 269. b. n. 1.
Sheffield v. Ratcliff 331. a. n. 1.
Shelley's case 22. b. n. 4. 24. b. n. 3. 26. b. n. 2. 342. b. n. 1. 376. b. n. 1. I. II. III. IV. V. 5. 6. VI.
Shephard v. Gray 48. b. n. 8.
Sheriff's (the) case 120. a. n. 4.
Sherman v. Collins 237. a. n. 1. I. II.
Sherwell's case 36. b. n. 2.
Shopland v. Ridler 58. b. n. 3.
Shrewsbury's (lady) case 57. a. n. 1.
Sidney v. Perry 239. a. n. 1.
Silvester d. Law v. Wilson 290. b. n. 1. VIII.
Simson v. Turner 290. b. n. 1. II. VIII.
Skele v. Arnold 55. b. n. 2. & 7.
Skelton v. Skelton 27. b. n. 2.
Skete v. Oxenbridge 26. a. n. 3.
Slaning's case 52. a. n. 9.
Smale v. Dales 243. b. n. 1.
Smith's case 52. a. n. 5. 18. a. n. 1.
Smith v. Clay 290. b. n. 1. XVI.
Smith v. Guyon 290. b. n. 1. XIV. 2.
Smith v. Parker 11 b. n. 3.
Smith et ux. v. Stafford 264. b. n. 2.
Smith v. Trender 333. a. n. 2.
Smith v. Trig 12. a. n. 2.
Smith v. Trinden 44. a. n. 2.
Smith v. Tyndal 387. a. n. 1.
Smith v. Farnaby 298. a. n. 2.
Snape v. Turton 272. a. n. 1. VII. 2.
Snowling v. Nursey 235. a. n. 1.
Sockett v. Wray 351. a. n. 1. VI.
Somerset's (the negro) case 79. b. n. 1. 117. b. n. 3.
Sonday's case 379. b. n. 1.
Southampton (lord) v. marquis of Hertford 271. b. n. 1. V.
Southcot's case 89. b. n. 3. 45. a. n. 1.
Southcott v. Stowell 24. b. n. 3.
Southwell v. Wade 13. b. n. 2.
Spalding v. Shalmer 290. b. n. 1. XIV. 2.
Sparkes's case 54. b. n. 4.
Sparks v. Darcy 48. b. n. 6.
Sparrey's case 30. a. n. 4.
Spencer's case 55. b. n. 2. 384. a. n. 1.
Sperling v. Rochfort 351. a. n. 1. V.
Sprint v. Hickes 17. b. n. 4.
Squib v. Wyn 351. a. n. 1. I.
Stafford's (lord) case 216. a. n. 2.
Stafford (earl of) v. Buckley 20. a. n. 4.
Stanhope v. earl Verney 290. b. n. 1. XV.
Stanley v. Stanley 327. a. n. 2. II. 2.

Stanning v. Style 3. a. n. 1.
Stapleton v. Colville 208. a. (208. b. 13th ed.) n. 1.
Starkey v. Starkey 24. b. n. 3.
Starling v. Elrick 24. b. n. 3.
Staunton v. Chambers 36. a. n. 6.
Stellicorn v. Hayes 41. b. n. 1.
Stephens's case 12. a. n. 7.
Stewart's (sir Thomas) case 246. b. n. 1.
Stockman v. Hampson 35. b. n. 6.
Stokes v. Russell 215. b. n. 1.
Stone v. Newman 335. b. n. 1.
Stoughton v. Leigh 31. b. n. B.
Stratford v. Dover 373. a. n. 2.
Street's case 46. b. n. 8.
Stroud v. Marshal 247. a. n. 2.
Sturge's case 36. b. n. 1.
Style's case 218. b. (219. a. 13th ed.) n. 3.
Suffolk's (duchess of) case 16. b. n. 4. 6.
Sutton v. Johnson 161. a. n. 4.
Swan's case 88. b. n. 5. 156. b. n. 2.
Swan v. Broome 135. a. n. 1.
Swannock v. Lyfford 208. a. n. 1.
Sydenham v. Cops 44. b. n. 1.
Symson v. Butcher 215. a. n. 1.

T.

Talbot's case 148. b. n. 5.
Talbot v. Braddyl 205. a. n. 1.
Taltarum's case 121. a. n. 1. 379. b. n. 1.
Tanfield v. Rogers 44. b. n. 7.
Tanistry, Irish case of 10. a. n. 3. 110. b. n. 1.
Taylor's (Matthew) case 330. b. n. 1.
Taylor v. Shaw 379. b. n. 1.
Taylors (the) of Ipswich's case 120. a. n. 4.
Tenant v. Browne 113. a. n. 2.
Teynham (lady) v. Lennard 88. b. n. 16.
Thecar's case 123. b. n. 1, 2.
Thellusson's will 290. b. n. 1. XVII.
Thomas v. Boys 120. a. n. 4.
Thomas v. Sorrell 120. a. n. 4.
Thomas v. Waters 120. a. n. 4.
Thomasin v. Mackworth 327. a. n. 2. II. 3.
Thompson v. Leach, 202. b. n. 2. 337. b. n. 1.
Thong v. Bedford 290. b. n. 1. VIII.
Thore v. Thomas 54. a. n. 10.
Thornbrough v. Baker 208. a. (208. b. 13th ed.) n. 1.
Thornby v. Fleetwood 132. b. n. 1.
Thorne's case 54. a. n. 9.
Thoroughgood's case 48. a. n. 4.
Thorp v. Wilby 239. b. n. 1.
Throgmorton's case 35. a. n. 3. 26. b. n. 4.
Thrustout v. Peak 20. b. n. A.
Thyn v. Cholmley 153. b. n. 2.
Thynne v. Thynne 32. b. n. 4.
Timberly v. Grobbam—How 270. b. n. 1.
Timmins v. Rowlinson 270. b. n. 1.
Tipping v. Cosin 376. b. n. 1. V. 5.
Tissin v. Clarke 239. a. n. 1.
Title v. Grevett 270. b. n. 1.
Tomlinson v. Dighton 271. b. n. 1. VII. 2.
Townley's (Mr.) case 158. b. n. 2.
Townshend v. Whales 52. b. n. 2.
Trafford v. Trafford 18. b. n. 7.
Trelawney (sir John) and the bishop of Winchester 44. a. n. 1.
Trevillian's case 52. a. n. 3. 7. 52. b. n. 2.
Turner v. Lee 162. b. n. 1.
Trotman's case 52. a. n. 3.
Tyrrell (Geodright d.) v. Mead and Shilson 331. a. n. 1.

U. & V.

Van v. Clark 237. a. n. 1. I.
Vane v. lord Bernard 220. a. n. 1.
Vaughan v. Atkyss 59. b. n. 1.
Udal v. Udal 218. b. n. 2.
Verner v. Winstanley 205. a. n. 1.
Verney v. Verney 290. b. n. 1. XI.
Vick v. Edwards 191. a. n. 1.

Villareal v. lord Galway 36. b. n. 6.
Villiers v. Villiers 290. b. n. 1. XV.
Viset v. Longdon 36. b. n. 3.
Visard v. Longdale 36. b. n. 3.
Unton's case 84. a. n. 2.
Upton v. Dawkins 122. a. n. 7.

W.

Wagstaff v. Smith 351. a. n. 1. VI.
Wainwright v. Bendloe 208. a. (208. b. 13th ed.) n. 1.
Wake of Liddel's (lord) case 115. a. n. 15.
Walker v. Lamb 44. a. n. 1.
Walker v. Nevil 32. b. n. 4.
Walker v. Walker 36. b. n. B.
Wall v. Baker 24. b. n. 3.
Walsingham's case 18. a. n. 4.
Walsop v. Derby 21. a. n. 4.
Wankford v. Wankford 264. b. n. 1.
Ward v. Walthew 187. b. n. 2.
Warnford's case 53. b. n. 10.
Warraine v. Smith 72. a. n. 1.
Warcombe v. Carrell 247. a. n. 2.
Wase v. Pretty 59. a. n. 2.
Waterer v. Freeman 161. a. n. 4. *IV.
Waterford's (merchants of) case 120. a. n. 4.
Wats v. Dicks 49. a. n. 1.
Watson v. Foxon 195. b. n. 1.
Watson v. Major 44. b. n. 8.
Watts v. Wainwright 195. b. n. 1.
Webb v. Hearing 224. b. n. 1.
Webb v. Porter 21. a. n. 7.
Webb v. Russell 215. b. n. 1.
Weedon's case 15. a. n. 3.
Weekes v. Peach 298. a. n. 2.
Wegg v. Villiers 48. b. n. 8. 52. b. n. 3.
Wentworth's case 34. b. n. 6. 10.
Wentworth's (lord) case 120. a. n. 4.
West v. Treade 27. a. n. 4.
Weyland's case 133. a. n. 2.
Whaley v. Tancred 330. b. n. 1. 332. b. n. 1.
Whately v. Kemp. 365. b. n. (A.)
Whistler's case 121. b. n. 2.
Whistler v. Newman 351. a. n. 1. VI.
Whitchurch v. Whitchurch 290. b. n. 1. XV.
White v. White 290. b. n. 1. XI. 376. b. n. 1. IV.
White v. Bacon 330. b. n. 1.
Whitehead and others v. Travis and others 159. a. n. 4.
Whitley v. Best 32. a. n. 5.
Whitlock's case 214. a. n. 1.
Wigfall (Oates d.) v. Brydon 254. b. n. 1.
Wild's case 9. a. n. 3.
Wilde v. Francis 59. b. n. 1.
Wilkes's (Mr.) case 128. b. n. 1.
Wilkinson v. White 236. a. n. 1.
Willes and others v. Palmer and others 25. a. n. 3. 164. a. n. 2.
Willis (Doe d.) v. Martin 241. a. n. 4.
Willion and Berkley 43. b. n. 1. 16 a. n. 2. 119. a. n. 1.
Willoughby v. Willoughby 290. b. n. 1. XV.
Willoughby (lord) v. Wimbish 304. a. n. 1.
Williams v. Williams 27. b. n. 2.
Willowe's case 60. a. n. 1.
Wilson v. Woodhall 60. a. n. 2.
Wimby's case 29. b. n. 1.
Winchelsea (lord) v. Norcliff 208. a. (208. b. 13th ed.) n. 1.
Winchester's (marquis of) case 265. a. n. 1.
Winchcombe's case 120. a. n. 2.
Windham's (justice) case 188. a. n. 11.
Windsor's case 18. a. n. 1. 120. a. n. 2.
Wiscot's case 184. b. n. 2.
Wiseman v. Craw 278. b. n. 1.
Withepole's (sir William) case 158. a. n. 1. 158. b. n. 3.
Witts v. Dawkins 351. a. n. 1. VI.
Wood v. Ingersole 28. a. n. 8.
Woodfall's case 155. b. n. 5.
Worseley's case 123. a. n. 8.
Wortley v. Watkinson 235. a. n. 1.
Wray v. Williams 208. a. n. 1.

Wright v. Holford and others 195. b. n. 1.
Wroth's (sir Thomas) case 144. b n. 2.
Wyat's case 373. a. n. 1.
Wyatt's (sir Thomas) case 213. b. n. 1.
Wyndham's (justice) case 189. b. n. 3. and n.* under n. 3.
Wyndham and others v. earl of Egremont 239. b. n. 3.
Wynne v. Humphreys 215. a. n. 1.
Wyth v. Blackman 18. b. n. 7.
Wytham v. Waterhouse 351. a. n. 1. I.

Y.

Yates v. Compton 113. a. n. 2.
York's (archbishop of) case 33. a. n. 3.
Young v. Steele 44. a. n. 1.
Young v. Wright 120. a. n. 4.
Young v. Young 135. b. n. 1.

Z.

Zenger's (Peter) case 155. b. n. 5.
Zouch's case 247. b. n. 1.
Zouch v. Parsons 51. b. n. 3. 246. a. n. 1.

END OF INDEX OF CASES.

INDEX

TO

MR. HARGRAVE AND MR. BUTLER'S

NOTES.

A B

Abatement,
By a younger son, 242. a. n. 1.
Of writ, 304. a. n. 1.
See more concerning Abatement. 125. a. n. 2. 241. a. n. 3. 243. b. n. 1. 271. b. n. 1. II. 330. b. n. 1.

Abduction,
88. b. n. 14.

Abeyance,
Of titles of honour, 165. a. n. 6.
Of the freehold at the common law could not be; though it might be of the inheritance separated from the freehold, 216. a. n. 2.
Of the freehold is admitted in equity, 290. b. n. 1. XVII.
Whether the fee simple of a parson's glebe is in abeyance, 340. b. n. (B)
Of the inheritance, why it was viewed with jealousy by the old law; and the reasons of the modern law for discouraging it, 342. b. n. 1.
See more concerning Abeyance, 55. b. n. 8. 191. a. n. 1. 216. b. n. 2. 343. a. n. 1.

Abjuration,
Ancient and modern use of the word, 92. b. n. 2.
See more concerning abjuration, 133. a. n. 1. 3.

Abrogation,
134. a. n. 5.

Acceptance,
Of a chest locked, to be kept, 89. b. n. 1.
Of goods, to be kept, 89. b. n. 4. 9.
Of rent, 60. a. n. 2.
See more concerning Acceptance, 44. b. n. 7. 45. a. n. 4. 55. b. n. 14. 93. a. n. 2.

Accessorium,
To what terms in our law it answers, 121. b. n. 6.

Accidents,
Inevitable, as to bailees, &c. 89. b. n. 2.

A C

Account,
Suit in equity by prochien amy of an infant for an account, 89. a. n. 2.
Action of account, 89. a. n. 2. 90. b. n. 3, 4, 5. 199. b. n. 1.
Award to account, effect of, 139. b. n. 1.
Jointenants and tenants in common may have *inter se*, 172. a. n. 8. 199. b. n. 1.
See more concerning Account, 89. a. n. 4. 90. b. n. 2. 159. a. n. 4.

Accountant to the Crown,
172. a. n. 9. 191. a. note, sect. VI. 9. 209. a. n. 1. III.

Acknowledgment
Of villenage, 117. b. n. 3.

Acre,
Contents of, vary, 5. b. n. 4.

Accumulation,
Trusts of, 290. b. n. 1. XVIII.
Of profits of personal estate, during a suspense or contingency, 55. b. n. 8.

Acquittal,
Implied by homage, 365. a. n. 1.
See more concerning Acquittal, 13. a. n. 3. 23. a. n. 6. 31. a. n. 2. 67. b. n. 1.

Acquittance,
For rent, 373. a. n. 3.
Made by obligee to one obligor, 232. a. n. 1.

Act,
Of law, 57. a. n. 1. 149. a. n. 2.
Of parties, ibid.
Of parliament, 27. a. n. 5. 51. b. n. 2. 95. a. n. 4. 110. a. n. 7. 131. b. n. 2. 133. a. n. 4. 159. b. n. 2.

Actions,
For defacing tombs, who shall have, 13. b. n. 5.

Actions,
On the case,
For ravishment of ward, 88. b. n. 13.
For loss of service, 117. a. n. 1.
For breach of contract, ibid.
In the nature of an action of deceit, in case of fraud in a vendor, 384. a. n. 1.
See more concerning Actions on the case. 56. a. n. 2. 56. b. n. 2. 57. a. n. 1. 4. 59. b. n. 6. 79. b. n. 2. 81. b. n. 2. 89. b. n. 3. 161. a. n. 4. 251. a. n. 1.
Porsonal, 129. b. n. 2.
Civil, 161. a. n. 4.
Apparently vexatious, ibid.
Concerning life or limb, ibid.
Real,
Division of, 239. a. n. 1.
Possessory, 239. a. n. 1. 278. b. n. 1. 347. b. n. 1.
The gist in, 278. b. n. 1.
Droitural, 239. a. n. 1. 347. b. n. 1.
Some late attempts to revive, 239. a. n. 1.
Against the heir of a disseisor, 239. a. n. 1.
By original, 285. a. n. 1.
By bill, ibid.
Whether personal or mixed, ibid.
See more concerning Actions, 34. b. n. 3. 88. b. n. 13. 115. a. n. 7. 121. a. n. 1. 132. b. n. 1. 133. a. n. 1. 3. 135. b. n. 1. 195. b. n. 2.

Adjournment,
72. a. n. 1.

Adjunctum.
121. b. n. 6.

Admeasurement,
Of dower, 39. a. n. 4.

Administration,
Of a wife's personal estate,
At common law, 351. a. n. 1.
By statute, ibid.
De bonis non of a wife, who had personal estate en auter droit, as executrix or administratrix, 351. b. n. 1.
Who entitled to, as next of blood, 10. b. n. 2.
Infant not entitled to, 89. b. n. 6.
During minority of an executor, when it determines, ibid.
See more concerning administration, 11. a. n. 1. 90. b. n. 4. 5. 210. a. n. 1.

Admiralty Court,
74. b. n. 1.

Admittance,
To copyhold, 58. b. n. 5. 59. a. n. 2. 59. b. n. 8. 60. a. n. 1. 2. 62. a. n. 1. 185. a. n. 9.

Admonition,
Of ecclesiastical court, to compel marriage upon a contract, 79. b. n. 4.

Advancement,
What by custom will exclude a child. 176. b. n. 5†. 7, 8, 9, 10.

Advowson,
Is assets, 17. b. n. 3.
In gross seisin in law of, sufficient to give title to curtesy, 29. a. n. 4, 5.
Appendant, *semble*, no curtesy of, without seisin in deed of the principal, ibid. n. 4,
Whether infant may present, 89. a. n. 1.

Advowson,
Why the king, and not the executors of a bishop who had an advowson, shall present, where the church became void in the bishop's lifetime, 90. a. n. 4.
Appendant to a manor, will not pass by the king's grant of the latter without express mention, 121. b. n. 2.
Instance of a partition of, referred to, 164, b. n. 6.
Mortgage of, compellable to present nominee of mortgagor, 205. a. n. 1. 3dly.
Sale of, 374. b. n. 1,
See more concerning Advowson, 17. b. n. 2. 18. a. n. 1. 2. 32. b. n. 2. 46. b. n. 6. 115. a. n. 6. 122. a. n. 1. 165. b. n. 2. 166. b. n. 2, 3. 171, b. n. 3. 186. b. n. 6, 7, 8, 9. 190. b. n. 5. 218. a. n. 1. 233. b. n. 1. 243. a. n. 1. 249. a. n. 2. 349. b. n. 2.

Æquivocum,
154. b. n. 7.

Affiance,
34. a. n. 1.
Whether synonimous with marriage, 34. a. n. 2.

Affinity,
As an impediment to marriage, 24. a. n. 2. 235. a. n. 1.
As a principal challenge to the array or to the poll, 156. a. n. 1, 2. 157. a. n. 6.

Affirmative Words,
115. a. n. 9.

Age,
Who shall have, 24. b. n. 2.
As to dower, 33. a. n. 7.
As to a jointure, 36. b. n. 7.
See more concerning Age, 38. b. n. 1. 79. a. n. 3. 4. 79. b. n. 2. 89. b. n. 6. 131. a. n. 1. 164. a. n. 1. 169. a. n. 2. 171. b. n. 2, 3. 187. a. n. 1†. 243. a. n. 2. 245. b. n. 2.

Agium,
The termination of, 175. b. n. 5.

Agnati,
In the Roman law, 11. a. n. 2. 88. b. n. 6.

Agreement,
Parol, 169. a. n. 3.
To abide by the custom, whether it presents a bequest of personal estate, 176. b. n. 9.
Of record, 121. a. n. 1.
Parol, where it may be alleged in explanation of a deed, 222. b. n. 2.
As to powers, 342. b. n. 1. VII.
To suffer a recovery cannot be restrained, 379. b. n. 1.
See more concerning Agreements, 53. a. n. 7. 57. a. n. 1. 59. a. n. 4. 79. b. n. 1. 121. a. n. 1, 2. 180. b. n. 4.

Aid,
After verdict, 125. a. n. 2.
To deraign a warranty paramount, 174. a. n. 4.
Prayer in, between parceners, 174. b. n. 2. 187. a. n. 3.
Prayer in, as to curtesy, 384. b. n. 1.

Aids,
Abolished by 12 Car. II. 76. a. n. 1. 85. b. n. 1. 91. a. n. 1†. 93. b. n. 3. 108. a. n. 1.

Alien,
A use will arise for, on a covenant to stand seised, 2. b. n. 1.
Cannot *take* by act of law, ibid.

Alien,
Purchasing with king's license, may hold, 2. b. n. 2.
In the name of a trustee, ibid.
Mortgagee, ibid.
King entitled to his property, when, 2. b. n. 3.
Tenant in tail, recovery by, ibid.
Copyhold, lord entitled, 2. b. n. 4.
Capacity of, to take chattels, 2. b. n. 7. 9.
Administration to the effects of, 2. b. n. 8.
His children may inherit to each other, 8. a. n. 2. 5. 12. a. n. 7.
Friend or enemy, how triable, and capacities of, 129. b. n. 2, 3.
Entitled to dower, when, 31. b. n. 9. 129. b. n. 4.
Who is not, though born beyond sea, 128. b. n. 2. See *Jointenants*.
Grant of reversion to, 310. b. n. 1.
See more concerning Aliens, 16. a. n. 1. 31. b. n. 10. 129. a. n. 1. 129. b. n. 1. 180. b. n. 2.

Alienage,
How it affects the course of descent, 8. a. n. 1, 2. 5. 12. a. n. 7.

Alienation,
Before the stat. of *quia emptores*, state of, 43. a. n. 2, 3.
Fines for, except by custom, abolished by 12 Car. II. c. 24. 43. b. n. 2.
Restraints imposed upon by the feudal system, and how eluded, 191. a. note, sect. VI. 6, 7, 8. 224. a. n. 1.
Involuntary, state of, 191. a. note, sect. VI. 9.
in the Roman law, 191, a. note, sect. VI. 9.
Voluntary, 191. a. note, sect. VI. 9.
Testamentary, 191. a. note, sect. VI. 10.
Condition restrictive of, in what cases good, and to what extent, 223. a. n. 1. 223. b. n. 1.
Restraints upon by the law of Scotland, 224. a. n. 1.
What a forfeiture, 233. b. n. 1.
How far restraints upon are guarded against, 271. b. n. 1. VIII. 3.
Observations on attempts to restrain, 379. b. n. 1.
Power of, under the statute *quia emptores*, 327. a. n. 2. I.
Involuntary, for debt, 330. b. n. 1.
See more concerning Alienation, 30. a. n. 4. 49. a. n. 6. 60. a. n. 1. 85. b. n. 1. 88. b. n. 13. 93. b. n. 3. 94. b. n. 1. 3. 111. b. n. 1. 121. a. n. 1. 191. a. note, sect. VI. 5. 224. b. n. 1. 309. a. n. 1.

Allegation,
Of being beyond sea, 107. a. n. 6.
Required by the common law, as to facts, 125. a. n. 2.

Allegiance,
Old oath of, 68. b. n. 1.
See more concerning Allegiance, 68. b. n. 2. 172. b. n. 1. 233. a. n. 1.

Allodial Land,
65. a. n. 1.

Alum,
165. a. n. 1

Almoner,
Office of, usually given to the Archbishop of York, 94. a. n. 6.

Alteration
Of a deed, 35. b. n. 7.

Amendments,
During a suit, 259. b. n. 1.

Amercements,
Formerly an object of attention, 127. a. n. 1. 161. a. n. 4.

Analogy
Between the decisions of equity and those of law, as to the rule that equity followeth the law, 290. b. n. 1. XVI.
Observe in the construction of the statute *de donis* with reference to the statue of *Gloucester*, 373. b. n. 2.
See also 271. b. n. 1. V.

Ancestor,
On several limitations, one to the ancestor, the other to his heir. See *Shelley*.
Unless there is an interest in, the heir cannot be entitled by descent, 386. a. n. 1.

Ancient Demesne,
154. a. n. 11.

Annuity,
Of inheritance, forfeitable for treason, 2. a. n. 1.
Not an hereditament within the stat. of mortmain, 2. a. n. 1.
Not intailable within the stat. de donis, 2. a. n. 1. 20. a. n. 4.
Writ of, will not lie against grantor's heir, unless specially bound, 144. b. n. 2.
Secus against successors of a body politic, ibid.
Assignable, in what cases, 144. b. n. 1.
Pro consilio impendendo, 144. b. n. 1.
An action of, 146. a. n. 1.
See more concerning Annuity, 17. b. n. 4. 83. b. n. 5. 146. a. n. 3. 148. a. n. 3. 213. b. n. 1. 223. b. n. 1. 300. b. n. 1.

Anticipation,
Of a wife's separate estate, 351. a. n. 1. VI.

Antiquity,
(Immemorial) of slavery, 117. b. n. 3.

Appeal,
Effect of proceedings in, 16. a. n. 8.
Of death, 156. b. n. 3.

Appeals of Felony, or *Mayhem*,
161. a. n. 4.
See more concerning Appeal, 33. a. n. 11. 33. b. n. 2. 4. 74. b. n. 1. 157. a. n. 4. 159. a. n. 4. 168. a. n. 2.

Appearance,
139. a. n. 1.

Appendants,
Are ever by prescription, 122. a. n. 2. See *Appurtenant*.
See more concerning Appendants. 121. b. n. 2. 121. b. n. 6. 122. a. n. 1. 3.

Application,
Of purchase-money, who answerable for, 290. b. n. 1. XIV.

Appointee,
210. a. n. 1.

Appointment,
Power of, 216. b. n. 2. 271. b. n. 1. VI. 342. b. n. 1. I.
Power of, as to the rule in Shelley's case, 299. b. n. 1.
See more concerning Appointment, 89. a. n. 1. 112. a. n. 2.

Apportionment of Rent,
On a sale, 271. b. n. 1. VII. 2.
See more concerning Apportionment, 32. b. n. 2. 147. b. n. 7. 148. b. n. 1. 4, 5. 150. a. n. 3. 202. b. n. 2.

Apprentices,
Interest of masters in property acquired by their personal labour, 117. a. n. 1.
Of watermen and seafaring persons, ibid.

Appropriation,
46. b. n. 1.

Appurtenances,
121. b. n. 2.

Appurtenant and *Appendant*,
What things may be, and to what, 121. b. n. 7. 122. a. n. 1.
Common, need not be prescribed for, where there is an existing grant, 122. a. n. 4.
See also 121. b. n. 5, & 6.

Arches,
Court of, 79. b. n. 1.
Dean of the, 95. a. n. 1.

Archives,
109. b. n. 2.

Argumentum ab inconvenienti,
66. a. n. 1.

Arms,
Historical deduction, and observations upon assize of, 71. a. n. 1.
Descent of, 27. a. n. 3.
And name of a settler, 327. a. n. 2. II. 2, 3.
See also as to Arms, 74. b. n. 1. 189. a. n. 2.

Array,
Commissions of, 71. a. n. 1.
See more concerning Array, 125. a. n. 2. 156. a. n. 5. 157. b. n. 7.

Arrected,
Derivation of, 173. b. n. †. 173. b. n. 2.

Arrest,
161. a. n. 3.

Arthur's
Consolidating Britain into one kingdom, 68. b. n. 4.

Articles,
Marriage, 246. a. n. 1.

Ascent,
Lineal, reasons for excluding, discussed, 11. a. n. 1.
Whether excluded in the Roman law, 11. a. n. 2.

Ash,
Cutting of, whether waste, 53. a. n. 11.

Assent,
To a charter of feoffment, 48. a. n. 5.
Of the commons to ancient statutes may be presumed, 159. b. n. 2.

Assets,
Advowson is, 17. b. n. 3.
Estates per auter vie not devised, are, 41. b. n. 5.
Legal and equitable, what are, 208. b. n. 1.
See more concerning Assets, 39. a. n. 6. 118. a. n. 3. 191. a. note, sect. VI. 8. 191. a. note, sect. VI. 9. 264. b. n. 1.

Assignee,
For voucher, 215. b. n. 1.

Assignee,
Within 32 *H.* 8, 215. b. n. 1.
See more concerning Assignee, 210. a. n. 1.

Assignees,
In law, 351. a. n. 1. IV.

Assignment,
Conditional, 34. b. n. 10.
Of a chose in action, the form of, 232. b. n. 1.
Of what it may not be, 265. a. n. 1.
See more concerning Assignment, 32. b. n. 1. 34. b. n. 8, 9. 35. a n. 3, 4. 7, 8, 9, 10, 11, 12, 13. 35. b. n. 5. 37. b. n. 1, 2. 38. b. n. 1. 39. a. n. 4. 308. a. n. 1.

Assigns,
144. b. n. 1.

Assise,
In what case disseisee shall not have, 47. b. n. 12.
Of arms, 71. a. n. 1.
In confinio comitatus, 154. a. n. 1, 2.
The great, 155. a. n. 3.
Of novel disseisin, 151. a. n. 3.
What seisin will maintain, 202. b. n. 1.
See more concerning Assise, 135. b. n. 1. 147. a. n. 4. 153. b. n. 8. 154. b. n. 3. 6. 8. 155. a. n. 2. 188. a. n. 10. 180. b. n. 5. 202. b. n. 1. 251. a. n. 1. 251. b. n. 3. 304. a. n. 1.

Assumpsit,
To take a benefit may be presumed, 337. b. n. 1.

Assurances,
Common, 121. a. n. 1.

Attainder,
Of issue in tail, *in vita patris*, does not give donor a right of entry, 22. a. n. 3.
Where it may be falsified, and how, 13. b. n. 1.
Shall relate to the time of committing the offence, 13. a. n. 7.
Whether necessary to arraign a new, for a second felony. 390. b. n. 2.
As to forfeiture, 391. b. n. 1.
See more concerning Attainder, 8. a. n. 3, 4, 5. 12. a. n. 6, 7. 18. a. n. 4. 24. b. n. 3. 28. b. n. 1. 33. a. n. 8. 40. a. n. 1. 40. b. n. 1. 41. a n. 3, 4, 5. 42. b. n. 3. 62. a. n. 1. 133. a. n. 4. 134. b. n. 1. 271. b. n. 1. II. 265. a. n. 1.

Attaint,
6. b. n. 4. 128. a. n. 1. 155. a. n. 3. 155. b. n. 5. 161. a. n. 4. 259. b. n. 1. 355. a. n. 1.

Attorney,
The origin of powers of, 271. b. n. 1. I.
As to maintenance, 368. b. n. 1.
Friction by which, in the Roman law, a person might plead by, 368. b. n. 1.
See more concerning Attorney, 48. b. n. 2. 49. b. n. 4. 50. a. n. 1. 52. a. n. 2. 65. a. n. 5. 68. a. n. 5. 232. b. n. 1.

Attornies,
295. a. n. 1.
Different functions of, in the English and the Roman law, 368. b. n. 1.

Attornment,
Where formerly not compellable, 148. a. n. 3.
Nearly abolished by stat. 215. a. n. 2. 309. a. n. 1.
How far made unnecessary by the statutes of uses and wills, 309. a. n. 1.
To the conusee of a fine, for what purposes it was necessary, 320. a. n. 1.

Attornment,
What it gave title to, 320. a. n. 1.
See more concerning Attornment, 28. a. n. 3. 5. 48. b. n. 1. 49. a. n. 1. 119. b. n. 2. 151. b. n. †. 161. b. n. 3. 186. b. n. 6. 300. a. n. 1. 311. a. n. 1. 314. b. n. 1. 316. b. n. 1. 318. b. n. 1. 319. b. n. (A).

Auditors,
Appointed by a court in an action of account, 119. b. n. 1.

Averia Caruca,
161. a. n. 2.

Averment,
34. b. n. 11. 36. b. n. 6. 42. a. n. 6. 123. b. n. 1.

Augmentation,
The court of, 159. a. n. 4.

Authors and Works,
Explained or characterized: Viner's Abr. 9. a. n. 3. Lord Bacon's reading of stat. of uses, 13. a. n. 2. 271. b. n. 1. English edition of Plowden's Comment. 23. a. n. 1. Noy's Rep. 54. a. n. 10. Sullivan's lectures, 68. a. n. 3. Ockham, 58. a. n. 2. 68. b. n. 7. Black Book, Red Book, and Dialog. of the Exchcq. 68. b. n. 7. Littleton, MS. introduction to the third book of, 163. a. n. 1. Sanders on uses and trusts, 271. b. n. VIII. 3. Preston on estates, 338. b. n. 4. On merger, ibid. On the rule in Shelley's case, 376. b. n. VI. Sugden on Purchases, 290. b. n. 1. On Powers, 334, b. n. 1.
On *Scintilla juris*, 271. b. n. 1. IV.
See more concerning Authors, 86. a. n. 2. 98. b. n. 1. 106. b. n. 2. 107. a. n. 6. 108. a. n. 4. 120. a. n. 4. 155. b. n. 5. 159. b. n. 2. 176. b. n. 5. †. 191. a. VI. 8. 208. a. (208. b. 13th ed.) n. 1. 2ndly. 237. a. n. 1. III. 239. a. n. 1. 261. a. n. 1. 262. a. n. 2.

Avowry,
For homage in respect of the wife's land, upon whom it shall be, 66. b. n. 2.
Upon a disseisee, 266. b. n. 1.
For rent. 373. a. n. 3.
See more concerning Avowry, 30. a. n. 3. 66. b. n. 2. 69. b. n. 1 83. a. n. 2. 145. b. n. 3. 268. a. n. 2. 268. b. n. 1. 269. b. n. 2.

Authority,
Where exercisable after the death of the party creating it, 52. b. n. 7.
Difference between a naked one, and one coupled with an interest, 49. b. n. 1. 113. a. n. 2.
Regal, 99. a. n. 1.
A bare, 236. a. n. 1.
See more concerning Authority, 52. b. n. 2. 90. b. n. 4. 112. a. n. 6. 113. a. n. 2. 115. a. n. 15.

Award,
To account, 139. b. n. 1.
Interlocutory, final, ibid. 168. a. n. 2.

B

Bail,
In king's bench, and Bail in common pleas, difference between, 265. b. n. 3.

Bailees,
89. a. n. 10.

Bailiff,
Not liable in B. R. to a fine for a false claim, 145. b. n. 1.
Has no possession, 330, b. n. 1.
See more concerning Bailiff, 89. a. n. 3. 172. a. n. 8. 199, b. n. 1. 239. b. n. 2. 249. a. n. 1.

Bailiffs,
Of manors, 168. b. n. 1.

Bailment,
Of goods, several points respecting, 89. a. n. 7. 9. 10. 89. b. n. 1, 2, 3, 4.

Banishment,
For felony, 133. a. n. 1.

Bankruptcy,
An action lies for a commission of, falsely and maliciously sued out, 161. a. n. 4. IV.
A Bankrupt's
Intailed lands may be sold by the commissioners, 191. a. note sect. VI. 8.
Landed property is subject to his debts, 191. a. note, sect. VI. 9.
A proviso between landlord and tenant for re entry, in case of, is good, 223. b. n. 1.
(In case of), the bargain and sale must be indented, 229. a. n. 2.
As to baron and feme, 351. n. 1. IV.

Bans,
Publication of with respect to the marriage of an infant, 79. b. n. 1.

Bar (the),
Functions and fees of, under the Roman, French, and English jurisprudence, 295. a. n. 2.

Bar,
To an entail by discontinuance, 191. a. note, sect. VI. 8.
Of dower by grant of rent out of the land, 36. b. n. 1.
Of dower, in equity, by acceptance of a collateral satisfaction, 36. b. n. 1.
Of dower by equitable jointure, 36. b. n. 5.
Of dower in pleading, 38. b. n. 2. 39. a. n. 3.
See more concerning Bar of Dower, 36. b. n. 2. 4, 6, 7. 40. b. n. 3. 41. a. n. 2.

Bargain and Sale,
For years, 48. a. n. 3.
Inrolled, 48. a. n. 3.
By statute, 270. a. n. 2.
As to discontinuance, 330. a. n. 1. VII.
By tenant in tail, effect of, 331. a. n. 1.
As to powers, 342. b. n. 1. IV. 342. b. n. 1. V.
As to disseisin, 367. a. n. 1.
See more concerning a Bargain and Sale. 49. a. n. 1. 121. a. n. 1. 123. a. n. 8. 147. b. n. 4, 5. 225. b. n. 2. †. 229. a. n. 2. 271. b. n. 1. VI. 271. b. n. 1. VI. 1. 342. b. n. 1. VIII.

Bark,
Of felled trees, 165. b. n. 2.

Baron and Feme.
Where and how the one can take of the gift of the other, 3. a. n. 1. 297. b. n. 1. And where not, 34. a. n. 1.
Tenants in special tail; if divorced *a vinculo*, &c. become tenants for life only, 25. b. n. 2.
Deeds of feme alone are void, not avoidable, 42. b. n. 4.

Baron and Feme,
Limitation to, and to the heires, &c. of them, or one of them, how construed, 26. a. n. 3. 26. b. n. 1, 2. 219. a. n. 3. 224. a. n. 2. 27. a. n. 1.
Rights of actions against the former, in respect of the latter, 46. b. n. 5. 154. b. n. 1.
Feme may devise by custom, 111. b. n. 4.
Trustee, whether she may convey without baron, 112. a. n. 6.
May convey without baron, in performance of a condition or in the exercise of a naked power, ibid.
Exile of former, entitles feme to sue alone, 133. a. n. 3.
The latter shall have deceit for fine levied by the former in her name, 133. a n. 4.
Tenant to the præcipe, may be made of a wife's estate by the husband alone, without a fine, 325. b. n. 2. III.
Lease by, how it shall be made, 333. a. n. 2.
Where it shall not bind, the wife's interest, 44. a. n. 2.
Interest of the former in the chattels real and things in action of the latter, 351. a. n. 1. 184. b. n. 6. 299. a. n. 2.
How, when the latter takes *en auter droit*, 351. b. n. 1.
As to trust estates, 290. b. n. 1. XVI.
Alienation by the former of the real estates of the latter, how affected by statutes, 353. b. n. 1.
See pleading, 26. a. n. 1.; partition, 171. a. n. 2; release, 264. b. n. 2.
The interest which the husband takes in the chattels real and things in action of his wife, 351. a. n. a.
Where the husband survives his wife, ibid. I.
With respect to such part of the wife's personalty as is not in her possession, ibid. II.
How this interest of the husband in, and his authority over, the personal estate of the wife is modified by equity, ibid. II.
If the husband be obliged to resort to a court of equity, to recover the choses in action of the wife, or any property which he cannot recover without the assistance of the wife, the court will not interfere unless he will submit to dispense equity before it be administered to him, ibid. III.
Whether the wife's equity will prevail against the assignee of the husband, for a valuable consideration, or against assignees in law, ibid. IV.
Where a settlement of personal estate, except chattels real, is executed before marriage, and contains an express stipulation that the woman, on the event of her surviving her husband, shall have the absolute property, or shall have the income of it during her life, no deed executed by the woman either alone or jointly with her husband, during their joint lives, can transfer, charge, or in any manner affect her contingent right to the property or income, by survivorship, ibid. V.
Some of the general rules of equity respecting dispositions by a married woman of her separate estate, ibid. VI.
See more concerning Baron and Feme, 45. a. n. 5. 46. b. n. 6. 55. b. n. 5, 6, 7. 57. b. n. 2. 66. b. n. 2. 121. a. n. 1. 156. a. n. 2. 172. b. n. 4. 185. b. n. 3. 185. a. n. 10. 187. b. n. 2. 188. a. n. 1. 218. b. n. 2. §. 229. a. n. 2. 241. b. n. 1.

Baronet,
Cannot be taken in execution by the title of knight, 16. b. n. 8.

Barony,
By writ, whether it may be surrendered, 16. b. n. 2.
Does not ennoble until seat taken in parliament, 16. b. n. 3.
By letters patent, ennoble without sitting, ibid.
Not triable by the record of parliament, ibid.
A land, 108. a. n. 4.
See more concerning a Barony, 9. b. n. 5. 29. b. n. 1. 31. b. n. 6. 69. a. n. 5. 70. b. n. 2. 83. b. n. *. 83. b. n. 3. 97. a. n. 2. 94. a. n. 4. 134. b. n. 1. 165. a. n. 7.

Baronial Possession,
134. b. n. 1.

Baronial Tenure,
134. b. n. 8.

Barons,
The king cannot create a dignity between them and baronets, 16. b. n. 8.

Barons by Tenure,
134. b. n. 1.

Bastard,
Not *in esse*, whether capable of taking, 3. b. n. 1.
Use in favour of, where good, 123. a. n. 8.
Derivation of the word, 243. b. n. 2.
Rule, that one shall not be adjudged such *post mortem*, extends only to a single instance, 244. b. n. 1.
Special 244. b. n. 2.
General, 126. a. n. 2.
Is differently considered in Germany and England on the one hand; and in Spain, Italy and France, on the other, 243. b. n. 2.
Special and general, how triable, 245. a. n. 1.
Egine and mulier puisne, 170. b. n. 3, 4. 244. b. n. 1.
See more concerning Bastards, 3. b. n. 1. 88. b. n. 12. 128. a. n. 1. 8. 128. b. n. 1, 2. 176. a. n. 1. 244. a. n. 1, 2.

Battle,
Trial by, authors upon, 294. b. n. 1.

Beasts,
Escaping, 47. b. n. 2, 3.
Of the plough 47. a. n. 18.

Beech,
May be timber, 53. a. n. 10.

Benefice,
Full, 119. a. n. 1.

Bequest,
Specific, 264. b. n. 1.

Biens,
118. a. n. 3.

Bigamy,
Meaning of the term, 80. b. n. 1.

Bill,
Of rights, 120. a. n. 4.
Of naturalization, 129. a. n. 1.

BO

Bill,
Of attainder, as to the votes of bishops, 134. b. n. 1.
Of partition, 169. a. n. 2.
Action by, 285. a. n. 1.
For relief in Equity, must be filed within six months after execution in ejectment, 202. a n. 3.
In Parliament, 260. a. n. 1.
In chancery, in case of fraud in a vendor, 384. a. n. 1.

Bishops,
By what right they sit in parliament, 70. b. n. 2. 134. b. n. 1.
Suffragan and coadjutor, nature of, 94. a. n. 3.
Precedence of, *inter se*, 94. a. n. 5.
Elective, 95. a. n. 4.
A bishop *quasi decanus*, 95, a. n. 4.
Not now the practice of the crown to charge with corodies and pensions, 97. a. n. 3.
How elected in the Saxon era, and afterwards, 132. a. n. 1. 2, 3, 4, 5.
Are seised in fee, 325. b. n. 1. II.
See more concerning Bishops, 90. b. n. 4. 121. b. n. 2. 206. a. n. 1.

Bishoprics,
Distinction between old and new, in respect to the patronage of, 134. a. n. 5.
The Irish, 134. a. n. 5.
The Welsh, 134. a. n. 5.
See more concerning Bishoprics, 94. a. n. 4. 95. a. n. 3, 4. 97. a. n. 2. 109. b. n. 3. 119. a. n. 1. 134. a. n. 1. 2, 3. 5.

Black Book,
68, b. n. 7.

Blood,
Consideration of, 123. a. n. 8.

Bockland and Folkland,
Distinction between, 6. a. n. 6.
See more concerning Bockland, 86. a. n. 2. 271. b. n. 1. I. 1.

Bond (*see Obligation*),
Of resignation, 186. a. n. 3. 206. b. n. 1.
For procuring marriage, ibid.
In restraint of trade, ibid.
Condition of, may be good in part, and void in part, ibid.
Payment to obligee at any time before action brought, may be pleaded in bar of the action, 212. b. n. 1.
In the third person, 230. a. 1.
Debt, whether released by marriage, 264 b. n. 2.
Considered an agreement in equity, ibid.
See more concerning Bonds, 36. a. n. 6. 89. b. n. 6. 172. a. n. 2. 5. 180. b. n. 1. 190. a. n. 2. 206. a. n. 1. 209 a. n. 1. 232. a. n. 1. 232. b. n. 1. 264. b. n. 1.

Bondage,
117. b. n. 3.

Borough,
Origin of the word, 109. b. n. 2. 108. b. n. 4.
Whether, unless corporate, it may be a city, 109. b. n. 2. 3.
See more concerning Boroughs, 108. b. n. 2, 3. 110. b. n. 2. 111. b. n. 1. 116. a. n. 1.
See also *Tenures*.

Borough English,
May be extended and restrained by special custom, as to descent, 110. b. n. 4.

CA

Borough English,
Chief instances of, collected in Rob. on Gav. 140. b. n. 3.
What customs in, must be specially pleaded, 110. b. n. 3. 175. b. n. 4.
See more concerning Borough English, 10 a. n. 3, 4. 24 b. n. 3. 110. b. n. 5. 376. a. n. 1.

Boundaries,
Commissions to ascertain, 169. a. n. 2.
Of land may depend on presumption and usage, 261. a. n. 1.
Whether prescription and usage is sufficient to constitute a right to the sea, 261. a. n. 1.

Boutetorte,
Barony of, 165. a. n. 6.

Brehon,
Law, in Ireland, when abolished, and where explained, 141. a. n. 5. 176. a. n. 1.
Law of partibility, 176. a. n. 1.

British,
Seas, the, 107. a. n. 6.
Channel, or Sea, ibid.

Brokage,
Marriage, 206. b. n. 1.

Burgage,
Tenure in, is not varied by 12 Car. 2. c. 24. 116. a. n. 1.
Tenure in, was a species of socage tenure, 191. a. note, Sect. VI. 11.

Burgesses,
Of parliament, 108. b. n. 4.

C.

Cambridge,
Manuscripts of Littleton, 163. a. n. 1.

Camp,
Protections for women attending upon, a. 130. a. n. 1.

Cancellarii,
In the Roman law, 290. b. n. 1. I. 2.

Cancelling,
A deed, divests no estate, 225. b. n. 1.

Canons,
Of collegiate churches, 95. a. n. 2.

Cape ad valentiam,
The grand, 386. b. n. 1.

Capitulars,
Of the first French Kings, 164. b. n. 4.

Caput baroniæ,
81. b. n. 6.

Carlovingian family,
191. a. note, Sect. IV.

Carrier,
Answerable for what losses, and on what ground, if robbed, 89, a. n. 6. 89. b. n. 2.
See more concerning Carriers, 89. a. n. 7. 9. 89. b. n. 4.

Carta de libertatibus,
43. a. n. 4.

Castle,
As to what passes by it, 5. a. n. 3.
As to dower, 31. b. n. 5.
Guard, 87. a. n. 1. 106. b. n. 2.

Cathedrals,
95. a, n. 2. 4.

Certainty,
The three kinds of, 303. a. n. (B.)
See more concerning Certainty, 34. b. n. 5. 35. b. n. 5. 115. a. n. 5. 125. a. n. 2.

Certificate,
Of the mayor and aldermen of London as to the custom of distribution, 176. b. n. 8.
Of a bishop, 206. a. n. 1.
See also, 74. a. n. 4.

Cessavit,
Writ of, 141. a. n. 2.
See also, 47. a. n. 4. 154. a. n. 3. 143. b. n. 5.

Cesser,
Forfeiture by, 142. a. n. 2.
Process of, in the lord's court, ibid.
As to rent, 149. a. n. 3.
Of estate tail, proviso for, with a limitation over, 223. b. n. 1.

Cesset executio,
208. a. n. 1.

Cestui que Use,
Before 27 H. 8. 50. a. n. 1.
Whether there can be *cestui que use* under the statute, in any case, where the party would not have been *cestui que trust* at common law, 342. b. n. 1. VIII.
See more concerning *Cestui que Use*, 191. a. note, Sect. VI. 11. 271. b. n. 1. II.

Chace,
115, a. n. 15.

Challenges,
As to jurors, 125. a. n. 2. 156. a. n. 1. 3. 4. 5. 156. b. n. 1, 2, 3, 4. 157. a. n. 6, 7, 8. 157. b. n. 1, 2, 3. 5, 6, 7, 8. 158. a. n. 5. 158. b. n. 2, 3, 4.

Chamberlain,
Great, office of, how descendible, 29. a. n. 1. 165. a. n. 8.

Chancellor,
The courts of the, 191. a. note, Sect. VI. 11.
The difference between the office of, in this country, and on the Continent, 191. a. note, Sect. VI. 11.
Resort to for redress where a contract was left unperformed, 290. b. n. 1. I. 1.
In this country, the original office of, 290. b. n. 1. I. 2.
See also, 169. a. n. 2.

Chancellors,
Of bishops and palatines, 290. b. n. 1. I. 2.
In the courts of foreign countries, 290. b. n. 1. I. 2.

Chancery,
Remedy in, for refusing to admit a surrenderee, 59. b. n. 6.
Relief in, against forfeiture for waste, 63. a. n. 2.
With respect to guardians, 88. b. n. 6. 12.
The jurisdiction of, over infants, 88. b. n. 16.
over tithes, 159. a. n. 4.
As to estoppel by partition between bastard *eigne* and mulier *puisne*, 170. b. n. 4.
Where the court of may direct infants to convey estates vested in them upon trust, or by way of mortgage, 171. b. n. 5.

Chapters,
To what ecclesiastical bodies the name is appropriate, 95. a. n. 2.
The new deaneries and, 95, a. n. 3.
The legal mode of constituting deans of, before king John, is uncertain, 95. a. n. 4.

Charges,
(Except a lease for years) are not avoided by recovery in waste, 234. a. n. 1.
On real property, how affected by a prior term of years, 290, b. n. 1. XV.

Charitable Donations,
191. a. note, Sect. VI. 8.

Charta indenta,
229, a. n. 1.

Chartæ partitæ,
229. a. n. 1.

Chartæ paricle; or, *paricolæ*,
229. a. n. 1.

Charta undulatoria,
229. a. n. 1.

Charta de unâ parte,
229. a. n. 2.

Charter of King John,
As to the election of a dean by the chapter, 95. a, n. 4.
As to Ireland, 141. b. n. 1.

Charters,
Detinue will lie for, where, 20. a. n. 2.
Distinguished from deeds, 9. b. n. 1.
As to the appointment of deans, 95. a. n. 4.
The indenting of, 143. b. n. 3.
See more concerning Charters, 229. a. n. 1. 261. a. n. 1.

Chattels,
Real and choses in action, of a wife, 299. a. n. 2.
Personal, and real, of a wife, 351. a. n. 1.
See more concerning Chattels, 9. a. n. 1. 20. a. n. 5. 42. a. n. 7, 8. 111. a. n. 6. 111. b. n. 1. 118. a. n. 3. 141. a. n. 2. 190. a n. 2.

Chester,
Earldom of, how it became annexed to the Crown, 165. a. n. 4.
The county palatine of, how affected by 24 Geo. 3. 157. a. n. 4.
The city of, is excepted in 4 W. & M. c. 2. 176. b. n. 5.

Chevage,
Offence of, still inquirable, 140. a. n. 3.

Child,
When either of two persons may be its legitimate father, whether it shall choose, 8. a. n. 7. 123. b. n. 1.
Where it shall take jointly with the parent, and where in remainder, 9. a. n. 2, 3.
Follows the condition of its father, by our law, 123. a. n. 4.
Secus, by the civil law, ibid. n. 7.
Posthumous, limitation to, secured, 298. a. n. 3.

Children,
Posthumous, born after the usual time, 123. b. n. 2.
See more concerning Children, 113. a. n. 2. 123. a. n. 6.

Chimney Pieces,
53. a. n. 5.

Chirograph,
143. b. n. 4.

Chirographum,
What, 143. b. n. 4. 229. a. n. 1.

Chivalry,
Court of, its criminal jurisdiction, 74. b. n. 1.

Choses,
In action, assignable through the medium of equity, 232. b. n. 1. 265. a. n. 1.
In action of a wife, 299. a. n. 2. 351. a. n. 1. III.
See more concerning Choses in action, 90. b. n. 4. 144. b. n. 1. 232. b. n. 1. 265. a. n. 1. 320. a. n. 1.

Chronicles, (ancient)
As to deaneries, 95. a. n. 4.

Churchwardens,
How and for what purposes they are capable of purchasing lands, 3. a. n. 4.

Cion,
123. a. n. 2.

Circuity,
191. a. note, Sect. VI. 8.

City,
109. b. n. 2. 3. 110. b. n. 2. 111. b. n. 1. 112. b. n. 2.

Civil Law,
123. a. n. 7.

Claim,
Continual, 252. b. n. 1.
On the record of a fine, ibid.
By a stranger to a fine, 262. a. n. (B)
See more concerning Claim, 48. b. n. 4. 121. a. n. 1. 145. b. n. 1. 218. a. n. 1, 2, 3. 243. b. n. 1. 250. b. n. 1. 257. a. n. 1.

Clauses,
For shifting one estate on the accession of another, 327. a. n. 1. II. 1.
(In a settlement) for shifting an estate, and for taking a name and using arms, reference to cases on, 327. a. n. 1. II. 2.
(In a strict settlement) which enjoin taking the name and using the arms of the settler, observations on, and form of, 327. a. n. 1. II. 2.
For taking a name and using arms, are sometimes improperly used, 327. a. 1. II. 3.

Clergy,
Benefit of, 80. b. n. 1.

Client,
And patron in the Roman law, 64. a. n. 1.

Coadjutors
Of a bishop, 94. b. n. 3.

Code,
Civil Napoleon, as to registration, 290. b. n. 1. XIII.

Codes,
Napoleon, 191. a. note, Sect. III. 3.
Of the German tribes, ibid. note, Sect. IV.

Cognati,
In the Roman law, 11. a. n. 2. 88. b. n. 6.

Cohabitation,
Averment against, in case of baron and feme, 123. b. n. 1.

Coin,
Of the kingdom, 207. b. n. 1.
Current, tender of a sum in, is good, 207. b. n. 3.

Collateral things,
231. a. n. 1.

Collation of Goods,
In the civil law, 176. a. n. 10.

Colleges and Chapters,
95. a. n. 1.

Collegiate Churches,
95. a. n. 2.

Coloni et glebæ adscriptitii,
64. a. n. 1.

Commandment,
Before disseisin, 180. b. n. 4.

Commencement
Of a lease, 46. b. n. 9. 10.

Commendams,
The case of, 112. a. n. 2.

Commerce,
How favoured by the law, 47. a. n. 14. 191. a. note, Sect. VI. 5. 9. 271. b. n. 1. VII. 2.

Commission,
In chancery, for examination of witnesses, a close, but for partition, an open proceeding, 167. b. n. 3.
Of array, 71. a. n. 1.
Of bankruptcy, 161. a. n. 4.
To ascertain boundaries, 169. a. n. 2.
Of partition, ibid.
Of escheat, 205. a. n. 1. 1st.
See more concerning Commission, 88. b. n. 16. 157. b. n. 3.

Commissioners,
Of oyer and terminer, 74. b. n. 1.

Commitment,
Of a jury to prison, 155. b. n. 5.

Committee,
To assign dower, 38. b. n. 1.
Of a lunatic, 88. b. n. 6.
(The king's) of an infant heir, 169. a. n. 2.

Common,
Appendant, must be by prescription, 122. a. n. 2.
Appurtenant, may be by grant, as well as by prescription, 122. a. n. 4.
In gross, whether it can be *sans nombre*, 122. a. n. 5.
Appurtenant, apportionment of, 147. a. n. 7.
Appendant or appurtenant, recovered with the land, 151. a. n. 3.
Appendant or appurtenant, 154. b. n. 6.
Sans nombre, 164. b. n. 8.
Right of, 122. a. n. 3. 271. b. n. 1. II. 290. b. n. 1. III. 291. b. n. 1.
See more concerning right of Common, 32. a. n. 6.

Common Assurances,
121. a. n. 1.

Commoner,
16. b. n. 3.

CO

Common Law,
The courts of, 135. b. n. 1.
See more concerning Common Law, 88. b. n. 16. 89. a. n. 7. 115. a. n. 8, 9. 11. 14, 15. 119. a. n. 1. 120. a. n. 4. 121. b. n. 2.

Common Pleas,
Court of, its origin, 71. b. n. 2.

Common Recovery,
135. a. n. 1.

Commons,
The house of, 42. b. n. 1. 64. a. n. 1 *. 110. a. n. 4. 159. b. n. 2. 260. a. n. 1.

Commune consilium,
110. a. n. 4.

Compositions amicable,
121. a. n. 1.

Computation,
As to a lease, 45. b. n. 3. 46. b. n. 8, 9.

Conclusion,
45. a. n. 6, 7, 8. 168. a. n. 2.

Condition,
Who shall enter for breach of, 12. a. n. 3.
Destroyed or not, 46. b. n. 4. 277. b. n. 2.
May be apportioned, where, 148. b. n. 4. 202. b. n. 2.
Effect of entry for breach of, 202. b. n. 2.
For payment of a sum *nomine pœnæ*, strictness required in, 153. b. n. 2.
Origin and application of the doctrine of, 201. a. n. 1.
Express, or conventionary, 201. a. n. 1.
Saved, 202. a. n. 3. 225. a. n. 1.
In law, or implied, 201. a. n. 1. 234. a. n. 1. 241. a. n. 4.
Distinguished from a remainder, and a conditional limitation, 203. b. n. 1.
At common law; in the civil law; in the canon law, 201. a. n. 1. 237. a. n. 1. III.
Performed or not, where, 205. b. n. 1. 207. a. n. 3. 212. b. n. 1. 213. a. n. 1. 219. a. n. 1.
Impossible, the different kinds of, 206. a. n. 1. 225. a. n. 1.
Against law, 206. a. n. 1. See Alienation, 223. a. n. 1. 223. b. n. 1.
Special, of entry until satisfaction, 203. a. n. 3.
Who may take advantage of, as assignees within the 32 Hen. 8. 215. b. n. 1.
General, of re-entry, 203. a. n. 3.
Performance of, *cy près*, 219. b. n. 1. 220. b. n. 1.
Not to alien or assign leases, 203. b. n. 1. 223. b. n. 1.
Doctrine of, as applicable to legacies, 237. a. n. 1. 1. III.
Annexed to the estate of a tenant to the præcipe, 203. b. n. 1. IV.
Precedent and subsequent observations upon, 237. a. n. 1. 224. a. n. 2. 310. b. n. 1.
When binding on lands, in the hands of disseisor, 240. a. n. 2.
Precedent estate granted on, vests not till performance of, 310. b. n. 1.
Repugnant, 206, a. n. 1.
Of a bond, 206. a. n. 1. 206. b. n. 1.
Some cases in which the performance of may be excused, 207. a. n. 1.
Why money only may be satisfied by a collateral thing, 213. a. n. 1.
To re-infeoff the feoffor and his wife in tail, &c. may be performed after the wife's second marriage, 21. b. n. 1 ‡.
Not to alien, 223. a. n. 1.

CO

Condition,
Not to make a tortious alienation, 223. b. n. 1.
A void, does not frustrate a recovery or a fine, 223. b. n. 1.
To defeat a freehold, 225. a. n. 2.
In gross, 230. b. n. 1.
Breach of, 236. a. n. 1.
Making void a devise, on marriage without consent, 237. a. n. 1.
Whether precedent or subsequent, is entitled to relief in equity, 237. a. n. 1.
Annexed to a fee conditional, 326. b. n. 1. IV.
To take a name and use arms, may be discharged by a recovery; determined by the estate's vesting in the settler's heir at law; released by such heir; and a right of entry upon a breach of, may be barred by a fine with proclamations, 327. a. n. 2. II. 3.
Cannot restrain the power of tenant in tail to make a lawful alienation, 379. b. n. 1.
See more concerning Conditions, 42. a. n. 11. 48. b. n. 6. 50. b. n. 1. 52. a. n. 9. 55. b. n. 10. 62 a. n. 1. 112. a. n. 6. 147. b. n. 7. 150. a. n. 4. 153. a. n. 6. 153. b. n. 2. 163. b. n. 4. 164. a. n. 3. 173. b. n. 4. 201. b. n. 3. 202. b. n. 1. 203. a. n. 1, 2. 205. a. n. 1. 1st. 207. a. n. 2. 218. a. n. 1, 2, 3. 218. b. n. 1. 3. 221. a. n. 1. 222. b. n. 2. 226. a. n. 1. 240. b. n. 2, 3. 241. a. n. 4. 252. b. n. 1. 271. b. n. 1. II. 309. a. n. 1. 353. a. n. 1.

Conditional Fees,
19. a. n. 2, 3, 4.

Conditional Limitation,
42. a. n. 6. 203. b. n. 1. I.

Conditional Purchases,
224. a. n. 2.

Confession
Of villenage, 122. b. n. 2.

Confirmation,
From lord paramount to tenant paravail, effect of, 152. b. n. 1, 2.
Grant to tenant at will, enures as a, 49. a. n. 1.
What is its operation, 295. b. n. 1, 2, 3.
In what it differs from a release, 296. a. n. 2.
Is good without privity, ibid.
Must confirm the whole estate of a tenant of freehold or inheritance, but may confirm part only of a term of years, 297. a. n. 1.
By enlargement should be distinguished from a conveyance or devise to the right heirs of tenant for life, 299. b. n. 1.
Before induction is void, 300. b. n. 1.
Of leases made by ecclesiastics, 301. a. n. 1.
To lessee for years to make him tenant for life, 307. b. n. 1.
See more concerning Confirmation, 45. a. n. 6, 7, 8. 152. b. n. 3. 187. b. n. 4. 296. a. n. 1. 300. a. n. 1.

Congé d'Elire,
The king's, 95. a. n. 4. 134. a. n. 4.

Conquest,
(the), 76. b. n. 1.

Consanguinity,
Different degrees of in the canon and civil law, 23. b. n. 3.
Authors upon, 24. a. n. 1, 2.
See more concerning Consanguinity, 23. b. n. 2. 160. a. n. 1. 235. a. n. 1.

Consent of Lessee,
For years, to livery of seisin, 48. b. n. 8.
See more concerning Consent, ibid. 79. b. n. 1. 80. a. n. 1. 94. b. n. 1. 121. a. n. 1. 125. b. n. 1.

Conservators of the Peace,
114. b. n. 1.

Consideration,
Good, 123. a. n. 8.
Valuable, ibid.
Of blood, ibid. 290. b. n. 1. X.
See more concerning Consideration, 49. a. n. 1. 290. b. n. 1. V. 4.

Conspiracy,
161. a. n. 4.

Constable,
High, office of, extinct, 74. b. n. 1.

Construction,
Of common law after the same is declared by statute, 115. a. n. 9.
Of law, as to manumission, 123. a. n. 3.
See more concerning Construction of law, 147. a. n. 2. 183. b. n. 1.

Consul,
Among the Romans, 168. a. n. 5.

Contempt,
Of royal authority, as to homage, 66. b. n. 1.

Contingent
Remainder and executory estates and interests, and possibilities with an interest, the transmissibility, conveyance, assignment, and devise of, 269. a. n. 1.

Contingent Interest,
Of a wife in Chattels real, and personal, 351. a. n. 1.

Contract,
Usurious, cannot be remedied by any subsequent agreement, covenant, or assignment, 222. b. n. 2.
Not to exercise powers, 342. b. n. 1. VII.
See more concerning contracts, 33. a. n. 10. 36. b. n. 7. 47. b. n. 7. 79. b. n. 1, 2, 4. 123. a. n. 8.

Contribution,
Of tenant for life towards redemption of mortgage, 208. a. n. 1.

Conveyances,
At Common law and to uses, difference between, 188. a. n. 13. 271. b. n. 1.
By felons, &c. 42. b. n. 3.
By custom, as to the secret examination of femes covert, 121. a. n, 1.
Tortious and rightful, 271. b. n. 1. I. 3.

Conveyancers,
The practice of, in assigning terms for years to attend the inheritance to prevent dower, 208. a. n. 1.
The practice of, in advising upon titles, considered by Lord Hardwicke as the reason of the determination in Radnor and Vandebendy, ibid.

Conuzance,
Spiritual, 89. b. n. 6.
Of property in K. B. 145. b. n. 1.
How affected by each other's acts, 163. b. n. 4.

Coparceners,
What may be divided between, 165. a. n. 1. 4. 8.
What seisin of one will give possession to the other, 186. b. n. 6.
May release *inter se*, 119. b. n. 1.
Fine levied by one to another, how it operates, ibid.
Inter se, what amounts to an ouster of one, 243. b. n. 1.
Disseisin of two, where one of them hath issue and dies, 364. b. n. (A)
See more concerning Coparceners, 148. b. n. 2. 153. a. n. 1. 164. a. n. 4, 5. 7, 8. 165. a. n. 3. 166. b. n. 2, 3. 167. b. n. 1, 2. 174. a. n. 4. 174. b. n. 5. 175. a. n. 1. 176. b. n. 2. 186. b. n. 8. 200. b. n. 1. 243. a. n. 1. 249. a. n. 2. 267. a. n. 1. 273. b. n. 2.

Copy,
Of court roll, 26. b. n. 4.
Sworn, 98. b. n. 1.
Of a record, 117. b. n. 4.

Copyhold,
Purchased by an alien, escheats to the lord, 2. b. n. 4.
In pleading, must be expressed to be *ad voluntatem domini*, 58. a. n. 1.
Surrender of, may be taken, by lord or steward, out of the manor, 58. a. n. 4. and that without special custom, 59. a. n. 6.
What estate passes by, 59. b. n. 2.
Where there are two stewards, grant of by one is good, 58. a. n. 5.
Guardian in socage may grant, in his own name, 58. b. n. 3.
Heir cannot hold courts during the interest of his guardian, ibid.
Grant of, in reversion, by *dominus pro tempore*, good, 58. b. n. 4.
In fee, lord disseisor may accept surrender of, and admit to, but not if held for life only, 58. b. n. 5.
Grant of, by heir before assignment of dower, not binding on doweress, 58. b. n. 6.
Custom of granting, may be destroyed, as to the particular tenant, but remain as to reversioner, 58. b. n. 7.
Tithes grantable as, 58. b. n. 9.
Cannot be partitioned without lord's license, 59. a. n. 1.
Release of, by and to whom it may be made, 59. a. n. 2.
Forfeiture of, by lease or alienation, what amounts to, 59. a. n. 3, 4.
Forfeiture of, by nonpayment of fine, what, 60, a. n. 1.
By waste what, and by whom, and when to be taken advantage of, 63. a. n. 1.
When relieved against in equity, ibid.
Whether, for attainder, before admittance, 62. a. n. 1.
Admittance to, whether compellable by action on the case, 59. b. n. 6.
Fine upon admittance to, by whom, and what payable, 59. b. n. 8. 302. b. n. 1.
What reasonable, or not, 60. a. n. 1.
Entail of, barable by surrender, or recovery, or forfeiture and re-grant, 60. a. n. 3. 60. b. n. 1.
Trees upon, trespass lies against the lord for cutting, 60. b. n. 4.
Surrenderee of, hath nothing till admittance, though his heir shall be admitted, 60. a. n. 2.

Copyhold,
Acceptance of rent by the lord, a good admittance to, ibid.
Admittance of a second surrenderee to, an admittance of the first by implication, ibid.
Whether surrender of good, if made by any other than the customary symbol, 61. a. n. 2.
As to the commencement of the surrenderee's estate in, 62. a. n. 1.
Propriety of receiving fealty for, 68. b. n. 5.
Devise of, may be by writing, unattested, 111. b. n. 3.
Whether within the 32d Hen. 8. respecting partitions, 187. a. n. 2.
Not within the stat. of uses, 271. b. n. 1. VIII. 2.
Tenures, 93. a. n. 1.
See more concerning Copyhold, 14. b. n. 6. 33. a. n. 5. 41. b. n. 3. 44. b. n. 7. 58. b. n. 2. 8. 59. a. n. 5. 59. b. n. 1. 3, 4, 5. 60. b. n. 2. 61. a. n. 1. 62. a. n. 2. 63. a. n. 2. 3. 88. b. n. 13. 16. 111. b. n. 1. 174. a. n. 1. 185. a. n. 9. 190. b. n. 4. 290. a. n. 1. V. 2. 290. b. n. 1. X. 338. a. n. 1.

Copyholder,
Whether debt lies against for his rent, 57. b. n. 1.
See more concerning Copyholders, 186. a. n. 4. 257. b. n. 1.

Corn,
In sheaves or cocks, or loose, or in straw, may be distrained, 47. a. n. 16.
&c. growing, may be distrained, 47. b. n. 1.

Cornage,
Tenure by, 106. b. n. 2. 106. b. (107. a. 13th ed.) n. 2*.

Corody,
Where grantable to more than one, 190. a. n. 1.
See more concerning a Corody, 17. b. n. 4. 97. a. n. 3.

Coroners,
154. a. n. 11. 157. b. n. 7. 158. a. n. 4. 161. a. n. 4. 168. a. n. 3.

Corporation,
Sole or aggregate, may take lands in fee without words of succession, where, 8. b. n. 7. 9. b. n. 7. 94. b. n. 4.
Sole, may take chattels in succession, where, 8. a. n. 1. 190. a. n. 2.
Parson and churchwarden may be by custom, 3. a. n. 4.
Whether lands given to shall, upon dissolution of, revert or escheat, 13. b, n. 2.
Aggregate, may in some cases act without deed, 94. b. n. 3.
Sole distinction between description of by both natural and politic name, and by politic name alone, 94. b. n. 5.
Successors of, bound without being specially named, 144. b. n. 2.
Leases from a, 290. b, n. 1. XI.

Corporation,
Remitter to a, 360. a. n. 1.
See more concerning Corporations, 2. b. n. 11. 15. b. n. 4. 16. a. n. 1. 43. a. n. 1. 45. a. n. 4. 52. b. n. 8, 9. 66. b. n. 3. 109. b. n. 2. 271. b. n. 1. VI. 2.

Costs in Actions or Suits,
At law, statutes respecting, 161. a. n. 4.

Costs in Actions or Suits,
- - - how satisfied before and since the statute of Gloucester, 355. b. n. 1.
In equity, how awarded, ibid.

Costs and Expenses,
Of guardians, bailiffs, and receivers, 89. a. n. 3, 4.
See more concerning Costs, 32. b. n. 4. 55. a. n. 4. 257. a. n. 2. 303. a. n. 1.

Covenant,
To repair, generally, whether it extends to the case of fire within 6 Anne, c. 31. 57. a. n. 1.
To stand seised, 123. a. n. 8. 205. b. n. 1†. 237. b. n. 2. 271. b. n. 1. VI. VI. 1.
Not to alien a lease for years, 203. b. n. 1.
Against a right of dower, 208. a. n. 1.
In gross, 215. b. n. 1.
Not to assign leases, 223. b. n. 1.
Who, not a party to the deed, may enter into or be benefitted by, 230. b. n. 1. 231. a. n. 1.
Action of, for rent, 269. b. n. 3.
Whether a release is a bar to a, before breach, 291. b. n. 1.
Action of, against lessor for loss of a term for years, by recovery against the tenant of the freehold, 325. a. n. 1.
Personal, 291. b. n. 1.
Real, ibid.
In law, ibid.
Not to assign, extends not to an under lease, 338. a. n. 1.
To stand seised, as to discontinuance, 330. a. n. 1. VII.
To stand seised by tenant in tail, effect of, 331. a. n. 1.
To stand seised, as to powers, 342. b. n. 1. IV. V.
How expounded as to the context, &c. 384. a. n. 1,
General, implied, may be restrained by express covenant, ibid.
General, express, is not restrained by a subsequent express covenant, unless it can be considered as part of the general covenant, ibid.
A writ of lies against lessor by lessee for years, whether the title be good or bad, if he covenants to warrant and defend the land, 389. a. n. 2.
See *Warranty*.

Covenants,
Collateral to the grantor's interest do not run with the land, 215. b. n. 1.
Incident to a reversionary interest, are extinguished by the merger of that reversionary interest, ibid.
(The usual,) for title, reference to a chapter on, 384. a. n. 1.
Of early vendors, a purchaser may avail himself of, ibid.
For lessor to enter and view the lands demised, 251. a. n. 1.
See more concerning Covenants, 36. b. n. 7. 41. b. n. 6. 45. a. n. 2. 47. a. n. 7. 54. b. n. 1. 55. a. n. 5. 59. a. n. 4. 277. b. n. 2. 379. b. n. 1.

Coventry Act,
The, 127. a. n. 2.

Coverture,
With respect to powers, authorities, and trusts vested in the wife, 112. a. n. 6.
See more concerning Coverture, 123. a. n. 3. 241. b. n. 1. 347. b. n. 1. See also *Baron* and *Feme*.

Cowin,
35. a. n. 6, 7. See *Fraud*.

Counterparts,
229. a. n. 3.

Counterplea,
39. a. n. 6.

Counties,
Remedy for recovering hereditaments in different counties, 154. a. n. 2.
Antiquity of the division of, 168. a. n. 6.
See more concerning Counties, 110. b. n. 2. 125. a. n. 2. 154. a. n. 1.

Court,
Of wards, 38. b. n. 1. 88. b. n. 16.
Baron, 58. a. n. 4, 5. 58. b. n. 1.
Ecclesiastical, 79. b. n. 4. 89. b. n. 6. 126. a. n. 2.
Of King's Bench, 89. b. n. 6.
Of Chancery, ibid.
Of Common Law, 89. b. n. 6. 135. b. n. 1.
Of Record, 117. b. n. 3.
Of the Lord, 123. b. n. 1. 141, a. n. 2.
Of Friesland, the supreme, 123. b. n. 2.
The County, 145. b. n. 1.
Rolls, 115. a. n. 10.
See more concerning Courts, 59. a. n. 6. 61. b. n. 2. 62. a. n. 1. 125, a. n. 2.

Coutumier de Normandie,
65. a. n. 1. 191. a. note, sect. III. 3.

Creation Money,
83. b. n. 5.

Creditor,
Made executor by debtor, 264. b. n. 1.
Of the testator, 290. b. n. 1. XIV. 1.
See more concerning Creditors, 57. a. n. 1. 113. a. n. 2. 191. a. note, sect. VI. 8. 223. b. n. 1. 224. a. n. 1. 290. b. n. 1. XIII.

Crimes,
Committed in foreign countries, in what courts triable, 74. b. n. 1.
See more concerning Crimes, 89. b. n. 6. 125. a. n. 2. 128. b. n. 1.

Criminal Judicature.
74. b. n. 1.

Cross Remainders,
195. b. n. 1.

Crown,
Succession of the, 92. b. n. 2.
The power of, in creating tenures, 93. b. n. 3.
The right of the, as to corodies and pensions, 97. a. n. 3.
Debts, 209. a. n. 1.

Curator,
Appointed (as gardian) by the ecclesiastical court, 88. b. n. 16.

Curia regis,
71. b. n. 2.

Curtesy,
Title to, conferred by possession of lessee, without entry, 29. a. n. 3.
Of an advowson in gross, by seisin in law, 29. a. n. 4, 5.
Of an advowson appendant (*semble*) by seisin in deed of the principal, 29. a. n. 4.
Whether of rent reserved on an estate of freehold, 29. a. n. 7.

Curtesy,
Of equitable estates, except where profits are directed to be paid during the wife's life for her separate use, 29. a. n. 6.
Title to, how affected by suspension of the wife's estate, 29. b. n. 2.
Whether of a title of honour, 29. b. n. 1. 165. a n. 7.
To entitle to, what formerly was proof of issue born alive, 29. b. n. 5.
In gavelkind estates is of a moiety only, 30. a. n. 1.
Ceases if husband marries, ibid.
Shall be of rent *de novo* granted in tail, 30. a. n. 2.
Whether of estates alioned and regranted, 30. a. n. 4.
Whether of estates of an idiot, 30. b. n. 2.
Second husband entitled to, though there be an adult heir by the first, 30. a. n. 5.
Where wife has two distinct seisins, husband may elect out of which he will have curtesy, 33. a. n. 5.
Of a trust is admitted, 290. b. n. 1. XVI.
Of titles and dignities has long ceased, 325. b. n. 2. III.
Tenant by, cannot vouch, but may pray in aid, 384. b. n. 1.
See more concerning Curtesy, 19. a, n. 2. 29. b. n. 3, 4. 30. a. n. 3. 30. b. n. 4. 6, 7. 40. a. n. 1, 2. 41. b. n. 2. 53. b. n. 11. 54. a. n. 1. 57. a. n. 1. 80. a. n. 1. 111. a. n. 1. 166. b. n. 3. 174. b. n. 5. 175. a. n. 2. 205. a. n. 1. 3dly. 205. a. n. 1. 4thly. 208. a. n. 1. 241. a. n. 4. 241. b. n. 1. 272. b. n. 1. 290. a. n. 1.

Custom,
Essentials to, 110. b. n. 1.
Extent of, 110. b. n. 2. 4.
Its effects upon testamentary dispositions of personalty, 176. b. n. 5 †, 6.
Special, 89. a. n. 7. 176. b. n. 6. 190. a. n. 2.
General, 89. a. n. 7.
Of the province of York, 176. b. n. 7.
Of London as to notice to quit, 270. b. n. 1.
See more concerning Custom of London, 111. b. n. 4. 176. b. n. 8, 9.
See more concerning Customs, in general, 83. b. n. 7. 10, 11. 41. a. n. 5. 43. a. n. 3. 43. b. n. 2. 49. a. n. 6. 58. a. n. 4. 58. b. n. 4. 7. 59. a. n. 4. 6. 60. a. n. 1. 3. 60. b. n. 1. 61. a. n. 2. 63. a. n. 1. 68. a. n. 5. 70. b. n. 2. 83. a. n. 3. 85. b. n. 1. 88. b. n. 13. 15, 16. 93. a. n. 1, 2. 110. b. n. 3. 111. a. n. 3. 5. 111. b. n. 3, 4. 112. b. n. 2. 115. a. n. 8, 9. 15. 121. a. n. 1. 134. b. n. 1. 140. b. n. 1, 2. 141. a. n. 2. 4, 5. 154. a. n. 7. 155. a. n. 3. 171. b. n. 5. 175. b. n. 4. 187. a. n. 1. 270. b. n. 1. 271. b. n. 1. VIII. 1. 379. b. n. 1.

Customary Descent,
140. b. n. 2.

Customary Freehold,
Will be intended, in pleading, if, &c. 50. a. n. 1.
Cases of instanced, 49. a. n. 6.
What, and what copyhold, 59. b. n. 1.
Does not entitle to vote at elections, 59. b. n. 1.
See also 338. a. n. 1.

Cypress,
Doctrine, 220. b. n. 1.
Estate, in Littleton, sect. 352. Lord Wilmott's remarks on the, 218. b. n. 3 ‖.

Cyrographum,
229. a. n. 1.

DE

D.

Damage feasant,
47. a. n. 12, 13.

Damages,
Special, 56. a. n. 2.
By reason of a false and malicious suit, 161. a. n. 4.
Double, 154. a. n. 5.
On default, 155. a. n. 3.
In waste, 355. a. n. 1.
By the statute of Gloucester, 355. b. n. 1.
Where to be recovered at common law, in personal and mixed actions, but not in real actions, ibid.
See more concerning Damages, 32. a. n. 5. 32. b. n. 4, 5. 33. a. n. 1, 2, 3. 6. 37. b. n. 2. 38. b. n. 15. 117. a. n. 1. 127. b. n. 4. 141. a. n. 2. 154. b. n. 1. 155. b. n. 5. 161. a. n. 4. 208. a. n. 1. 251. a. n. 1. 257. a. n. 1, 2. 290. b. n. 1. XV.

Date,
Of a lease, 46. b. n. 8, 9.

Day,
The natural, as to rent, 202. a. n. 2.

Deans,
Various kinds of, 95. a. n. 1.

Deaneries,
Account of, and the mode of election to, 95. a. n. 3, 4. 134. a. n. 4.

Death,
Of lessor, 47. a. n. 8.
Of feoffor or feoffee before entry, 48. b. n. 5.
Civil and natural, 132. a. n. 1. 133. a. n. 1. 3. 181. b. n. 5.

Death-bed Dispositions,
111. b. n. 1.

Debt,
By bond 47. b. n. 8.
Action of, whether it lies against copyholder for rent, 57. b. n. 1.
Action of, for rent, 269. b. n. 3.
See more concerning an action of debt, 83. a. n. 4. 83. b. n. 1. 90. b. n. 3. 146. b. n. 1. 304. a. n. 1.
On record to the crown, 209. a. n. 1. V. 3.
To the crown by simple contract, 209. a. n. 1. V. 1.
Attachment for as to disseisin, 330 b. n. 1.
By simple contract, a judgment after a vendor's death in an action on the case, in the nature of an action of deceit, in case of fraud in the vendor can only charge his property as a, 384. a. n. 1.

Debts,
Of an ancestor, by the Roman law, were payable by his heir, 191. a. note, secs. VI. 5.
By simple contract, 191. a. note, sect. VI. 9.
By specialty, ibid.
To the crown, ibid. 249. b. n. 1.
Of record, 191. a. note, sect. VI. 9.
Of a testator, 208. a. (208. b. 13th ed.) n. 1. 2dly.
To the crown, succinct view of the prerogative remedies for the recovery of:
I. At the common law:
II. Under the statute of H. 8:
III. Under the statute of Q. Eliz.; and under the act passed, for this purpose, in the reign of his late Majesty:
IV. Of the general effect of these remedies, 209. a. n. 1.

DE

Debts,
Specified or scheduled, or not, 209. b. n. 1. XIV. 2.
To the crown, no outstanding term is a protection against, 290. b. n. 1. XV.
And legacies, 290. b. n. 1. XIV. 3, 4.
General; specified, 29. a. b. n. 1. XIV. 1.
See more concerning Debts, 12. b. n. 2. 17. b. n. 3. 44. b. n. 3. 47. a. n. 4. 47. b. n. 9. 57. a. n. 1. 150. a. n. 2. 191. a. note, sect. VI. 5. 191. a. note, sect. VI. 9. 224. a. n. 1. 232. b. n. 1. 264. b. n. 1. 271. a. n. 1.

Debtor,
To the king's debtor, 209. a. n. 1. V. 3.
Made executor by creditor, 264. b. n. 1.

Debtors,
Insolvent, 191. a. note, sect. VI. 8.

Declaration,
In ejectment, 45. a. n. 7. 8.
Of fidelity, 68. b. n. 1.
(In pleading) as to general customs, 89. a. n. 7.
Of rights, 120. a. n. 4.

Decrees,
Interlocutory and final, 168, a. n. 2.

De Donis (the Statute,)
What is intailable within, 20. a. n. 5.
Does not extend to the Isle of Man, ibid.
See more concerning the statute De Bonis, 121. a. n. 1. 327. a. n. 2. I.

Deed,
Delivery of, 49. b. n. 5.
Indented, 186. a. n. 9.
A deed, void as a bargain and sale, may operate as a covenant to stand seised, and *vice versâ*. 271. b. n. 1. VI. 1. 337. b. n. 2.
Whether a deed, void as a surrender, may operate as a covenant to stand seised, 337. b. n. 2.
A deed though void as a bargain and sale, for want of inrolment, may operate as a grant of a reversion expectant on a lease for years or at will, 337. b. n. 2.
To whom the custody of it belongs in the case of conveyance to uses, 6. a. n. 4. See *Charters*.
One named in the habendum only shall take, 7. a. n. 3.
Where one not a party to it shall take by it or not, 26. b. n. 4.
Profert of, where necessary or not, 35. b. n. 6. 226. a. n. 1. 271. b. n. 1. VI. 2.
Non est factum, where pleadable to, 35. b. n. 7.
Of a body corporate, when complete, 36. a. n. 5.
Delivery of, what is, 36. a. n. 6.
Of a feme covert void, of an infant voidable, 42. b. n. 4.
Things incorporeal will not pass without, 47. a. n. 2.
Of an infant, on what grounds it is construed voidable only, 51. b. n. 3.
When and how to be explained or altered by parol agreement, 222. b. n. 2.
Different kinds of deeds, 143. b. n. 3. 229. a. n. 1, 2, 3.
Cancelled; rased; interlined; or with broken or defaced seals, 35. b. n. 7. 225. b. n. 1.
Who bound by without sealing, 230. b. n. 1.
Where indentation necessary to its validity, 229. a. n. 1.
Who, not a party to, may be bound or benefited by, 231. a. n. 1*.

DE

Deed,
Court will not detain, though found not to be those of the party producing them, 231. b. n. b.
Construction of, as to general and particular intention, 271. b. n. 1. VII. 2.
As to technical expressions, 271. b. n. 1. VII. 2.
See more concerning Deeds, 6. a. n. 5. 7. a. n. 2. 4. 9. b. n. 1. 36. a. n. 1, 2, 3, 4, 7. 45. b. n. 1. 48. a. n. 1. 7, 8. 49. a. n. 8. 52. a. n. 1. 52. b. n. 4. 94. b. n. 3. 115. a. n. 5. 171. b. n. 4. 190 b. n. 4, 5. 225. a. n. 2. 225. b. n. 2†. 232 a. n. 1.

Deer,
47. a. n. 11.
If a park, whether they belong to the heir, 8. a.

Default,
Of tenant for life, 46. a. n. 3.
Of vouchee, 46. a. n. 3.
By one where two are vouched, 386. a. n. 1.

Defeasance,
Of an obligation, 207. a. n. 2.
When it may be made, 236. b. n. 1.

Defence,
Legal import of the term in pleadings, 127. b. n. 2.
See more concerning Defence, 127. b. n. 3, 4. 135. b. n. 1.

Defendants,
Obstinate and vexatious, 161. a. n. 4.

Definition,
Of a word and its etymology confounded, 110. a. n. 1.

Deforcement,
Derivation of, 331. b. n. 1.
In its general, and in its particular signification, 331. b. n. 1.
Grounded on the non-performance of a covenant real, 331. b. n. 1.
In levying a fine, 331. b. n. 1.
See more concerning Deforcement, 290. b. n. 1. III. 330. b. n. 1.

Degrees,
Of consanguinity, difference of, in the civil and canon law, 23. b. n. 3.
As to disseisin, &c. 239. a. n. 2.
Not expressly named in the Levitical law, are yet prohibited by that, and the 32 Hen. 8. 235. a. n. 1.
See more concerning degrees, 23. b. n. 1, 2. 24. a. n. 1.

Delay,
In criminal justice, 125. a. n. 2.

Delegates,
Court of, 79. b. n. 1.

Delivery,
Of birth of a child before or after the usual time 123. b. n. 1, 2.
Of dower by the sheriff, 34. b. n. 4.
Of a bond, 36 a. n. 6.
Of a deed as an escrow, 36. a. n. 3.
- - - by an infant, 51 b. n. 3.
See more concerning the Delivery of a Deed, 36. a. n. 4. 7. 49. a. n. 1.

Demand,
Of rent, where necessary or not, to give title to re-enter, &c. 202. a. n. 3. 203. a. n. 1.
For money to be paid at a certain place, may be made at any other place, 210. b. n. 1 ℔.

DE

Demand,
See more concerning Demands, 153. a. n. 6. 153. b. n. 2. 201. b. n. 1. 3. 202. a. n. 1. 291. b. n. 1.

Demesne,
Ancient, 154. a. n. 11.
Lands in tenure cannot be said to descend as demesne, 240. b. (241. a. 13th edit.) n. 1.

Demesnes,
Of a manor, 44. b. n. 7. 122. a. n. 1.

Demise,
47. b. n. 7.

Demisi or *Concessi*,
49. a. n. 1.

De modo levandi fines,
121. a. n. 1.

Demurrer,
Trial on a, 155. b. n. 5.
To evidence, 155. b. n. 5.
See more concerning Demurrer, 72. a. n. 3. 115. a. n. 15. 164. a. n. 4. 283. a. n. 1. 303. a. n. 1.

Denial,
Of rent, 160. b. n. 3.

Denization,
129. b. n. 6.

Denizen,
12. a. n. 7.

Depasturing,
The right of, 261. a. n. 1.

De prærogativâ regis,
121. b. n. 2.

Deputy,
107. a. n. 5. 165. a. n. 8.

Descender,
A formedon in, 115. a. n. 1.

Descent,
Authors upon the law of, 10. b. n. 44. a. n. 2.
Ex parte materna, where it continues, and what shall be a purchase and break the descent, 12 b. n. 2.
What, and what a purchase, in case of a devise to the heir, ibid.
May be through one parent, though the other be an alien or attainted, 12. a. n. 7.
Where prevented by seigniory and homage, 13. b. n. 3.
Where to the heirs *ex parte materna*, 13. a. n. 4. 5.
By the half blood, why excluded, and when, 14 a. n. 3. 6.
To daughters, by different femes, as heirs to their father, 14. a. n. 5.
Where course of, enlarged by having issue, 19. a. n. 2.
How affected by 11 and 12 *W.* 3. c. 4. 8. a. n. 8.
Defeated by dower, 241. a. n. 1.
Of legal and equitable estates the same, 191. a. note, sect. VI. 11. 290. b. n. 1. XVI.
Partible, 175. b. n. 6. 176. a. n. 1.
The fruits of tenure incident to, 191. a. note VI. 11.
Of a remainder or reversion, 239. b. n. 2.
Which tolls entry, 241. b. n. 1. 242. b. n. 1.
To the heir of a disseisor, 278. b. n. 1, 347, b. n. 1.
By the Salic law, 325. b. n. 2. III.
Of the crown of France, and of other dignities there, 325. b. n. 2. III.
Of fiefs, as to females, 385. b. n. 2. III.

Descent,
As to remitter, 347. b. n. 1.
To the heir, cannot be where the ancestor is secluded from taking, 386. a. n. 1.
See more concerning Descent, 8. a. n. 2. 9. a. n. 4. 10. a. n. 3. 11 a. n. 1. 11. b. n. 3. 4. 12. a. n. 4. 15 b. n. 2. 4. 17 b. n. 3. 18 b. n. 2. 19 a. n. 3, 4, 24. b. n. 2, 3. 25. a, n. 1. 26. b. n. 3. 27. a. n. 5. 28. a. n. 8. 40. a. n. 2. 40. b. n. 3. 55. b. n. 2, 57. b. n. 6. 60. a. n. 1. 87. b. n. 1. 88. b. n. 2. 5, 6, 11. 13. 91. b. n. 1. 93. a. n. 2. 94. b. n. 1. 110. b. n. 4. 140. b. n. 2. 165. a. n. 4. 7, 8, 9. 175. b. n. 3, 4. 176. a. n. 1. 236. a. n. 1. 238. a. n. 1. 239. a. n. 1. 4. 239. b. 1, 2, 3. 240. b. n. 2, 3. 242. a. n. 1. 243. a. n. 2. 245. b. n. 1, 2. 248. a. n. 1. 249, a. n. 1. 250. b. n. 1. 277. a. n. 1. 334. b. n. 1.

Description,
Of a corporation sole, 94. b. n. 5.

Despenser,
Barony of, 165. a. n. 6.

Detainer
Of rent, 161. b. n. 2.

Detainment,
Of charters, 39. a. n. 3.

Detinue,
For charters, 20. a. n. 2.

Devise,
Of land, passes the fee without words of inheritance, if the devisee is charged with a gross sum, 9. b. n. 2.
Secus, if the sum be payable out of the profits of the land, ibid.
Construction of, *proximo consanguinitatis et sanguinis*, 10. b. n. 2.
Construction of a devise to *A.* and his heirs male, 27. a. n. 4.
History of the power of disposing by, III. b. n. 1. 3. 4.
Requisites to a devise, within 29 Car. 2. c. 3. and extent of that stat. 111. b. n. 3.
By custom, where it should even now be resorted to, 111. b. n. 4.
Effect of two inconsistent ones in the same will, 21. a. n. 4. 112. b. n. 1.
Superstitious, 112. b. n. 2.
Of lands operates as a legal conveyance, 191. a. note, sect. VI. 10.
Of lands to be sold by executors, 236. a. n. 1.
Executory, 241. a. n. 1. 271. b. n. 1. VII. 2.
By statute and by custom, 271. b. n. 1. VIII. 1.
In general terms, whether it passes estates in mortgage and trust estates, 305. a. n. 1. 5thly. 379. b. n. 1.
See more concerning Devises, 9. b. n. 3. 12 b. n. 2. 14. a. n. 6. 20. b. n. 2. 22. b. n. 4. 28. a. n. 8. 36. b. n. 6. 41. b. n. 5. 42. a. n. 9. 52. b. n. 2. 7. 62. a. n. 1. 88. b. n. 11. 111. a. n. 5. 112. b. n. 2. 113. a. n. 2, 3. 154. a. n. 7. 185. a. n. 10. 213. b. n. 1. 223. a. n. 1. 240. b. n. 2, 3.

Dialogue,
(The) of the Exchequer, 68. b. n. 7.

Dies juridicus,
135. a. n. 1.

Dies non juridici,
135. a. n. 3.

Dignities,
Titles of, king cannot create, with a mesne between baron and baronet, 16. b. n. 8.

Dignities,
How determined or surrendered, 16. b. n. 2.
Precedence in respect of, 16. b. n. 4.
May be granted without naming a place, 20. a. n. 3.
Intail thereof cannot be barred, ibid.
Whether the husband entitled to, by curtesy, 29. b. n. 1. 165. a. n. 7.
Annexation of creation money to, 83. b. n. 5.
Though in abeyance may be revived by royal nomination, 165. a. n. 6.
To whom descendible, 165. a. n. 7, 8.
See more concerning Dignities, 2. a. n. 2. 15. b. n. 3. 16. b. n. 1. 165. a. n. 4.

Diocese,
94. a. n. 3.

Disability,
120. a. n. 3.

Disappropriation,
46. b. n. 1.

Disclaimer,
46. a. n. 3.

Discontinuances,
Where originally for life, enlarged by accession of the fee, 42. b. n. 2..

Discontinuance,
I. General import of, 325. a. n. 1.
Usual Import of,
At present,
In Littleton's time, ibid.
Analogy between it, and interruption (and prescription) in the Civil law, ibid.
Applies solely to those cases where the freehold is divested, ibid.
II. By ecclesiastical persons, 325. b. n. 1.
III. By persons seised *jure uxoris*, ibid. n.
IV. By tenants in tail with respect to their issue, 326. b. n. 1.
V. By tenants in tail with respect to the reversioner, 327. a. n. 1. 333. b. n. 1.
VI. By tenants in tail with respect to those in remainder, 327. a. n. 2.
Observations on the effect of the statutes *de donis* and *quia emptores*, ibid. I.
Distinction between a remainder limited after an estate tail, and a conditional, or contingent use, limited upon, or after such an estate, ibid. II.
As to clauses for shifting the second estate, on the accession of the family estate, ibid. II. 1.
As to clauses enjoining persons to whom estates are limited in strict settlement, to take the name and use the arms of the settler, ibid. II. 2.
The injunction of taking a particular name, and using particular arms, is sometimes improperly used, ibid. II. 3.
VII. Modes of conveyance which work a discontinuance, 330. a. n. 1.
VIII. Cannot be of things lying in grant, unless by election, 332. a. n. 1.
IX. The conveyance must be of such an estate as in its original creation may, by possibility, endure beyond the life of the tenant in tail, 333. a. n. 1.
Ends when the estate conveyed determines, ibid.
X. To, or with the occurrence of, the remainder man or reversioner, 335. a. n. 2.

Discontinuance,
For life, is continued after the determination of the life estate, where the reversion or remainder is executed in possession in a third person during the life of the tenant in tail, 333. b. n. 1.
As to the king, 372. b. n. 1.
See more concerning Discontinuance, 60. a. n. 3. 121. a. n. 1. 163. b. n. 4. 191. a. note, sect. VI. 8. 200. b. n. 1. 224. b. n. 1. 226. b. n. 1. 300. a. n. 2.

Discontinuor,
Difference between the alienee of, and the heir or alienee of a disseisor, 325. a. n. 1.

Discovery,
Enforced in Chancery and the Exchequer, 159. a. n. 4.

Discretion,
The ages of, as to infants, 79. a. n. 3. 79. b. n. 2. 89. a. n. 1. 89. b. n. 6.

Disparagement,
81. b. n. 2. 88. b. n. 11.

Dispensation,
Or license to alien in mortmain, 99. a. n. 1.
With a disability created by statute, 120. a. n. 3, 4.
As to marriage, 235. a. n. 1. 244. b. n. 2.

Dispensing Power,
120. a. n. 4. 134. a. n. 1.

Disseisee,
Avowry of the lord upon, 268. a. n. 2.
His remedies to recover possession, 239, a. n. 1.
After 1. R. 2. c. 9. 191. a. note, sect. VI. 11.
Why he may not enter upon a person who is in by judgment of law, 325. a. n. 1.

Disseisin,
Actual or by election, where, 57. a. n. 3. 57. b. n. 5. 153. b. n. 7. 239. a. n. 1. 266. b. n. 1. 330. b. n. 1.
Writ of, 154. a. n. 11.
Whether replevin of a rent charge is, 160. b. n. 3.
What amounts to, ibid.
By infants, and femes covert, must be by their own proper acts, 180. b. n. 4.
Why of tenant for life, makes a fee in disseisor, 180. b. n. 7.
By procurement, 181. a. n. 1.
Effect of, 239. a. n, 1.
Of rents, 181. a. n. 2.
Of land does not disturb rent issuing out of the land, 266. b. n. 1.
By a guardian's holding over, 271. a. n. 2.
Cannot be qualified, 296. b. n. 1.
With respect to discontinuance, 325. a. n. 1.
The notoriety of, countervails livery, 330. a. n. 1. VII.
Investigation of the learning upon the subject of, with respect to the question,—What possession is required in the feoffor to make his feoffment an actual disseisin of the freehold, not merely a disseisin which is such at the election of the party, 330. b. n. 1.
Actual as defined by lord Mansfield, ibid.
By election, as explained by lord Mansfield, ibid.
Actual, the precise definition of, was considered by lord Mansfield as once well known, but not then to be found, ibid.

Disseisin,
Mr. Butler's rule for distinguishing those acts which amount to actual disseisin, from those which are only such at the election of the party, 330. b. n. 1.
By tenants for years and others having estates less than of freehold, the books which speak of, generally, must be understood of actual disseisins, and not of disseisins by election, ibid.
An actual, is made by the feoffment of tenant for years, since a fine levied by the feoffee will bar the lessor at the end of five years, ibid.
An actual, may be made by the feoffments of copyholders, tenants for years, by elegit, statute, at will, or by sufferance, ibid.
Of things lying in grant is only such at election, 332. a. n. 1. VIII.
As to damages, 335. b. n. 1.
Of two coparceners where one hath issue and dies, 364. b. n. (A).
Actual, the editor's opinion on, seems confirmed by sect. 698, and lord Coke's commentary upon it, 367. a. n. 1.
After 34 H. 8. 373. a. n. 1, 2.
See *Entry*, 50. a. n. 2. 57. b. n. 6. &c.
See more concerning Disseisin, 30. b. n. 4. 47. b. n. 12. 52. a. n. 9. 55. b. n. 11. 58. b. n. 5. 59. a. n. 2. 153. b. n. 3. 5. 161. b. n. 2. 180. b. n. 5. 188. a. n. 10. 239. a. n. 4, 5. 239. b. n. 3. 240. a. n. 1, 2. 241. a. n. 3. 241. b. n. 1. 242. a. n. 1. 248. a. n. 1. 249. a. n. 1. 251. a. n. 1. 257. a. n. 1. 262. a. n. 1. 266. a. n. (A). 267. a. n. 1. 268. a. n. 2. 271. b. n. 1. II. 275. b. n. 1. 277. a. n. 1. 278. b. n. 1. 290. b. n. 1. V. 4. 349. b. n. 1. III.

Disseisor,
The nature of his interest, 194. b. n. 3. 238. a. n. 1. 264. a. n. 1. 266. a. n. 1.
Donee and feoffee of, is out of 87 H. 6. c. 1. 238. a. n. 2.
Heir of, what estate the law will defend his possession of, and why, 239. b. n. 2. 250. b. n. 1.
Assignment of dower to widow of, by disseisee, 241. a. n. 1.
Title of, completed by release from disseisee, 264. a. n. 1.
Who is, or not, 271. a. n. 1, 2.
Release to one shall not enure to his companion, 275. b. n. 1.
What he may plead, 285. b. n. 1.
Cannot acquire less than a fee, 296. b. n. 1.
The feoffee of, after a year and a day, was anciently held to have right of possession, and to put the disseisee to his writ of entry, as in the case of a descent to his heir, 330. b. n. 1.
The different degrees of title in a disseisor, &c. 347. b. n. 1.

Dissolution,
Of monasteries, 129. b. n. 1.
See Release, *per mitter le droit*.

Distress,
May be made for arrears after determination of particular estate, 47. a. n. 6.
At what time it may be made, 47. b. n. 6.
Of what things it may be made, 47. a. n. 11, 12. 13, 14. 16, 17, 18. 47. b. n. 1, 2.
May be sold, at what time, 47. b. n. 7.
Where, of beasts which escape, 47. b. n. 2, 3.

Distress,
May be impounded on any part of the land, 47. b. n. 4.
Authors upon and statutes relating to, 47. b. n. 7.
Where it may be made for a relief, 83. a. n. 3.
Difference between acts of law and acts of the party respecting power of, 150. b. n. 1.
The king may distrain on all the lands of his lessee, 47. a. n. 1. and take his cattle in the highway, 161. a. n. 3.
Effect of tender of rent before or after distress, 160. b. n. 4.
May be made by representation of tenants for life, 162. a. n. 4. 162. b. n. 1.
Statutory provisions respecting, collected, 162. b. n. 6.
With respect to the avowry, is a chose in action, 320. a. n. 1.
See more concerning Distress, 34. b. n. 4. 47. a. n. 4. 15. 47. b. n. 5. 55. b. n. 13. 57. b. n. 1. 67. b. n. 1. 68. b. n. 5. 83. a. n. 4. 83. b. n. 1. 91. b. n. 3. 93. a. n. 2. 141. a. n. 2. 143. b. n. 5. 144. a. n. 1. 147. a. n. 2. 5. 147. b. n. 2. 148. a. n. 1. 4. 150. a. n. 3. 151. b. n. 5. 153. a. n. 1. 4. 154. a. n. 2. 160. b. n. 3. 161. a. n. 3. 169. b. n. 1. 191. a. note, Sect. VI. 9. 202. a. n. 2. 202. b. n. 1. 209. a. n. 1. I. 214. a. n. 1. 268. b. n. 1. 319. b. n. (A).

Distribution,
In exclusion of the testamentary power, 176. b. n. 6.
The statute of, 176. b. n. 10.

Divorce,
On reversal of sentence of, a writ issues out of Chancery, 33. a. n. 11.
See more concerning Divorce, 25. b. n. 2. 32. a. n. 9. 33. b. n. 1. 136. a. n. 1. 235. a. n. 1.

Domesday Book,
1. b. n. 2. 83. a. n. 1.

Dominium directum,
191. a. note, Sect. II.

Dominium utile,
191. a. note, Sect. II.

Dominus litis,
In the Roman law, 368. b. n. 1.

Domus,
5. b. n. 1.

Dower,
Wife of an idiot entitled to, 30. b. n. 2.
Reason why the law gave, 30. b. n. 8.
Dowress, how attendant in respect of services, 31. a. n. 2.
Whether prevented by a contingent mesne estate, 28. a. n. 7. 239. b. n. 3.
Of land held upon condition, after entry for condition broken, 31. a. n. 4.
Dowress shall not have emblements, 32. a. n. 7.
Shall be of an estate as it was in the seisin of the husband, 32. a. n. 8.
Of what seisin generally, 31. b. n. 7. 38. a. n. 10. 239. b. n. 3.
Of how much, on eviction of part by title paramount, 31. a. n. 6.
Not of a trust, 29. a. n. 6. 31. b. n. 3. 208. a. n. 1. nor of a castle, 31. b. n. 5. nor of the capital mansion of a barony *by tenure*, ibid. n. 6. nor of land held in joint-tenancy, 35. a. n. 1. 185. a. n. 3.

Dower,
Alien entitled to, if married by king's license, 31. b. n. 9. 129. b. n. 4.
Assignment of, by whom, what and how it should be made, 32. a. n. 3. 5. 8. 32. b. n. 1. 34. b. n. 1. 35. a. n. 1, 2. 38. b. n. 1.
Of rent reserved in tail so long as the tail continues, 32. a. n. 4. 298. a. n. 2.
Whether in case of a divorce *causa adulterii*, 31. a. n. 9, 10.
Where dowress shall hold charged, 32. b. n. 2. 208. a. n. 1.
Damages in, what and how assessed, 32. b. n. 4. 33. a. n. 1. 6.
Where baron has two distinct seisins, the wife may elect, 33. a. n. 5.
Where of lands purchased and aliened during the time wife was not dowable, 32. b. n. 8.
By custom, instances of, 33. b. n. 7. 11. authors upon, 39. b. n. 5. 111. a. n. 1.
Wife cannot wave customary for common law dower, 33. b. n. 10.
Ad ostium, &c. must be immediately *after* marriage, 34. a. n. 3.
Ad ostium, &c. may be of after-purchased lands, 34. a. n. 4.
Ad ostium, &c. wife may recover by action or entry, 34. b. n. 3.
When once assigned by metes and bounds, tenant in, notwithstanding refusal, may afterwards enter, 34. b. n. 5.
If heir assigns lands not subject to dower, the dowress shall hold them as tenant in dower, 34. b. n. 9.
So of lands taken by dowress in exchange, ibid.
Bar or satisfaction of, or not, what, 34. b. n. 10. 36. b. n. 1. 3. 5, 6.
Ex assensu patris, 34. a. n. 3. 35. a. n. 14. 35. b. n. 2. 4. 176. a. n. 3.
Where equity compels the wife to elect, 36. b. n. 6.
The freehold, though assigned, not in the wife till entry, 37. a. n. 1.
Entry upon lands assigned in, when it may be made, 37. b. n. 2.
Voucher in wardship in dower, 38. b. n. 2.
Where judgment shall be against heir and where against vouchee, 39. a. n. 6.
By custom, 36. a. n. 8.
De la pluis beale, virtually abolished by 12 Car. 2. c. 24. 39. b. n. 3.
As to the loss of dower by the husband's offences, 40. b. n. 1.
Whether of lands of a traitor aliened before commission of the treason, 41. a. n. 3.
Ex assensu patris and *ad ostium*, &c. whether defeated by the husband's offences, 41. a. n. 4, 5.
Whether executors of tenant in, shall pay rent in respect of emblements, 55. b. n. 3. see also *Emblements*.
Execution of, not prevented by lease for years subsisting at husband's death, 167. a. n. 2.
How affected by terms of years, 208. a. n. 1.
May be prevented by the usual estate for preserving contingent remainders, 239. b. n. 3.
Tenant in, how he shall hold, and be said to be in, 240. b. (241. a. 13th ed.) n. 1.
Assignment of, 241. a. n. 2.
Where it shall continue or not after the fee charged with it is determined, 241. a. n. 4.
Out of a fee determinable, 241. a. n. 4. III.
Out of an estate in fee conditional, 241. a. n. 4. IV.
Out of an estate in tail, 241. a. n. 4. IV.

Dower,
Out of a fee limited, 241. a. n. 4. VI.
Of a trust has been refused, 290. b. n. 1. XVI.
May be of lands entailed, where it would not be of a rent entailed, 298. a. n. 2.
The modes formerly used to prevent, by limiting the estate:
1. to the purchaser, and a trustee, jointly in in fee;
2. to the purchaser, and a trustee, and the heirs of the trustee, are objectionable, 379. b. n. 1.
Plan for preventing suggested by Mr. Butler, by Mr. Fearne, } 379. b. n. 1.
See also the notes from 30. b. n. 7. to 41. a. n. 5. both inclusively.
See more concerning Dower, 12. a. n. 7. 19. a. n. 2. 28. a. n. 7. 29. a. n. 7. 46. b. n. 5. 54. a. n. 1. 57. a. n. 1. 58. b. n. 6. 80. a. n. 1. 110. b. n. 2. 123. a. n. 5. 148. b. n. 3. 165. a. n. 2. 169. b. n. 1. 174. a. n. 3. 205. a. n. 1. 4thly. 224. b. n. 1. 241. a. n. 3. 271. b. n. 1. II. 272. b. n. 1. 290. a. n. 1. 305. b. n. 1.

Duces limitanei,
64. a. n. 1.

Duel,
Trial by, 74. b. n. 1.

Durham,
The county palatine of, 157. a. n. 4.

E.

Earldom,
83. b. n. 3.*, †. 69. a. n. 5. 165. a. n. 7.

Earl Marshal,
Account of the office of, 20. a. n. 1.
Judicial power of, 74. b. n. 1.

Earnings,
Of apprentices and servants, 117. a. n. 1.

Ecclesiastical Court,
88. b. n. 16.

Editions,
(New) of law books, observations on, 176. b. n. 5†.

Education,
Of the Prince of Wales's children, 110. a. n. 5.

Edward the Confessor,
The laws of, 168. a. n. 4, 5.

Ejectment,
Remedy of, extended by statute, on non-payment of rent, 202. a. n. 3.
Feoffor may have, under a title of re-entry till payment, &c. 203. a. n. 2.
If not brought within 21 years after the title accrued, is barred by the statute of limitations, 330. b. n. 1.
See more concerning Ejectment, 45. a. n. 7, 8. 141. a. n. 2. 203. a. n. 3. 208. b. n. 1. 4thly. 239. a. n. 1. 254. b. n. 1. 270. b. n. 1. 290. b. n. 1. XV. XVI. 302. b. n. 1.

Election,
To wave dower or to wave a will, 36. b. n. 6.
To waive a jointure and to take dower, 36. b. n. 7.
To take by statute or common law, 49. a. n. 1.
Of knights of the shire, 59. b. n. 1.

Election,
Of guardian, 88. b. n. 16.
Canonical, 95. a. n. 4.
Parliamentary, 109. b. n. 2.
To wave a portion, 176. b. n. 8.
Disseisin by, 330. b. n. 1.
Disseisins and discontinuances of things lying in grant are only such by, 332. a. n. 1. VIII.
To take by statute or to enter, 347. b. n. 1.
Of a wife to be remitter or not, where both estates are waveable, 357. a. n. 1. VII.
To make a rent charge an annuity, 144. b. n. 2.
See more concerning Election, 36. b. n. 3. 49. a. n. 1. 57. a. n. 3. 57. b. n. 5. 63. a. n. 1. 74. b. n. 1. 95. a. n. 4. 110. a. n. 2. 123. b. n. 1. 134. a. n. 1, 2, 4. 135. b. n. 1. 145. a. n. 1, 2, 3. 145. b. n. 3. 153. b. n. 7. 218. b. n. 3. 225. a. n. 1. 239. a. n. 1. 266. b. n. 1.

Elegit,
Tenant by, cannot hold over, if interrupted by war, 249. b. n. 1.

Elisors,
158. a. n. 4.

Elopement,
32. a. n. 10. 33. a. n. 3. 33. b. n. 2.

Emblements,
Who shall have or not, 32. a. n. 7. 55. a. n. 1. 4, 5. 55. b. n. 1, 2, 3, 4, 5, 6, 7. 10, 11, 12.

Emphyteusis,
64. a. n. 1.

Emphyteuta,
191. a. note, sect. II.

Emphyteuticarii,
64. a. n. 1.

Enfranchisement,
123. a. n. 3. 6, 7.

England,
The laws of, 141. b. n. 1.
The crown of, 165. a. n. 9.

English,
Modus, 69. b. n. 2.
Statutes, 141. b. n. 2.

Enlargement,
Of an estate by release, 267. a. n. 1. 270. a. n. 3. 271. b. n. 1. VI. 2. 272. b. n. 1. 273. b. n. 2.

Entails,
The introduction of, 191. a. note, sect. VI. 7.
In England, Ibid.
Within the statute *de donis*, requisites to, 20. a. n. 5.
When first loosened, 121. a. n. 1.
See *Tail*.

Entry,
Not always necessary to give seisin *in deed*, 29. a. n. 3.
For forfeiture, when it may be made, 42. a. n. 1.
Disseisee of lands in different counties, must enter in each, 50. a. n. 2.
Tolled by guardian abator dying seised, 57. b. n. 6.
To distrain and to avoid an estate, difference between, 144. a. n. 1.
An ouster, proof of, is not necessary in ejectment, 202. a. n. 3.
For a condition broken, effect of, 202. b. n. 2.
Until satisfaction of rent, 203. a. n. 1.

Entry,
Different kinds of powers of, 203. a. n. 3.
A power of, limited by way of use, ibid.
Or claim, by whom it may be made, 218. a. n. 3.
On a disseisor, 239. a. n. 1.
Tolled, or not, by death of disseisor in possession, 239. a. n. 4.
Of devisee, not tolled by entry and death of heir, 240. b. n. 2.
Secus after fine and non-claim, ibid.
Not tolled, by descent cast after condition broken, 240. b. n. 3.
For breach of condition, 241. a. n. 4.
Descent to toll must be immediate, 241. b. n. 1.
- - - - - must be without fraud, 242. a. n. 1.
Of posthumous child, tolled by descent cast, qu. 245. b. n. 1.
Of infant disseisee, tolled by descent cast after his full age, 245. b. n. 2.
Of termor before descent cast, revests freehold in disseisee; *secus*, if after descent, 249. a. n. 1.
To avoid a fine, 250. a. n. 1. 251. a. n. 1. 252. b. n. 1.
Limitation of right of, 250. a. n. 1.
Saved by continual claim, 250. b. n. 1.
Of lessor for life, when it may be made, 251. a. n. 1.
Or claim to avoid a fine, 252. b. n. 1.
For a condition broken, 252. b. n. 1.
To complete the landlord's title, 254. b. n. 1.
To rebut the defendant's title, 254. b. n. 1.
Actual, in what cases necessary to avoid a fine and confer a title, 254. b. n. 1.
Forcible, penalties and remedy for, 257. a. n. 1. 257. b. n. 1.
By lessee disseised, 318. b. n. 1.
See more concerning Entry, 34. b. n. 3. 5. 9. 37. b. n. 1, 2. 46. b. n. 2. 48. b. n. 6. 8. 57. b. n. 1. 88. b. n. 11. 121. a. n. 1. 127. a. n. 1. 141. a. n. 2. 163. b. n. 4. 180. b. n. 4. 182. a. n. 1. 191. a. note, sect. VI. 8. 202. a. n. 1. 203. a. n. 2. 208. b. n. 1. 4thly. 218. a. n. 2. 218. b. n. 3. 240. a. n. 1. 245. b. n. 2. 247. b. n. 1. 248. a. n. 1. 270. a. n. 2. 271. a. n. 1. 278. b. n. 1.

Equity,
Construction of statutes by, and authors upon, 24. b. n. 1.
To which personal estate is entitled when the land is the primary fund for the payment of a debt, and the personalty only auxiliary, and *vice versa*, 208. a. (208. b. 13th ed.) n. 1. 2ndly.
Where the parties have equal, he who has the law is preferred, 276. b. n. 1. 290. b. n. 1. XV.
Never wants a trustee, 290. b. n. 1. VI.
Analogy between the decisions in equity and the decisions at law, 290. b. n. 1. XVI.
See more concerning Equity, 48. a. n. 3. 89. a. n. 1. 112. a. n. 6. 112. b. n. 2. 113. a. n. 2. 123. a. n. 3. 135. b. n. 1. 141. a. n. 2. 161. a. n. 4. 232. b. n. 1.

Equity of Redemption,
The nature of, 205. a. n. 1. 4thly.
All persons interested in the, may redeem, 208. a. n. 1.
See *Mortgages*. And see further, as to Equity of Redemption, 29. a. n. 6. 205. a. n. 1. 1st, 3dly. 208. a. (208. b. 13th ed.) n. 1. 3dly, 4thly. 290. b. n. 1. XV. XVI.

Erisco,
164. b. n. 2.

Error,
Amendable, 127. a. n. 1.
In assignment of dower, 34. b. n. 1.
In non-entry of amercements, 127. a. n. 1.
Writ of,
Founded upon a judge's direction made part of the record, 155. b. n. 5.
For reversal of judgment in ejectment, 202. a. n. 3.
In what cases, for what, and to what courts it lies, 259. b. n. 1.
See more concerning Writs of Error, 14. a. n. 6. 125. a. n. 2. 131. a. n. 1.

Escheat,
Where land shall escheat to the lord, instead of reverting to the donor, 13. b. n. 2.
Title by, explained, 18. b. n. 2.
What will prevent, 13. a. n. 8. 236. a. n. 1.
Cannot be, of a rent charge, 298. a. n. 2.
In a general sense, 358. b. n. (A).
See more concerning Escheat, 12. a. n. 4. 6. 13. a. n. 6. 58. b. n. 7. 77. a. n. 1. 92. b. n. 1. 103. a. n. 3. 191. a. note, sect. VI. 11. 205. a. n. 1. 1st, 4thly. 240. a. n. 1. 271. b. n. 1. 11. 379. b. n. 1.

Escheator,
169. a. n. 2.

Escrow,
36. a. n. 3, 4.

Escuage,
Assessment of, 69. b. n. 3. 72. b. n. 3.
Arbitrary before *Magna Charta*, 72. b. n. 1.
When and how payable, 72. b. n. 4, 5.
Whether a tenure of itself, or an incident only to tenure, 73. a. n. 2. 106. b. n. 2.
Whether due for general, or only for particular foreign service, 74. a. n. 1.
Abolished by 12 Car. 2. c. 24. 74. b. n. 1.
Not an inseparable incident to knights service, 106. b. n. 2.
The introduction of the tenure of, 191. a. note, sect. VI. 11.
See the notes from 68. b. n. 6. to 74. b. n. 1. both inclusively. And see further as to Escuage, 85. b. n. 1. 107. a. n. 5. 108. a. n. 1. 115. a. n. 3.

Esplees,
17. b. n. 4.

Essoin,
De servitio regis, manner of casting, 65. b. n. 4, 5.

Essoins de ultra mare,
107. a. n. 6.

Estates, per auter vie,
Whether they might go to executors or administrators before 29 Ch. 2, c. 3, and 14 G. 2, c. 20. 41 b. n. 4.
Not intailable within the stat. *de donis*, though capable of settlement by way of intail, 20. a. n. 5.
How, and by whom, interests in, in the nature of estates tail, may be barred. ibid.
Are devisable, 41. b. n. 5. 111. b. n. 1. 3.
Shall go to the heir as special occupant, 41. b. n. 5.
If heir not entitled as such, to executors or administrators, ibid.
In either case are assets, ibid.
In case of intestacy, and heir not entitled, are distributable as personal estate, ibid.

Estates,
For years, as to dower, 33. a. n. 3. See *Terms* for *Yeare*, and *Dower*.
For life, pass under what words, 42. a. n. 10, 11.
Tail, when loosened, 121. a. n. 1. See *Tail*.
What legal and what equitable, 290. b. n. 1. VIII.
Of tenants by statute merchant, and statute staple, why considered as chattels, 208. b. n. 1. 1st.
See more concerning Estates, 2. a. n. 3. 27 b. n. 2. See also *Fee*.

Estoppel,
By matter of record, or not, difference between, 47. b. n. 13.
What amounts to, 170. b. n. 3, 4. 373. a. n. 3.
Reason why allowed, 352. a. n. 1.
By warranty, 373. b. n. 2.
See more concerning Estoppel, 12. a. n. 2. 47. b. n. 11. 93. a. n. 2. 121. a. n. 1. 191. a. n. 1. 232. a. n. 1. 342. b. n. 1. III.

Estrays,
119. a. n. 1.

Estreat of amercement,
161. a. n. 4.

Estrepement,
355. a. n. 1.

Etymologies, &c.
Of names by which things are passed, observations on Coke's inquiries into, 6. a. n. 3.
See more concerning Etymology, 86. a. n. 1. 108. b. n. 4. 110. a. n. 1. 112. a. n. 7. 140. a. n. 4. 141. a. n. 2.

Eviction,
By title paramount, 241. a. n. 4.
And other troubles in the civil law, 365. a. n. 1.
After mere investiture, ibid.
With respect to warranty, and whether the lord was anciently liable to compensate the loss of the fief, ibid.
See more concerning Eviction, 31. a. n. 6. 147. a. n. 5. 174. a. n. 1. 3. 191. a. note, sect. VI. 8. 271. b. n. 1. I. 1.

Evidence,
Admissible or not, of persons infamous, 6. b. n. 1.
Of deists, b. n. 2.
Of infidels, ibid.
Of baron or feme, against each other, 6. b. n. 6.
Of persons interested, 6. b. n. 7.
Of infants, 172. b. n. 1.
Demurrer to, 155. b. n. 5.
Learning and authors upon, 7. a. n. 1.
Copy of a record is, 117. b. n. 4.
By which the right to the soil of a park may be proved against common right, 261. a. n. 1.
Of intention, 271. b. n. 1. VII. 2.
Contrariety of, 290. b. n. 1. XIII.
See more concerning Evidence, 74. a. n. 1. 98. b. n. 1. 115. a. n. 4. 15. 126. a. n. 2. 158. b. n. 2. 225. b. n. 2 †. 244. a. n. 2. 247. a. n. 2. 261. a. n. 1. 271. b. n. 1. VI. 2. 290. b. n. 1. X. 352. a. n. 1.

Examination,
Secret in case of a fine, 121. a. n. 1.

Exception,
46. b. n. 6. 59. a. n. 4. 143. a. n. 1. 155. b. n. 5. 156. a. n. 5.

Exchange,
Cannot be between more than two parties, 50. b. n. 1. 51. a. n. 1.
Of freeholds or terms exceeding three years, must be in writing, 50. b. n. 2.
Whether the subjects of need be *in esse*, 50. b. n. 4.
By infant voidable only, 51. b. n. 3.
If by the king, must be by writing recorded, 51. a. n. 2.
The word *exchange* is necessary in a deed *of* exchange, 51. b. n. 2.
Avoided as to part is void for the whole, 174. a. n. 1.
From Ireland to England, as to money, 211. b. n. 2.
See more concerning Exchanges, 34. b. n. 9. 50. b. n. 3. 5. 51. b. n. 1. 271. b. n. 1. VI. 2. 309. a. n. 1.

Exchequer,
Chamber, 72. a. n. 1.
The Court of, as to crown debtors, 191. a. note, sect. VI. 9.
See more concerning the Court of Exchequer, 71. b. n. 2. 159. a. n. 4. 171. b. n. 5. 209. a. n. 1. IV.

Execution,
On a recognizance, statute or judgment, 184. b. n. 5.
Upon a statute or recognizance is void against an infant heir; whether void against the ancestor's lessee for years, or against the mother endowed by the infant heir, 290. a. n. 1.
See more concerning Execution, 47. a. n. 18. 48. b. n. 4. 150. a. n. 2. 153. a. n. 4, 154. a. n. 9. 266. b. n. 2. 289. a. n. 2.

Executor de son tort,
271. a. n. 1.

Executors,
Account against, when it lies, 90. b. n. 2, 3, 4, 5.
Power of selling given to, whether it shall survive, 113. a. n. 2. 236. a. n. 1.
Are only assignees in law, and cannot take as appointees or special assignees, 210. a. n. 1.
Are not bound to seek a payee under the will if no place is named, 210. b. n. 1 §.
Debtor or creditor how privileged, 264. b. n. 1.
Power of leasing may vest in, as assignees, 210. a. n. 1.
The testator's personalty vests in, absolutely, 290. b. n. 1. XIV. 1.
With a trust or a power to sell, 290. b. n. 1. IX.
An action at law by a husband, for a legacy due to his wife, does not lie against, 351. a. n. 1. IV.
See more concerning Executors, 54. b. n. 4. 55. b. n. 1, 2, 3. 89. b. n. 6. 111. a. n. 6. 118. a. n. 3. 146. b. n. 1. 181. b. n. 3. 191. a. note, sect. VI. 9. 203. a. n. 2. 264. b. n. 3. 342. b. n. 1. III.

Executory,
Devises, how far good, 327. a. n. 2. II. 1.
Things, 236. b. n. 1.

Exemplification,
Of letters patent, 225. b. n. 3.
Under the great seal, 98. b. n. 1.

Exile,
133. a. n. 1. 3.

Expenses,
172. a. n. 7. 203. a. n. 3.

Experience,
88. b. n. 13.

Exposition,
of one statute by another, 211. a. n. 1.

Extent,
What it shall bind, 290. a. n. 1.
See more concerning Extent, 153. a. n. 4. 191. a. note, sect. VI. 9.

Extinguishment,
Of right by release, 267. a. n. 1. 278. b. n. 1.
See more concerning Extinguishment, 49. a. n. 4. 63. a. n. 1. 121. a. n. 1. 147. b. n. 1. 7. 148. b. n. 1. 5. 149. a. n. 3. 152. b. n. 2. 4. 268. a. n. 1. 297. b. n. 1.

Eyres,
Of the Forest, 115. a. n. 15.

F.

Fact,
Matters of, 155. b. n. 4, 5.
Issuable, 125. a. n. 2.

Factors,
89. a. n. 6.

Faith
To the king, 66. b. n. 1. 68. a. n. 3.

Family,
The royal, 133. b. n. 1.

Favour,
To the king, whether it is an exception to a juror, 156. a. n. 4.

Fealty,
To what estate incident, 67. b. n. 2. 93. a. n. 1.
Difference between it and homage, 68. a. n. 1, 2. 68. b. n. 5.
Whether it may be done by attorney, 68. a. n. 5.
Distinction between, when done to the king, and the old oath of allegiance, 68. b. n. 1.
The law upon, the same as when Coke wrote, 68. b. n. 5.
Title to, remains, though unusual to exact it, ibid.
See more concerning Fealty, 66. b. n. 2. 68. a. n. * to n. 1. 68. a. n. 6. 85. b. n. 1. 93. b. n. 1. 106. b. n. 2. 115. a. n. 3. 151. b. n. 5. 152. a. n. 6. 152. b. n. 1. 164. b. n. 4.

Fee,
Littleton's explanation of, defended, 1. a. n. 1.
Simple moveable, 4. a. n. 4.
Passes to a corporation without the word *successors*, where, 8. b. n. 7.
On a fee, 18. a. n. 7.
Simple, 19. a. n. 2, 3.
Conditional at common law, 20. a. n. 3. 191. a. note, sect. VI. 7. 201. a. n. 1. 224. a. n. 2. 241. a. n. 4. 271. b. n. 1. I. 1. 326. b. n. 1. IV.
Descendible to males only, 27. a. n. 5.
Qualified, 27. a. n. 6, 7.
Every estate was once called a, 271. b. n. 1. I. 1.
Conditional, at common law, the effects of, 290. b. n. 1. V. 1.
Base, 298. a. n. 2.
At common law, and after the statutes *de donis* and *quia emptores*, 327. a. n. 2. I.
Simple conditional as to warranty at common law, 373. b. n. 2.
Simple as to warranty at common law, 373. b. n. 2.
Conditional in a subject with the possibility of reverter in the king, whether it might have been aliened at common law, 372. b. n. 3.
Simple, conveyances in, as to implied warranty, 384. a. n. 1.

Fee,
Simple, by what words created, 20. b. n. 2.
Tail, - - - - - - - - - - ibid. 21. a. n. 1, 2, 3. 27. a. n. 5.
Determinable, 27. a. n. 6. 241. a. n. 4.
Whether in abeyance, or not, by a limitation to two and the heirs of the survivor, 191. a. n. 1.
Conditional, at common law, descent of, enlarged by birth of issue, where, 19. a. n. 2. 4.
How recoverable by the issue, 19. a. n. 5.
Alienation of, did not bar the king's possibility of reverter, 19. b. n. 1.
See more concerning a Fee, 1. b. n. 4, 5. 21. a. n. 7. 44. a. n. 1.

Fees,
Of a counsellor at law are honorary, 295. a. n. 1.

Fee Farm,
Meaning of, 143. b. n. 5.
Rent, ibid.

Felony,
Where it may be traversed, 13. b. n. 1.
Appeal of, 13. a. n. 8.
See *Attainder*. And see more concerning Felony, 2. b. n. 10. 41. a. n. 4. 125. a. n. 2. 127. a. n. 2. 156. a. n. 4, 5. 157. a. n. 4. 157. b. n. 8. 161. a. n. 3, 4. 272. a. n. 1. 385. b. n. 1.

Feme,
Noble by birth, (as a daughter of a marquis, &c.), how her rank is affected by marriage, 16. b. n. 6.

Feme Covert,
See *Baron* and *Feme*, also 12. b. n. 2. 52. a. n. 2. 121. a. n. 1, 2. 133. a. n. 1. 171. b. n. 5. 180. b. n. 4. 353. a. n. 1. V. 379. b. n. 1.

Females,
Their age of discretion, 79. a. n. 3.

Feoffee,
To uses at common law, 271. b. n. 1. II.

Feoffment,
Of a moiety, 190. b. n. 2.
How different from lease and release, 207. a. n. 3.
With condition, difference between it and an obligation, 220. b. n. 1.
To the uses of a will, and to such uses as feoffor should appoint by will, difference between, 112. a. n. 2.
Import of the term, and ancient use of, 271. b. n. 1.
Voidable may be avoided by an action, 278. b. n. 1.
By an infant is voidable, ibid.
By lessor, 318. b. n. 1.
As to discontinuance, 330. a. n. 1. VII.
By the old feudal law, 330. b. n. 1.
Charters of, ibid.
How its original solemnity and notoriety became lessened, and what effect this had on its subsequent operation and efficacy as to disseisin, ibid.
It had the same effect anciently in taking away entry as a descent to the heir, but has not lost its efficacy in other respects, ibid.
It has been made with the same ceremonies, and attended with the same efficacy and operation, from the reign of Henry II. to the present time, ibid.
Made by a person in possession, under a verdict, which he obtains in ejectment by a pretended title, is fraudulent and void, ibid.
By a copyholder, or a tenant for years, or at will, who after the feoffment continues in possession and pays rent, is fraudulent and void, ibid.

FE

Feoffment,
Its effect to pass a freehold by disseisin, 330, b. n. 1. 367. a. n. 1.
By tenant in tail takes away the entry of the issue and reduces him to a formedon, 331. a. n. 1.
By tenant in tail in possession to the immediate remainder-man or reversioner, is not a discontinuance; but it is, if it is made to a stranger, though the reversioner or remainder-man join in the feoffment, 335. a. n. 2.
As to powers, 342. b. n. 1. III. V. V. VI. IX. 1.
See more concerning feoffments, 9. a. n. 5. 35. a. n. 3. 36. a. n. 2. 42. a. n. 1. 48. a. n. 3. 48. b. n. 6. 49. a. n. 1. 50. a. n. 1. 59. a. n. 3. 93. b. n. *. 112. a. n. 2. 6. 186. a. n. 6. 221. a. n. 1. 230. b. n. 1. 247. b. n. 1. 248. a. n. 1. 264. a. n. 1. 265. b. n. 1. 269. b. n. 1, 2. 271. b. n. 1. VI. VI. 2. 290. b. n. 1. V. 4. 342. b. n. 1. III.

Ferme,
What passes by, 5. a. n. 5.

Feuds,
Origin and history of, and authors upon, 64. a. n. 1. 191. a. note, sect. VI. 11.
A succinct account of the different nations by whom they were established, ibid. sect. 1.
- - - - - - of their nature, and particularly of those peculiar marks and qualities, which distinguish them from other laws, ib. II.
1st. The right to the soil and the right to the profits of the soil were separate, ibid.
2d. Immoveable or real property only was admitted to be held in feudality, or in other words, to be the substance of a fief, ibid.
3d. The nature of the relation between the chief and the vassals, ibid.
Some account of the principal written documents, which are the sources from which the learning respecting them is derived, ibid. sect. III.
Codes of law, ibid. sect. III. 1.
The capitularies, ibid. sect. III. 2.
The customary law, ibid. sect. III. 3.
Some account of the principal events in the early history of the feuds of foreign countries, ibid. IV.
Some account of
The States-General of the nations on the Continent in which the feudal policy has been introduced, ibid. sect. V. 1.
The Parliaments of such nations, ibid. sect. V. 2.
Their Nobility, ibid. sect. V. 3.
The difference between the Parliament and Nobility of those nations and the Parliament and Nobility of England, ibid. sect. V. 4.
An historical view of the revolutions of the feud in England, ibid. sect. VI.
On the time when feuds may be supposed to have been first established in England, ibid. sect. VI. 1.
On the fruits and incidents of the feudal tenure, ibid. sect. VI. 2.
On the feudal polity of this country, with respect to the inheritance and alienation of land; and the principal points of difference between the Roman and Feudal jurisprudence, in the article of heirship, ibid. sect. VI. 3.
An historical view of the revolutions of the feud in England, 191. a. note, sect. VI.

FI

Feuds,
The order of succession of the subject of the civil law, ibid. sect. VI. 4.
The absolute and unqualified property of the subject of the civil law, and the limited and qualified property of the feudal tenant, in their respective possessions, ibid. VI. 5.
The means by which some of the general restraints upon the alienation of real property, introduced by the feud, have been removed, ibid. sect. VI. 6.
Of entails, ibid. sect. VI. 7.
The means by which the restraints created by entails were eluded or removed, ibid. sect. VI. 8.
The attachments of lands for debt; in regard to its effect upon them, while they continue in the possession of the party himself; in regard to its effect upon them, when in possession of the heir or devisee; in regard to the prerogative remedies for the recovery of crown debts, ibid. sect. VI. 9.
On testamentary alienation, ibid. sect. VI. 10.
A detail of some of the principal circumstances in the history of the decline and fall of the feud in this country, ibid. VI. 11.
Import of terms relating to, 266. b. n. 1.
Whether by the old feudal law they could be aliened without mutual consent, 309. a. n. 1. IV.
See more concerning Feuds, 11. a. n. 1. 14 a. n. 1. 43. a. n. 2. 290. b. n. 1. I. 2. and see *Fiefs*.

Feuda data et oblata,
191. a. note, sect. VI. 1.

Feudal Custom,
111. b. n. 1.

Feudal Institutions,
224. a. n. 1.

Feudal Land,
65. a. n. 1.

Feudal Law,
Writers upon, 191. a. note, sect. VI. 11.
The meaning of, ibid. sect. I.

Feudal Tenures,
76. b. n. 1. 83. a. n. 1.

Fiction,
In the feudal law, as to descent, 191. a. note, sect. VI. 4.

Fidei Commissarius,
In the Roman law, 191. a. note, sect. VI. 5.

Fief,
Definition of, 191. a. note, sect. II.

Fiefs,
Improper, 64. a. n. 1. 201. a. n. I.
were descendible to females, 325. b. n. 2. III.
Proper, were not descendible to females, ibid.
Gratuitous, distinguished from a voluntary donation, 365. a. n. 1.
See more concerning Fiefs, 65. a. n. 1. 68. a. n. 3. 143. a. n. 2. See also *Feuds*, *Feudal Custom*, &c.

Filius,
Naturalis, *legitimus*, *adoptivus*, in the Roman law, 244. a. n. 1.

FI

Fines levied,
By tenant in tail, before conviction for murder, effect of, 2. b. n. 10.
Sur render, 26. b. n. 4. 390. b. n. 1.
By disseisee, effect of, 49. a. n. 4.
History and effect of,
In extinguishing dormant titles, 121. a. n. 1, 2.
In barring the issue in tail, ibid.
In passing the interests of femes covert, ibid.
In barring rights and titles of entry, 240. b. n. 2.
Power of levying, 223. b. n. 1.
Sur conusance de droit come ceo, &c. 78. a. n. 3. 200. b. n. 1. 233. b. n. 1.
May be a bar to a devisee, after five years non-claim, 240. b. n. 2.
By infant can be reversed during his minority only, 247. a. n. 2.
May be levied by infant trustee within 7th Ann. ibid.
By ideots and lunatics, ibid.
How avoidable, 251. a. n. 1. 252. b. n. 1. 254. b. n. 1.
At common law, when a bar, 262. a. n. 1.
Before the statute of non-claim, ibid.
Are necessary to pass a wife's life estate, if the same is not subject to a power of appointment, 271. b. n. 1. VII. 2.
Mistake sometimes made in directing the uses of, ibid.
On original writs, 290, b. n. 1. I. 2.
Introduction of, ibid. n. 1. V. 3.
Of trust estates, ibid. n. 1. XVI.
Of a seigniory, 319. b. n. (A).
Of a wife's estate are not necessary for making a tenant to the præcipe, 325. b. n. 2. III.
By both husband and wife of her lands, are not within 32 H. 8, c. 28. 326. a. n. 1.
With proclamations, 252. b. n. 1. 327. a. n. 2. II. 3.
Executed and executory, distinction between with respect to discontinuance, 330. a. n. 1. VII.
By feoffee of tenant for years will bar the lessor at the end of five years, and therefore the feoffment is an actual disseisin, 330. b. n. 1.
By feoffee are void where the feoffment is fraudulent, ibid.
As to the expression, That they have no operation upon any estate or interest not previously turned to a right, and how far this is inaccurate, 332. b. n. 1.
By a disseisor, intruder, or abater, operate merely as a bar, and not as as a conveyance, ibid.
By tenant for life, do not operate as a bar only, but also as a forfeiture, ibid.
In which tenant for life and a remainder-man in tail join, are no discontinuance to the reversioner in fee, 335. a. n. 2. X.
As to powers, 342, b. n. 1. III. IV. V. VI. 1. 2. IX. 1. 2.
Their effect on a wife's contingent interest in land, 351. a. n. 1. V.
Since the 4 H. 7. as to remitter, 353. b. n. 1.
As to disseisin, 367. a. n. 1,
Before 34 H. 8. barred, but did not discontinue, an estate tail, where the reversion was in the king, 372. b. n. 1.
Of lands entailed with the reversion in the king, their effect before and since the 34 H. 8. 372. b. n. 3.
By a disseisor of tenant in tail with the reversion in the king within 34 H. 8. whether they bar the estate tail, 373. a. n. 2.
See more concerning Fines of land, 14. a. n. 6.

FO

Fines levied,
20. a. n. 3. 28. b. n. 1. 46. b. n. 2. 112. a. n. 6. 121. a. n. *. 131. a. n. 1. 133. a. n. 4. 141. a. n. 3. 191. a. n. 1. ibid. note, sect. VI. 8. 203. b. n. 1. IV. 205. a. n. 1. 3dly. 250. a. n. 1. 262. a. n. (B). 262. a. n. 2. 271. b. n. 1. V. ibid. n. 1. VI. ibid. n. 1. VI. 2. 290. b. n. 1. V. 4. ibid. n. 1. VII. 330. b. n. 1. 365. b. n. (A). 379. b. n. 1.
Fines, (as to copyhold,)
Due to the lord, 59. b. n. 8. 60. a. n. 1.
Due for grant of copyhold by jointenants, tenants in common, &c. for surrender and common recovery by plaint, 302. b. n. 1.
Fines (due to the king),
For being excused from taking the order of knighthood, 69. a. n. 7.
For default of military service, 71. a. n. 1.
Fines and amercements, 145. b. n. 1. 161. a. n. 4. V.
Fine and ransom, 257. a. n. 1.
Fines for alienation, 43. a. n. 3. 43. b. n. 2. 85. a. n. 1. 93. b. n. 3.
Fire,
Accidental, who answerable for, 53. a n. 7. 53. b. n. 5. 57. a. n. 1.
Fish,
Royal, 261. a. n. 1.
Fishery,
Several, whether the soil passes by grant of, or not, 4. b. n. 2. 122. a. n. 7.
In what different from common and free fishery, 122. a. n. 7.
Fixtures,
Who is entitled to remove, 53. a. n. 5.
Foldcourse
Hath various meanings, and what, 6. a. n. 1.
Folkland,
And bockland, distinction between, 6. a. n. 6. 86. a. n. 2.
Foreclosure,
205. a. n. 1. 4thly.
Forest,
The king's, 115. a. n. 15.
Statutes, ibid.
Forester,
115. a. n. 13.
Force,
180. b. n. 4.
Forcible Entry,
257. a. n. 1. 257. b. n. 1.
Forfeiture,
May be a remainder expectant upon an estate tail, 14. b. n. 4.
What amounts to, 42. a. n. 1. 52. a. n. 4. 192. a. n. 1. 233. b. n. 1. 252. a. n. 1.
Of marriage, 88. b. n. 11.
For non-payment of rent, 202. a. n. 3.
By acceptance, 252. a. n. 1.
As to warranty, 367. b. n. 1. 373. b. n. 2.
Of lands and goods by a man killed in rebellion, in what case there shall be, 390. b. n. 2.
On attainder, reference to a discussion of the policy and justice of our laws of, 391. b. n. 1.
See more concerning Forfeiture, 28. a. n. 1, 2. 49. a. n. 1. 55. b. n. 10. 59. a. n. 3, 4, 5. 60.

FR

Forfeiture,
a. n. 1. 60. b. n. 1. 63. a. n. 1, 2. 64. a. n. 1. 88. b. n. 11. 88. b. n. 13. 99. a. n. 1. 119. a. n. 1. 120. a. n. 4. 141. a. n. 2. 145. a. n. 3. 202. a. n. 1. 207. a. n. 3. 224. a. n. 2. 233. a. n. 1. 266. b. n. 1. 271. b. n. 1. II. 290. b. n. 1. V. 4. 332. b. n. 1.

Formedon,
In descender, whether it lay at common law, 19 a. n. 3.
See more concerning Formedon in Descender, 19. a. n. 5. 191. a. note, sect. VI. 8. 326. b. n. 1. IV.
Limitation of writs of, 115. a. n. 2.
In remainder, in reverter, in descender, ibid.
By issue of a parcener, in whose name it should be brought, 173. a. n. 4.
In Remainder, 337. a. n. 1. I.
In Reverter, 327. a. n. 1. V.

Foundership,
of deaneries, 95. a. n. 4.

Four Seas,
The, 107. a. n. 6.

Franc-aleu,
65. a. n. 1.

Franc-aleu sans titre,
65. a. n. 1.

France,
Descent of the crown of, as to the exclusion of females; and descent of other dignities there, 325. b. n. 2. III.

Franchise,
Of fishing in public rivers by derivation from the crown, 122. a. n. 7.
Of a port, 261. a. n. 1.
Royal, ibid.
Franchises and liberties are excepted in 21 Jam. 1, c. 2, for limiting the king's title, 119. a. n. 1.

Frankalmoigne,
Not affected by 12 Car. 2, c. 24, 100. b. n. 1.
Feoffment of estates given in, 271. b. n. 1. I. 1.

Frankmarriage,
Gift in, is confined to the donees and the issue between them, 19. a. n. 2, 3.
Gifts in, where good, 21. b. n. 3.
Remedy of the issue in, after fourth degree, 23. a. n. 6.
Issues of donor and donee in, may intermarry during the degrees, 23. b. n. 1.
Cannot be created by devise, 385. b. n. 4.
See more concerning Frankmarriage, 20. a. n. 1. 21. a. n. 6, 7. 21. b. n. 1, 2. 22. a. n. 1. 26. b. n. 4. 31. a. n. 2. 174. b. n. 2. 176. a. n. 3. 176. b. n. 2. 271. b. n. 1. I. 1.

Frank-pledge,
Sense of, as used in Magna Charta, 115. a. n. 10.

Fraud,
In obtaining a verdict in ejectment, and consequently the possession under it by a pretended title, renders void a feoffment afterwards made by the person so in possession, 330. b. n. 1.
In continuing in possession and paying rent after a feoffment, is sufficient to make void the same, ibid.
In a vendor, 384. a. n. 1.
See more concerning Fraud, 3. b. n. 9. 33. a. n. 10. 35. a. n. 6. 48. a. n. 3. 55. b. n. 16. 59. a. n. 4. 88. b. n. 11. 121. a. n. 1. 191. a.

GA

Fraud,
note, sect. VI. 11. 209. a. n. 1. V. 1. 236. b. n. 1. 268. b. n. 1. 290. b. 1. XIV. 1. XV. 330. b. n. 1.

Frauds and Perjuries,
Statute of, 111. b. n. 3, 4. 290. b. n. 1. X. XIII.

Fraudulent Conveyances and *Devises*,
The statutes against, 191. a. note, sect. VI. 9. 290. b. n. 1. XIII.

Freehold,
Estate of, what is, or not, and when, 42. a. n. 6, 7. 45. b. n. 2. 203. a. n. 2.
At common law, may, by custom, be conveyed without livery, 49. a. n. 6.
Passing by conveyance at common law must immediately vest in some person; it is otherwise as to conveyances under the statute of uses, trusts in equity, and grants of rents *de novo*, 216. b. n. 2.
Upon condition broken, is not vested till entry, 218. b. n. 3.
Where it shall remain to the grantor, &c. by implication, 216. a. n. 2.
Explanation of, 266. b. n. 1.
No estate of, vested by common recovery till execution served, 266. b. n. 2.
Lands of a wife, 351. a. n. 1.
See more concerning Freehold, 37. b. n. 1. 48. a. n. 3. 48. b. n. 1. 58. a. n. 1. 59. b. n. 1. 157. a. n. 1.

Freeholders,
By what names they were anciently designated, 64. b. n. 1.
By the feudal law, 330. b. n. 1.

Free Pledge,
115. a. n. 10.

Fruit Trees,
53. a. n. 6.

Futurity,
Words of, their effect, 20. b. n. 3.

G.

Gabel or *Gavel*,
140. a. n. 4.

Gavelet,
An ancient process for recovering rent and service in respect of gavelkind lands, 142. a. n. 2.
Given by statute for recovering rent service in London, ibid.
The statute of, ibid.

Gavelkind,
Custom of, extends to estates tail, 10. a. n. 3. 110. b. n. 4.
Etymology of the term, 140. a. n. 4.
Extension of custom of, to collaterals, universal in Kent, 140. b. n. 1.
Statutes for abolishing, in particular lands, how construed, 140. b. n. 2.
Lands alienable by infants at fifteen, 171. b. n. 5.
Descent in, in lands in Wales taken away by statute, 175. b. n. 3.
Descent in, in Ireland, abolished with the custom of tanistry, 176. a. n. 1.
What customs in, must be specially pleaded, 175. b. n. 4.
See more concerning Gavelkind, 10. a. n. 4. 24. b. n. 3. 80. a. n. 1. 33. b. n. 9. 111. a. n. 1.

GR

Gavelkind,
141. a. n. 2. 166. b. n. 2. 175. b. n. 6. 187. a. n. 1.

Gens,
Signification of, 66. a. n. 3.

Gents,
Lord Coke's translation of, is erroneous, 66. b. n. 3.

German Ocean,
107. a. n. 6.

Gift,
123. a. n. 8.
Legal import of the term, 384. a. n. 1.

Give,
Operation of the word;
1. In conveyances of estates in fee simple.
2. As to estates tail and leases for life.
3. In leases for years, 384. a. n. 1.

Glebe,
(A parson's,) whether the fee simple of is in abeyance, 340. b. n. (B).

Glossaries,
Those most useful in the study of English law, history, and antiquities, specified, 6. a. n. 2.

Goods,
Acceptance of, to be kept or carried, 89. a. n. 9.
Or chattels, 118. a. n. 3.
Of a villein, 118. b. n. 4.

Grand Serjeanty,
105. b. n. 1. 107. a. n. 2. 5. 108. a. n. 1.

Grange,
5. a. n. 12.

Grant,
Good, though grantee named in the *habendum* only, 7. a. n. 3.
What estates at common law lay in grant, and what in livery, 48. a. n. 1.
Pro fraterno amore, 49. a. n. 1.
Parol, 169. a. n. 4.
Of things lying in grant, 233. b. n. 1.
Original signification of the word, 271. b. n. 1. I. 2.
The word in a conveyance of an inheritance does not imply a warranty, and if it did its force and operation might be qualified and restrained by express covenant, 384. a. n. 1.
Whether it is dangerous for a trustee to convey by the word, or essential for a purchaser to require it, 384. a. n. 1.
The operation of the word;
1. In conveyances of estates in fee simple.
2. As to estates tail and leases for life.
3. In leases for years, ibid.

Grants,
Royal, not avoided by nonage, *et similiter*, 15. b. n. 4. 16. a. n. 2.
By letters patent, pass lands without livery, ibid.
See more concerning Grants, 32. a. n. 10. 41. b. n. 3. 49. a. n. 1. 59. a. n. 4. 88. b. n. 13. 119. b. n. 2. 121. b. n. 2. 122. a. n. 4. 7. 129. a. n. 1. 147. a. n. 2. 152. a. n. 1, 2, 3. 261. a. n. 1.

Great Britain,
Whether before the union it had legislative power, and the appellant jurisdiction over Ireland, 141. b. n. 2. and n. †.

HA

Guardian,
In socage, and in chivalry, confined to a descent, 87. b. n. 1.
Who shall be, and the power and nature of the office explained, 88. b. n. 2. 6. 13.
Jure naturæ, 88. b. n. 12.
By statute, 88. b. n. 13, 14, 15, 16. 93. b. n. 3.
Customary in respect to copyholds, 88. b. n. 16.
By election of the infant himself, ibid.
By appointment of the lord chancellor, ibid.
Ad litem, ibid. and 135. b. n. 1.
Per cause de ward, what it was, and who was entitled to be, 88. b. n. 3. 13.
To what extent the half-blood excluded from being guardian in socage, 88. b. n. 5.
By nature, and in socage, difference between, 88. b. n. 9.
In chivalry, nature and privileges of, 87. b. n. 1. 88. b. n. 9. 11.
By nature, who entitled to be, 88. b. n. 9. 12.
Objects and power of, 88. b. n. 13.
Testamentary or by deed, appointment, and privileges of, under 12 Car. 2. c. 24. 88. b. n. 12, 13.
Power given by this statute does not extend to copyholds, 88. b. n. 16.
By nurture, who shall be, 88. b. n. 12, 13. 89. a. n. 1.
Account against, where, and when it lies, 89. a. n. 2. 90. b. n. 2.
How chargeable in account, 89, a. n. 3.
In socage, cannot assign, 90. b. n. 1.
In socage, 87. b. n. 1. 88. a. n. 1. 88. b. n. 2. 5, 6. 9. 13. 89. a. n. 1. 90. b. n. 1, 2.
By appointment of the ecclesiastical court, 88. b. n. 16.
Natural, 88. b. n. 12.
By will, 88. b. n. 13.
See more concerning Guardians, 35. a. n. 11, 12. 38. b. n. 1. 39. a. n. 2. 54. a. n. 3. 57. a. n. 1. 57. b. n. 2. 6. 58. b. n. 3. 79. b. n. 1. 81. b. n. 2. 89. a. n. 4. 89. b. n. 6. 90. a. n. 1. 271. a. n. 2.

Guineas,
Whence they took their name, 207. b. n.

H.

Habeas Corpus,
155. b. n. 5.

Habendum,
Its effect in correcting the premises, 7. a. n. 3. 21. a. n. 1, 2. 26. b. n. 4. 180, b. n. 299. a. n. 1.
After the death of the grantor, 49. a. n. 1.
See more concerning the habendum, 46. b. n. 9. 48. b. n. 1. 183. b. n. 2, 3.

Habere facias seisinam,
52. a. n. 6.

Half-blood,
Where not excluded, 26. b. n. 3.
In a descent, is more rigidly excluded in England than in other feudal countries, 191. a. note, sect. VI. 4.
See *Seisin*. And also, 14. a. n. 3. 5. 14. b. n. 2, 3. 15. b. n. 2.

Hamlet,
110. b. n. 2. 125. a. n. 2.

Hardwick,
Lord. See *Manuscript*, 208. a. n. 1.

Hay,
may be distrained, 47. a. n. 16.

Heir,
Singular, where *nomen collectivum*, 8. b. n. 4. 22. a. n. 4.
Claiming customary land, *by descent*, must be the heir according to the custom, 10. a. n. 3.
By purchase, must be the heir at common law, unless controlled by special words, 10. a. n. 4.
May inherit from one parent, though the other be an alien or attainted, 12. a. n. 7.
Shall have action against the defacer of his ancestor's monument, 18. b. n. 5.
Male cannot deduce his descent through females, *et vice versa*, 19. a. n. 4.
Where he shall take by descent, and where by purchase, 12. b. n. 2. 22. b. n. 4. 24. b. n. 2. 26. b. n. 2.
Female, whether to take by purchase as she must be heir as well as female, 24. b. n. 3. 164. a. n. 2.
Presumptive, 88. b. n. 12.
Apparent, ibid.
In tail, 121. a. n. 1.
Is not bound, if not named in a bond, &c. unless the bond, &c. is made by a body politic, or (by statute, and according to lord Coke, by common law,) to the king, 144. b. n. 2. 209. a. n. 1.
Where he shall take, though not named, 148. a. n. 1.
Nature of in the Roman and the feudal laws contrasted, 191. a. note, sect. VI. 3.
Takes by descent when an estate is limited to a husband and wife and the heirs of their two bodies, 218. b. (219. a. 13th ed.) n. 3. ‖.
Takes by purchase when an estate is limited to one only and the heirs of two, ibid.
How triable who is, 243. a. n. 2.
Cannot take by descent, unless there is an interest in his ancestor at the time of his decease, 386. a. n. 1.
When a father and his heir apparent join in a warranty, after the father's death, the son is liable in his own right, and as heir, 386. a. n. 1.
See more concerning Heirs, 9. b. n. 6. 10. a. n. 1, 2. 32. b. n. 1. 38. b. n. 1. 39. a. n. 6. 90. b. n. 4. 94. b. n. 1. 4. 144. b. n. 2. 213. b. n. 1.

Heir-Looms,
By custom, not alienable by devise, 18. b. n. 6.
By devise or settlement, subject to all rules concerning executory devises, 18. b. n. 7.
Cases of, and authors upon, ibid.
See more concerning Heir-Looms, 8. a. n. 9, 10. 9. a. n. 1.

Hercisco,
164. b. n. 2.

Hereditaments,
Extent of the word, and how it differs from tenements, 1. b. n. 6.
With respect to what passes by the word, 6. a. n. 3.
(Incorporeal), a rent cannot be reserved out of, except by the king, 47. a. n. 1.
Lying in livery, distinguished from those lying in grant, 48. a. n. 1. 3.
(Not lying in tenure), guardianship in socage extends to, 88. b. n. 13.
(Incorporeal), are sometimes included in the word tenements, 154. a. n. 7.

Hæres fidei commissarius,
In the Roman law, 191. a. note, sect. VI. 11.

Hæres fiduciarius,
In the Roman law, 191. a. note, sect. VI. 5.

Heriots,
Distinction between them and reliefs, 83. a. n. 1.
Are preserved by 12 Car. 2, c. 24. 85. b. n. 1.

Hide,
Of land, 69. a. n. 2.

Highway,
Action on the case lies for damages by neglect to repair, 56. b. n. 2.
Distresses on the, 161. a. n. 1.

Hire,
89. a. n. 6. 9.

History,
Ancient, 191. a. note, sect. IV.
Modern, ibid.

Holding over,
Penalties of, 57. b. n. 2, 3.

Homage,
To the king, special act passed to excuse the kissing in, by reason of pestilence, 64. a. n. 3 †.
To the king of France by the king of England for Guienne, &c. 65. a. n. 3.
Liege, ibid.
Auncestrel, 65. b. n. 2. 67. b. n. 1. 106. b. n. 2.
By a bishop, 65. b. n. 3.
Importance of the express saving to the king on performing, 66. b. n. 1. 68. a. n. 3.
The importance of, both to lord and tenant, 67. b. n. 1.
For the feme's land, how the lord might avow for, 66. b. n. 2.
What means the law gave to compel, 67. b. n. 1.
Whether it might be received by a parson, 67. a. n. 1.
Abolished by 12 Car. 2. c. 24. 67. b. n. 1.
Could not be done by attorney, 68. a. n. 5.
Different kinds of, referred to, 68. b. n. 1.
Auncestrel, expired before 12 Car. 2. 105. a. n. 1.
Tenure by, ibid.
Bound the lord to acquittal and warranty, 365. a. n. 1.
The grant of homage auncestral by the word *dedi* imports a warranty, 384. a. n. 1.
See more concerning Homage, 64. a. n. 1*, to 67. b. n. 1, inclusively. See also, 30. a. n. 3. 67. a. n. 2. 68. a. n. 1, 2. 4. 6. 68. b. n. 5. 73. a. n. 1. 85. b. n. 1. 106. b. n. 2. 115. a. n. 3. 164. b. n. 7. 271. b. n. 1. I. 1. 365. a. n. 1. 384. a. n. 1.

Homagers,
64. a. n. 1*.

Homagium,
Simplex, 68. b. n. 4.
Ligeum, 65. a. n. 3. 68. a. n. 3. 68. b. n. 4.
Non ligeum, 65. a. n. 3.
Mixtum, 68. b. n. 4.

Homines,
64. a. n. 1*.

Honor,
Or land barony, the nature of, 5. a. n. 1. 108. a. n. 4.
(The genuine), is a land barony, 108. a. n. 4.

IM

Honor,
Titular, ibid.
See also, 77. a. n. 1. 110. b. n. 2.

Honour,
And arms, matters relative to, 74. b. n. 1.

Hops,
Belong to executor though not gathered, where, 55. b. n. 1.

Horses,
Distrained for Rent, &c. 47. a. n. 12.

Hotchpot,
Partition by, 169. a. n. 2.
With respect to lands given in frankmarriage, where other lands descend, 176. b. n. 2.
Law respecting, where a deceased father's personal estate is divided by custom among his children, 176. b. n. 8, 9.

House of Commons,
64. b. n. 1.

House of Lords,
110. a. n. 5. 134. b. n. 1.

Hundreds,
110. b. n. 2. 121. b. n. 7. 125. a. n. 2.

Hundredors,
125. a. n. 2. 157. a. n. 3, 4. 272. a. n. 1.

Hypotheca,
The Roman, 205. a. n. 1. 1st.

I. & J.

Idiotcy,
(Of a wife) found by office, whether it defeats the husband's title by curtesy, 301. b. n. 2.

Idiot,
Who, 246. b. n. 1.
Wife of, entitled to dower, 30. b. n. 2.
See more concerning Idiots, 80. a. n. 1. 88. b. n. 16. 121. b. n. 2. 247. a. n. 2.

Jewish Law,
11. a. n. 1.

Jewish Nation,
ibid.

Jews,
As to dower, 32. a. n. 1.
May present to advowson, 391. a. n. 2. IV. 1.

Implication,
Of cross remainders, 195. b. n. 1.
Of trust for a child, 290. b. n. 1. X.
Of trust may be rebutted, ibid.
Of a freehold estate in an ancestor, with respect to the rule in Shelley's case, 299. b. n. 1.
Of consent in a grantee, 337. b. n. 1.
See more concerning Implication, 20. a. n. 1. 22. b. n. 2, 3. 55. a. n. 3. 56. a. n. 1. 60. a. n. 2. 67. b. n. 1. 122. a. n. 7. 153. a. n. 1. 216. b. n. 2. 237. a. n. 1. I. 271. b. n. 1. VII. 2. 298. a. n. 2.

Imprisonment,
161. a. n. 4. 191. a. note, sect. VI. 9. ibid. VI. 11. 257. a. n. 1.

Improved Value,
32. a. n. 8.

IN

Incidents,
Separable and inseparable, 151. b. n. 2. 5. 152. a. n. 6. See also 121. b. n. 6.

Inclosure,
160. b. n. 4.

Inconvenience,
66. a. n. 1. 152. b. n. 6, 7.

Incumbent,
119. b. n. 4.

Indenization,
129. b. n. 6.

Indentures,
Origin and use of, 143. b. n. 3. 229. a. n. 1.
What deeds must be, 229. a. n. 1.
In the third person, 230. a. n. 1.
See also 143. b. n. 3, 4. 229. a. n. 1, 2, 3.

Indenting of Deeds,
229. a. n. 1.

Indictment,
42. b. n. 3.

Indictments,
125. a. n. 2. 155. a. n. 3. 157. a. n. 4. 161. a. n. 4.

Indivisibility,
165. a. n. 1. 4.

Induction,
90. b. n. 4.

Infamy,
6. b. n. 1.

Infancy,
Of an heir is a personal privilege against execution upon a statute, &c. 290. a. n. 1.

Infant,
What office capable of holding, 3. b. n. 4.
Whether bound by a jointure, 36. b. n. 7.
Deeds and acts of, what void, and what voidable, 42. b. n. 4. 45. b. n. 1. 51. b. n. 3.
Cannot execute a power coupled with an interest, 52. a. n. 2. 171. b. n. 5.
May be an attorney to deliver seisin, 52. a. n. 1.
Female, age of discretion what, 79. a. n. 3. 79. b. n. 1.
The custody of his person draws after it the custody of his property, 88. b. n. 13.
Whether his person and estate should be in the custody of a guardian appointed by the ecclesiastical court, 88. b. n. 16.
When, and how, he may sue his guardian, 89. a. n. 2.
Whether he may present to a church, 89. a. n. 1.
Cannot be an administrator, though he may be an executor, 89. b. n. 6.
At what age he may make a will of personal estate, ibid. 171. b. n. 6. 264. b. n. 8.
May make a will of real estate by custom, 111. b. n. 4.
By whom he may sue, and be sued, 135. b. n. 1.
Trustee or mortgagee enabled to convey by 7 Ann. c. 15. 171. b. n. 5.
May alien gavelkind lands at fifteen, ibid.
Single bond of, for necessaries, good, 172. a. n. 2.
At what age and how examinable as a witness, 172. b. n. 1.
Cannot sever a joint-tenancy, 246. a. n. 1.
May reverse his fine when under age, but not after, 247. a. n. 2.

Infant,
Trustee within the 7th Ann. c. 15, may levy fines and suffer recoveries, ibid. and 206. b. n. 1. VII.
May make an executor at seventeen, as he might then make a will by the civil law, 264. b. n. 3.
Trustee may by order of Chancery, upon petition, convey the estates held in trust, 271. b. n. 1. VII. 2. 290. b. n. 1. VII.
Cannot convey under a power without an act of parliament, 271. b. n. 1. VII. 2.
May suffer a common recovery under a privy seal, 330. b. n. 1.
See more concerning Infants, 43. b. n. 1. 65. b. n. 4. 79. b. n. 2. 88. b. n. 11. 16. 119. a. n. 1. 121. a. n. 1. 131. a. n. 1. 155. a. n. 3. 169. a. n. 2. 170. a. n. 1. 171. b. n. 2, 3, 4. 172. a. n. 5. 180. b. n. 4. 187. a. n. †. 245. b. n. 1, 2. 247. b. n. 1. 248. a. n. 1. 278. b. n. 1. 347. b n. 1. 353. a. n. 1. V. 379. b. n. 1.

Information,
66. b. n. 1. 135. a. n. 1. 161. a. n. 4.

Infra, or intra, quatuor maria,
Royal dominion and jurisdiction there, 107. a. n. 6.
Meaning and extent of the term illustrated, 107. b. n. 6.

Ingrossing
Corn, &c. 135. a. n. 1.

Inheritance,
May descend from one parent, though the other be an alien or attainted, 12. a. n. 7.
Of copyhold land, 61. a. n. 1.
Indivisible, 165. a. n. 2.
Nature of, in the Roman and the feudal laws contrasted, 191. a. note, sect. VI. 3.
Words of, are as necessary in a will as in a deed, to create a fee, 191. a. note, sect. VI. 10.
Conveyed to the heirs of tenant for life, how it shall affect his estate, 299. b. n. 1. See *Shelley*.

Inhibition,
In Scotland, 224. a. n. 1.

Injunction,
54. a. n. 5. 141. a. n. 2.

Innkeeper,
89. a. n. 7.

Inquest,
158. b. n. 3.

Inquiry,
Of dying seised and damages, as to dower, 32. b. n. 4.

Inquisition
On a commission of escheat, 205. a. n. 1. 1st.
See also 115. a. n. 15. 123. b. n. 1.

Inrolment,
48. a. n. 3. 49. a. n. 1. 117. b. n. 4. 121. a. n. 1. 147. b. n. 4, 5.

Inspection
Of infant, 131. a. n. 1.

Instant,
185. b. n. 1.

Institution,
90. b. n. 4.

Intention,
Evidence of, 271. b. n. 1. VII. 2.

Intention,
Of a testator, ibid, n. 1. VIII. 1.
See more concerning Intention, 36. b. n. 6. 24. b. n. 3. 79. a. n. 2. 113. a. n. 2. 191, a. note, sect. VI. 10. 205. a. n. 1. 5thly. 271. b. n. 1. VII. 2. 237. a. n. 1. I.

Interest,
Present rate of in England, 4. a. n. 1.
- - - - in Ireland and the plantations, ib.
A lease may commence in interest, and not in computation, 46. b. n. 8, 9.
Merely of trust, 90. b. n. 4.

Interlineation,
In a deed, 35. b. n. 7. 225. b. n. 1.

Interpleader,
243. a. n. 2.

Intestates,
The statutes for distributing the personal estates of, save customs, 176. b. n. 5.

Intestacy,
36. b. n. 7. 176. b. n. 5. 10.

Intrusion,
57. b. n. 4. 271. b. n. 1. II. 330. b. n. 1.

Investiture,
Of the feudists, 271. b. n. 1. I. 1.
Whether it alone entitled the tenant to claim an equivalent from the lord in case of eviction, 365. a. n. 1.
See also, 134. a. n. 1, 2.

Joint Estate,
To husband and wife before marriage, or after, 187, b. n. 2. 4.

Jointenants,
Power of attorney from, to deliver seisin good, though one afterwards die, 52. b. n. 6.
Of copyhold, may release to each other, without fine or surrender, 59. a. n. 2.
Remedy of one against the other, 172. a. n. 8.
Being an alien and natural born subject, qu. right of survivorship between, 180. b. n. 1.
Right of survivorship, between, where good or not, 182. a. n. 2.
Severance of estate of, what amounts to, ibid.
For life with the remainder in fee in one of them, 184. a. n. 3. 184. b. n. 2.
What seisin of the one will give title to the other, 186. b. n. 6.
By the statute of uses, or by the common law, 188. a. n. 13.
Where joint words operate severally, 189. b. n. 3.
For life, 191. a. n. 1.
In fee, ibid.
Release of *inter se* passes a fee, without the word *heirs*, 193. a. n. 1.
And tenants in common, may have account *inter se*, 199.b. n. 1.
One, keeping his part, may vouch after severance by the other. By partition both lose the benefit of the warranty, 385. b. n. 2.
Warranty to three, who are joint tenants, *& cuilibet eorum*, is a joint warranty; otherwise when they are tenants in common, 385, b. n. 3.

Jointenancy,
May be severed by grant of reversion or descent, 192. b. n. 2.
What words will make or put the fee in abeyance, 191. a. n. 1.

Jointenancy,
Where, though estates commence at different times, 188. a. n. 13.
Severance of what amounts to, 192. a. n. 1.
Whether severable by an infant, 246. a. n. 1.

Joint Words,
Construed to operate severally, 188. a. n. 11. 189. b. n. 3.
Passing two entire things severally, 189. b. n. 3.
See more concerning Jointenancy and Jointenants, 180. a. n. 2. to 188. a. n. 13. both inclusive, 21. a. n. 4. 31. b. n. 4. 35. a. n. 1, 2. 44. a. n. 2. 54. a. n. 4. 55. b. n. 6. 111. b. n. 1. 112. b. n. 1. 149. a. n. 3. 161. b. n. 3. 164. a. n. 4. 264. b. n. 4. 169. a. n. 2. 190. a. n. 2. 190. b. n. 4. 230. b. n. 1. 267. a. n. 1. 273. b. n. 2.

Jointures,
What good as, in equity, or not, 36. b. n. 5. 7.
Whether infant bound by, 36. b. n. 7.
Power to settle, 342. b. n. 1. I. II. V. VI. 1, 2.
(And Portions), power to charge with, 342. b. n. 1. VI. 1.
See also 36. b. n. 2, 3. 5. 7. 271. b. n. 1. VII. 2. 290. b. n. 1. XV.

Ireland,
When title by curtesy was introduced there, 30. a. n. 5.
The manner of appointing to the old and new deaneries there, 95. a. n. 4.
When the laws of England were first introduced there, 141. b. n. 1.
Whether subject (before the Union) to the legislative power of Great Britain, and the appellant jurisdiction, 141. b. n. 2.
And Great Britain united into one kingdom, 141. b. n. †.
Whether the chancellor here can hold plea of trust of lands there, 169. a. n. 2.
Abolition there of the custom of tanistry and of gavelkind descent as incident to it, and generally of the Brehon law, 176. a. n. 1.
Whether (in the case stated) a portion charged on estates in Ireland ought to be paid in England without deducting for exchange, 211. b. n. 2.
The 34 H. 8. c. 20. is not of force in Ireland, and therefore the knowledge of the common law is necessary there (Lord Nott. MSS.), 372. b. n. 3.
See also 16. b. n. 4. 271. b. n. 1. VI. 2.

Irish Modus,
69. b. n. 2.

Irish Sea,
Or St. George's Channel, 107. a. n. 6.

Issues,
In law, 155. b. n. 5.
In fact, ibid. 125. a. n. 2.
Collateral, 157. b. n. 8.

Judges,
Whether the king may consult them extrajudicially, 110. a. n. 5.
Province of, on trials, 155. b. n. 5.
See also 71. b. n. 1. 110. a. n. 5. 115. a. n. 15. 141. a. n. 3. 155. b. n. 5.

Judgments,
In real actions, where against heir, and where against vouchee, 39. a. n. 6.
Interlocutory and final, difference between, 139. b. n. 1. 168. a. n. 2.
Partition by judgment, 169. a. n. 2.

Judgments,
For debt or damages, 191. a. note, sect.
Writ of false judgment, 259. b. n. 1.
Of which a purchaser has not notice, 278. b. n. 1.
It is safe, in some cases, to dispense with a search for, 290. b. n. 1. XV.
At common law judgment in a writ of right was not a bar to a disseisee until execution sued, 262. a. n. 1.
Judgment in felony, 305. b. n. 1.
Saving in, good or void, ibid.
See more concerning Judgments, 32. b. n. 4. 33. a. n. 1. 39. a n. 5. 39. b. n. 4. 46. a. n. 2. 72. a. n. 3. 121. a. n. 1. 125. a. n. 2. 134. a. n. 1. 203. b. n. 1. IV.

Judicial Capacity,
134. b. n. 1.

Jura Coronæ,
70. b. n. 2.

Jurata,
154. b. n. 8.

Juris consulti,
In the Roman law, 295. a. n. 1.

Jurisdiction,
Of the court of chivalry held before the earl marshal only, without a high constable, 74. b. n. 1.
The appellant, 141. b. n. 2. 186. a. n. 3.
Equitable, 169. a. n. 2.
See more concerning Jurisdiction, 88. b. n. 16. 94. a. n. 3. 125. a. n. 2. 127. b. n. 3. 141. a. n. 2.

Jurisprudence,
In subjects of, a knowledge of the *present* state of things depends on a reference to the *ancient* one, 105. a. n. 1.
Roman, 191. a. note, sect. IV.

Juris utrum,
155. a. n. 1.

Jurors,
Worth £. 6 per annum, 272. a. n. 1.
Worth £. 10 per annum, ibid.
Worth 40s. in goods, 272. a. n. 1.
See more concerning Jurors, 155. a. n. 3. 156. b. n. 5. 157. a. n. 7, 8. 157. b. n. 1, 2, 3. 158. a. n. 1. 158. b. n. 1, 2, 3, 4.

Jury,
From the visne, law respecting, 125. a. n. 2. 126. a. n. 1.
May still, in criminal cases, be challenged for default of hundredors, 125. a. n. 2. 157. a. n. 4.
Number of, more or less than twelve, in different cases, 155. a. n. 3. 159. a. n. 2.
The grand, 155. a. n. 3.
The rights of a, 155. b. n. 5.
Must be *de corpore comitatus*, where, 155. b. n. 2. 157. a. n. 4.
May find a general verdict, and so far may decide both the law and the fact, 155. b. n. 5.
Can try issues in fact only, not issues in law, ibid.
Finding against judge's recommendation, cause for a new trial, ibid.
Origin of, 155. b. n. 6.
What are *principal* causes of challenge to, 156. a. n. 1, 2. 5. 157. a. n. 6. 157. b. n. 5, 6.
No challenge now can be taken to, for want of a a knight, 156. a. n. 3.
Challenges of, for favour to the king, whether allowed, 156. a. n. 4.

Jury,
In a writ of right, when challenge to should be taken, 156. b. n. 1.
Challenge to, may be taken by the king, at what time, 156. b. n. 4.
Verdict of, void, where, 157. b. n. 5.
Peremptory challenges to, on collateral issues denied, 157. b. n. 8.
Challenges to, where inquest for information merely, 158. b. n. 3.
Qualifications of, 272. a. n. 1.
See more concerning a Jury, 6. b. n. 3. 98. b. n. 1. 117. b. n. 4. 155. a. n. 2. 155. b. n. 4. 157. a. n. 1. 3. 161. a. n. 4. 231. b. n. 1. 244. a. n. 4.

Jus accrescendi,
182. a. n. 5.

Jus possessionis,
238. a. n. 1.

Jus Maris,
Of the king of England, considered and discussed, 261. a. n. 1.
To whom the soil between high and low water mark belongs, ibid.

Justice,
The execution of, is favoured, 52. b. n. 2. 181. b. n. 4.
Criminal, 125. a. n. 2.
Of the peace, 141. a. n. 2. 155. b. n. 4. 159. a. n. 4.

K.

Kent,
The remedy of *gavelet* in, 141. a. n. 2.
Gavelkind descent in, 175. b. n. 3.

King of *Great Britain* and *Ireland*,
Titles of, 7. b. n. 2. 5. 119. a. n. 1.
Having the legal estate, shall hold discharged of uses and trusts, where, 13. a. n. 7.
Purchases by or descents upon, how they shall devolve, 15. b. n. 4. 16. a. n. 2.
Though an alien, shall take the crown, 16. a. n. 1.
Shall be in, in point of reverter, on forfeiture of donee in tail of his grant, 18. a. n. 4.
Secus, if he claims the remainder by purchase, ibid.
Whether the reformation, and the assertion of the king's supremacy influenced the manner of appointing to deaneries and bishoprics, 95. a. n. 4.
His confirmation of the choice of a dean by the chapter is required by king John's charter, ibid.
His counsel for matters of law, 110. a. n. 5.
Cannot dispense with a disability created by statute, 120. a. n. 3.
His dispensing powers generally, 120. a. n. 4.
Distress of freehold by the king's writ, was excepted in stat. 52. H. 3. 142. a. n. 2.
His prerogative, in charging persons as accountants, 172. a. n. 9.
In respect to the coin, 207. b. n. 1.
Estates of his debtors, bound from what time, 209. a. n. 1.
Effect of his release to one of several obligors, 232. a. n. 1.
May give or take by assignment, a chose in action, 232. b. n. 1.
Cannot be disseised, 239. a. n. 5.

King of *Great Britain* and *Ireland*,
As to warranty, 370. b. n. 1.
As to 34 H. 8, c. 20. 372. b. n. 3.
How affected by the common and statute law, where there is an estate tail in a subject, with the reversion in the king, ibid.
See *Leases*, 44. b. n. 4. *Rent*, 47. a. n. 1. *Exchange*, 51. a. n. 2. *Nullum Tempus occurrit regi*, 119. a. n. 1. *Advowson*, 121. b. n. 2. *Re-entry*, 201. b. n. 3. *Jus Maris*, 261. a. n. 1. *Wardship*, 84. a. n. 2. *Warranty*, 370. b. n. 1.
See more concerning the King, 7. b. n. 1. 3, 4. 6. 9. a. n. 1. 19. b. n. 1. 33. a. n. 4. 38. b. n. 1. 43. b. n. 1, 2. 48. b. n. 7. 57. b. n. 4. 58. b. n. 7. 61. b. n. 1. 71. b. n. 1. 88. b. n. 11. 16. 90. b. n. 3, 4. 6. 95. a. n. 4. 110. a. n. 5. 115. a. n. 15. 121. a. n. 1. 129. b. n. 3. 131. b. n. 2. 133. b. n. 1. 134. a. n. 1, 2. 4, 5. 135. b. n. 1. 143. b. n. 5. 144. b. n. 2. 152. a. n. 2. 156. a. n. 4, 5. 156. b. n. 4. 157. b. n. 8. 161. a. n. 1. 169. a. n. 2. 190. a. n. 2. 180. b. n. 2. 191. a. note, sect. VI. 9. 239. a. n. 5. 265. a. n. 1. 314. b. n. 1. 335. a. n. 1. 372. b. n. 1.

King's Bench,
Though the king be actually present in the court of, the judicature belongs to the judges only, 71. b. n. 1.
See also, 74. b. n. 1. 145. b. n. 1.

King of France,
65. a. n. 3.

Knight's Fee,
Contents of, 69. b. n. 1.
See also, 5. a. n. 6. 69. a. n. 3, 4, 5. 7. 83. b. n. 3.

Knight's Service,
In capite, 30. b. n. 1.
Tenure by, converted into socage by 12 Ch. 2. c. 24. 43. a. n. 3.
See more concerning Knight's service, 74. b. n. 1. to 85. a. n. 1, both inclusively, 67. b. n. 1. 69. b. n. 3. 71. a. n. 1. 72. a. n. 5. 73. a. n. 2. 74. a. n. 1. 85. b. n. 1. 87. a. n. 1. 88. b. n. 11, 12. 93. b. n. 3. 106. b. n. 2. 107. a. n. 5. 108. a. n. 1. 111. b. n. 1. 191. a. note, sect. VI. 11.

Knighthood,
Who formerly compellable to accept, 69. a. n. 7.
Such power of compulsion abolished by 16 Car. 1. c. 20. ibid.

L.

Laches,
57. b. n. 4. 90. b. n. 6. 250. b. n. 1. 270. b. n. 1.

Lancaster,
County palatine of, 157. a. n. 4.
Duchy of, 314. b. n. 1.

Land,
Vesture of, 4. b. n. 1.
Profits of, 4. b. n. 5.
Where at common law it shall pass either by delivery of the deed, or by livery of seisin, 49. a. n. 1.
Quantity of, contained in an oxgang, yard land, and hide, is uncertain, 69. a. n. 2.
Allodial, in what countries there is, 65. a. n. 1.

Land,
How it may be acquired, 18. b. n. 1, 2.
No interest in, of longer duration than three years, can be created by parol, 48. a. n. 3.
History of testamentary power over, 111. b. n. 1.
See more concerning Land, 4. a. n. 2. 5. a. n. 11. 6. a. n. 6. 111. a. n. 3. 111. b. n. 3. 129. a. n. 1.

Landlord and Tenant,
What fixtures tenant is entitled to remove during his term, 53. a. n. 5.
How affected by 6 Ann. c. 31. 53. a. n. 7. 54. a. n. 5.
Whether covenant to repair generally, extends to the case of fire within that statute, 57. a. n. 1.
Law, as to accidental burning of tenant's house, discussed, ibid.
Remedy to recover possession, where tenant deserts the premises, 142. a. n. 2.

Lapse,
Of time, 119. a. n. 1.
Of legacy, 237. a. n. 1. 111.

Lateran,
Council of, holden in 1215, 81. b. n. 2.

Law,
Of marque or reprisal, 11. b. n. 2.
When a rule of law has long prevailed it ought to be supported, though it be not strictly agreeable to natural reason, 24. b. n. 3.
Of nations, 107. a. n. 6.
Rules and maxims of, 152. b. n. 6, 7. 186. a. n. 3.
Matters or questions of law, 155. b. n. 5.
Of civil obligation, 191. a. note, sect. IV.
Of tenure, ibid.

Laws,
Of Edward the confessor, 68. b. n. 3, 4. 168. a. n. 4, 5. 7.
Of Ireland, 141. b. n. 1.

Laying in wait,
127. a. n. 2.

Leases,
By corporations sole and aggregate, difference between, 43. a. n. 1. 45. a n. 4.
By baron and feme, or by baron alone of the latter's land, shall not bind feme, where, 42. a. n. 2. 46. b. n. 3, 4.
By tenant in tail, 28. b. n. 1. 44. b. n. 1. 46. b. n. 2. 290. b. n. 1. V. 3.
Difference of commencement of, under the words, "from the day of making" and "from the "making," 44. a. n. 4, and "from the date" and "from the day of the date," 46. b. n. 8, 9.
Of tithes by ecclesiastics, 44. b. n. 3. 47. a. n. 3.
By the king during the vacancy of a see, 44. b. n. 4.
Reservations upon, good or not, 44. b. n. 6, 7. 213. b. n. 1.
For three years, 48. a. n. 3.
For years, 44. a. n. 1. to 54. b. n. 4, both inclusively, 201. b. n. 3. 209. a. n. 1. V. 3. 251. b. n. 3. 290. a. n. 1.
For years at common law, 290. b. n. 1. XV. 270. a. n. 2.
For a long term of years, 330. b. n. 1.
For life, 41. b. n. 1. to 43. b. n. 2, both inclusively, 251. b. n. 3.
By ecclesiastics, and corporations, good or not, and against whom, 44. b. n. 3. 7, 8, 9. 45. a. n. 2. 4. 46. a. n. 7.
- - -, confirmation of, 301. a. n. 1.

Leases,
By tenants in common, not good if made jointly, 45. a. n. 7.
By infants, voidable only, 45. b. n. 1.
Aided by livery, though otherwise void, 45. b. n. 2.
Duration of, how calculated, 45. b. n. 3.
Law against leases for more than forty years, if it ever existed, was soon antiquated, 46. a. n. 1.
By one coparcener avoided by allotment of the land to the other coparcener on partition, 46. b. n. 5.
In præsenti by tenant in tail not avoided by fine, levied by issue before entry, 46. b. n. 2.
Effect of mis-recitals in respect to the commencement of, 46. b. n. 10.
By estoppel, what will turn to an interest, 47. b. n. 11.
For years may be delivered by attorney by parol, 48. b. n. 2.
How affected by partition, 167. a. n. 2.
For years, survive before entry, 182. a. n. 1.
By *cestui que use*, before 27 H. 8, rendering rent to himself, 213. b. n. 1.
Under a power, 214. a. n. 1.
By mortgagor and mortgagee, 215. b. n. 1.
With proviso for re-entry on the tenant's bankruptcy, 223. b. n. 1.
What provisions for determining, allowed, ibid.—and how construed, 308. a. n. 1.
Are as covenants real, 249. a. n. 1.
Of an advowson, 249. a. n. 2.
Uses declared of leases for years in existence are not executed, 271. b. n. 1. VIII. 3.
Gained by undue means or suppression of the tenant right of renewal, 290. b. n. 1. XI.
From corporations, ibid.
For years or for lives, intended to be settled upon trusts, corresponding with a strict settlement of a real estate, 290. b. n. 1. XII.
By tenant for life and remainder-man, 302. b. n. 1.
By ecclesiastical persons, 325. b. n. 1. II.
Of the wife's land under 32 H. 8, ought to be made in the names of both husband and wife, 333. a. n. 2.
For years by tenant in tail do not disturb the descent of the estate, but leases for life do, 334. b. n. 1.
Power to execute leases, 342. b. n. 1. II.
Power of leasing, 342. b. n. 1. VI. 1.
For years made by him who is remitted, is not defeated by the remitter, 358. a. n. 1. VIII.
For life or years, as to implied warranty, 384. a. n. 1.
See *Surrender*, *Terms for years*, *Statutes*, 47. a. n. 4. And see more concerning Leases, 3. a. n. 6. 15. a. n. 2. 17. b. n. 3. 31. a. n. 2. 55. a. n. 1. 5. 55. b. n. 1. 4. 13, 14. 59. a. n. 4. 63. a. n. 1. 88. b. n. 13. 93. b. n. 1. 93. b. n. *. 141. a. n. 2. 165. b. n. 4. 186. a. n. 9. 186. b. n. 4. 187. b. n. 4. 192. a. n. 1. 203. b. n. 1. IV. 210. a. n. 1. 211. a. n. 1. 215. a. n. 1. 215. b. n. 1. 229. a. n. 2. 230. b. n. 1. 234. a. n. 1. 251. a. n. 1. 270. b. n. 1. 271. b. n. 1. VI. 2. VII. 2. 290. b. n. 1. XV. 300. a. n. 2.

Lease and *Release*,
How different from a feoffment, and effect of conveyance by, 207. a. n. 3.—48. a. n. 3.
What estates may be conveyed by, 270. a. n. 3.
In what respect it operates as a common law conveyance, and in what it operates under the statute of uses, 271. b. n. 1. VI. & VI. 2.
Not pleadable as a grant, 301. b. n. 2.

Lease and Release,
As to discontinuance, 330. a. n. 1. VII.
As to powers, 342. b. n. I. IV. V.

Leets,
Frequency of holding, how affected by Magna Charta, 115. a. n. 10, 11, 12.
Of private persons, 115. a. n. 11.
To which waif and stray are appurtenant, 121. b. n. 7.
Appurtenant to a manor, ibid.

Legacies,
Charged on real estate are presumed to lapse for the benefit of the heir, if the legatee dies before the time of payment, 237. a. n. 1. I.
Charged upon personalty, and given to a man at, or if, or when he attains 21, distinguished (with respect to lapse) from similar legacies payable to a man at, or if, or when he attains 21, 237. a. n. 1. II.
Charged on a mixed fund, with respect to lapse, 21, 237. a. n. 1. III.
Specific, 264. b. n. 1.
To a wife with respect to her husband, 351. a. n. 1. II.
An action at law by a husband against executors for a legacy due to his wife, does not lie, 351. a. n. 1. IV.
See more concerning legacies, 12. b. n. 2. 237. a. n. 1. I. 290. b. n. 1. XIV. 1. 3, 4.

Legislation,
The power of, cannot be exercised by the king, without the two houses of parliament, 120. a. n. 4.

Legislature,
The early proceedings of the, 260. a. n. 1.

Legitimacy,
Observations upon the criterion of, in respect to time of births and separation of the parties, and proofs of, 123. b. 1, 2. 126. a. n. 2. 244. a. n. 2.
By subsequent marriage, civil and canon law respecting, 244. b. n. 2. 245. a. n. 1.
- - - rejected by the English legislature, ibid.
See also 107. a. n. 6. 123. b. n. 2. 126. a. n. 2.

Lessee,
For years of land by the guardian cannot assign dower, 38. b. n. 4.
Of a copyholder, as to forfeiture by waste, 63. a. n. 2.
Entry of, vests the freehold in the person having the right of possession, 249. a. n. 1.
Debt lies not against, after acceptance of rent, from his assignee, though covenant does, 269. b. n. 3.

Letter of Attorney,
36. a. n. 5. 48. b. n. 1. 6. 8. 49. a. n. 1. 52. a. n. 1. 3. 7. 9. 52. b. n. 2, 3, 4, 5, 6, 7, 8, 9. 59. a. n. 3.

Letter missive (the King's),
With respect to deaneries, 95. a. n. 4.
- - - - - to bishoprics, 134. a. n. 4.

Letters Patent,
The *constat*, or *inspeximus* of, may be pleaded, 225. b. n. 3.
See more concerning Letters Patent, 88. b. n. 16. 95. a. n. 4. 109. b. n. 3. 134. a. n. 3. 5. 135. b. n. 1.

Levitical Degrees,
235. a. n. 1.

Lex loci,
79. b. n. 1.

Lex mercatoria,
182. n. 5.

Libel,
Privilege of a parliament does not extend to cases of, 128. b. n. 1.
Provinces of judge and jury in prosecutions for state libels, 155. b. n. 5.

Libera piscaria,
Whether *libera, ex vi termini*, implies *common*, 122. a. n. 7.

Liberties,
Ancient, 115, a. n. 11.

Liberties and *Franchises*,
Are excepted in 21 Jam. I. c. 2. 119. a. n. 1.

Liberty
Is favoured by law, 145. b. n. 2.

License,
To alien serjeanties, 43. a. n. 3.
For the appropriation of an advowson, 46. b. n. 1.
To make partition of copyhold between parceners, 59. a. n. 1.
To make a lease of copyhold land, 59. a. n. 4. 63. a. n. 1.
For marriage, 79. b. n. 1.
To alien in mortmain, 52. b. n. 10. 99. a. n. 1.
From a master for his apprentice to serve a third person, 117. a. n. 1.
To retail wine, 120. a. n, 4.

Lien,
With respect to crown debts, 209. a. n. 1. V. 1. 3.

Life Estate,
Its value, with respect to the remainders over, 298. a. n. 1.

Life and Limb,
74. b. n. 1. 161. a. n. 4.

Life,
(Natural), 132. a. n. 1.

Lightning,
And other like inevitable accidents, 89. b. n. 2.

Limitation of Time,
Of memory, 86. b. n. *.
With respect to persons beyond sea, 107. a. n. 6.
To what cases 32 H. 8. extends, 115. a. n. 4, 5, 6.
In respect to suits as to right of patronage taken away by 7 Ann. c. 18. 115. a. n. 6.
Principal stat. relating to, is 11 Jac. 1. c. 16. 115. a. n. 7.
As to the king's title, 119. a. n. 1.
Is shortened by levying a fine, 121. a. n. 1.
In ejectment, 330. b. n. 1.
Right of entry, how affected by, 21 Jac. c. 16. and 4 & 5 Ann. c. 16. 250. a. n. 1.
The statutes respecting, 121. a. n. 1. 250. a. n. 1. 252. b. n. 1. 261*. a. n. 1. 262. a. n. (B) 290. b. n. 1. XVI. 330. b. n. 1.
See more concerning Limitation of Time, 83. a. n. 2. 93. a. n. 2. 115. a, n. 1, 2, 3.

LI

Limitations,
Proximo sanguinis et consanguinitatis, of the devisor, who shall take by, 10 b. n. 2.
By deed, to a man and his heirs male lawfully begotten, 20. b. n. 2.
- - - to him and the heirs of him lawfully begotten, ibid.
In tail as to the expressions *procreatis, procreandis, in posterum proc reandis*, 20. b. n. 3.
To a person and such heir of her body as should be living at her death, with remainder over, 22. b. n. 4.
Who may take by purchase or descent, under the words *heirs female of the body*, 24. b. n. 3.
(Conditional), distinguished from conditions and remainders, 203. b. n. 1. III.
To husband and wife and the heirs of their two bodies, 218. b. n. 3. ‖.
To a widow, and the heirs of the bodies of her deceased husband and herself begotten, ibid.
To posthumous children, 298. a. n. 3.
Introduced under stat. of uses, 271. b. n. 1. V.
In restraint of the power of a tenant in tail to suffer a common recovery are void, 379. b. n. 1.

Litigation,
Vexatious, provisions against, 161. a. n. 4.

Littleton,
The Cambridge MSS. of,
Vell. MS. xxvii. 163. a. n. 1.
Paper MS. xxvii.
The numerous editions of, vii. viii. xv.

Liveries,
And the court of wards and liveries, taken away by 12 Cha. 2. c. 24. 85. b. n. 1.

Livery,
By the king after full age, 38. b. n. 1.
Sued by a widow on a fine *come ceo*, 78. a. n. 3.
Whether the suing of a writ of livery was confined to tenure *ut de corona*, 87. a. n. 1.
Sued to the crown by an heir, 88. b. n. 11.
And *primer seisin*, taken away by 12 Ch. 2. c. 24. 108. b. n. 1.
Writ of livery and partition, 169. a. n. 2.
Sued by *mulier puisne* with *bastard eigne*, 170. b. n. 4.

Livery of Seisin,
Origin and history of, 48. a. n. 2.
Substitution of the notoriety of inrolment for that of livery, 48. a. n. 3.
Nearly superseded by conveyances to uses, and upon trusts, 48. b. n. 3.
What does not amount to, 48. a. n. 5.
Tenant in possession cannot take by, 48. b. n. 7.
Good or void, with respect to the deed, 48. b. n. 1. 331. a. n. 1.
Feoffor, if absent, cannot give, nor feoffee, if absent, take by attorney created by parol, 48. b. n. 2.
Good though not given upon the land, 48. b. n. 3, 4.
(By attorney) good or void, and when it may be made, and how, 48. b. n. 6. 50. a. n. 1. 52. a. n. 2, 3. 9. 52. b. n. 2, 3. 5. 7. 9.
Bad to pass a remainder, if there be a prior estate of freehold not surrendered, 48. b. n. 7.
Secus, if such prior estate be for years only, 48. b. n. 7.
When good or not, if lessee be upon the land, 48. b. n. 8. 52. a. n. 9.

MA

Livery of Seisin,
Whether livery, in one county, of a manor, passes a part of it in another county, 50. a. n. 2.
Bad to pass a remainder expectant on a lease for years, if made after delivery of the deed, 49. b. n. 5.
Was necessary for a lease for lives before the statute of uses, and therefore such a lease was a feoffment, 93. b. n. *.
By a termor for years is good, 330. b. n. 1.
By a bailiff is ineffectual, ibid.
As to discontinuance, 330. a. n. 1. VII.
Secundum formam chartæ, 331. a. n. 1.
See more concerning Livery of Seisin, 45. b. n. 2. 48. a. n. 1. 4. 6, 7, 8. 48. b. n. 5. 49. a, n. 1. 8. 49. b. n. 4. 52. a. n. 4. 7. 52. b. n. 6. 8. 59. a. n. 3. 111. b. n. 1. 153. b. n. 9. 264. a. n. 1.

Livery Stable,
47. a. n. 14.

Loci Lex,
To what extent allowed, 79. b. n. 1.

London (the City of,)
The process there, called gavelet, for the recovery of rent has fallen into disuse, 142. a. n. 2.
Notwithstanding the customary division there, the whole of personal estate may now be disposed of by will, 176. b. n. 5.
The custom there, as to distribution, certified by the mayor and aldermen, 176. b. n. 8.
Custom there as to advancement and hotchpot, 176. b. n. 9.

Lords (the House of,)
Have declined taking the opinion of the judges extrajudicially, 110. a n. 5.
With respect to its judicial capacity and legislative character, and the title by which bishops sit there, 134. b. n. 1.

Lords Court,
123. b. n. 1. 141. a. n. 2.

Lord and *Vassal*,
In the feudal law, were widely different from the *patron* and *client* of the Roman law, 64. a. n. 1.

Lord Mayor,
In London tithes are recoverable before his lordship, with an appeal to the lord chancellor, 159. a. n. 4.

Losses,
By trustees, 89. a. n. 5.
By carriers, 89. a. n. 6.
By bailees or pawnees, 89. a. n. 10.
By carriers or masters of ships, 89. b. n. 2.
Of letters with exchequer bills in them, 89. b. n. 3.

Lunatics,
80. a. n. 1. 88. b. n. 6. 16. 246. b. n. 1. 247. a. n. 2.

Lyons (the Council of,)
80. b. n. 1.

M.

Madmen,
who, 246. b. n. 1.

Magna Charta,
43. a. n. 4. 81. b. n. 1. 110. a. n. 4. 115. a. n. 10.

MA

Magna Charta,
Construction of, as it respects tourns and leets, 115. a. n. 11, 12.

Maidens (under sixteen),
Object of 4 and 5 Ph. and M. respecting, 88. b. n. 14.

Maiming,
A capital felony, where, 127. a. n. 2.

Maintenance,
Or *chevage*, described in the book of assises, and by Lambard as inquirable by a jury, 140 a. n. 3.
In labouring a jury, 157. b. n. 6.
Maxim of the common law to prevent maintenance, 265. a. n. 1.
By an attorney, 368. b. n. 1.

Mala,
In se, 120. a. n. 4. 206. a. n. 1. 206. b. n. 1.
Prohibita, ibid.

Man (Isle of),
Not *within* the stat. *de donis*, of uses, and wills, 20. a. n. 5.

Mandamus,
249. b. n. 1.

Mandate,
Royal, 110. a. n. 5

Manor,
May have special customs, and it is safer to allege customary dower within a manor than within a town, 110. b. n. 2.
Whether before the statute *de prærogativa regis*, the king's grant of a manor would pass an advowson appendant without express mention of it, 121. b. n. 2.
An advowson is appendant to the demesnes and not to the rents or services, 122. a. n. 1.
Rent by surplusage to the mesne, where the lord purchases the tenancy, 150. b. n. 4.
Recovery of a manor was a tacit recovery of a villein regardant, 151. a. n. 3.
By prescription the lord may have a woodward, and the bark of felled trees, 165. b. n. 1.
Partition without any particular agreement about an advowson appendant, 165. b. n. 2.
Bailiffs of a manor, 168. b. n. 1.
An advowson appendant could not be disannexed by fooffment without deed, 190. b. n. 5.
The soil between high and low water mark may be parcel of a manor, 261. a. n. 1.
See more concerning Manors, 5. a. n. 2. 29. a. n. 4. 32. b. n. 2. 44. b. n. 7. 48. b. n. 3. 50. a. n. 2. 52. a. n. 9. 57. b. n. 1. 58. a. n. 4, 5, 6. 58. b. n. 1, 2. 7, 8. 61. b. n. 1, 2. 93. a. n. 1.

Manumissions,
123. a. n. 3.

Manuscript Note,
Of Lord Hardwicke's argument in Hill *v.* Adams, or Swannock *v.* Lyford, on the general doctrine, whether a term of years is a protection against dower, and its application to the point then in question, 208. a. n. 1.

Marches,
107. a. n. 1.

Marchet,
140. a. n. 2.

ME

Mariners,
As to *nuncupative* wills, 111. a. n. 3.

Marque or *Reprisal*,
Reference to a treatise on the law of, 11. b. n. 2.

Marriage Act,
88. b. n. 16.

Marriages,
Degrees of affinity within which prohibited, 24. a. n. 2. 235. b. n. 1.
Of infants, what necessary to the validity of, 79. b. n. 1.
Scotch, validity of, ibid.
Clandestine, universally annulled, ibid.
Difference between contracts of, *per verba de præsenti et per verba de futuro*, and how binding upon infants, 79. b. n. 2.
Not dissolubly now, *præcontractus causa*, 79. b. n. 4.
Of idiots and lunatics when void, 80. a. n. 1.
Guardian in socage is accountable to a son for the value of his marriage as well as for the profits of his land, 88. b. n. 9.
Of the royal family how regulated, 133. b. n. 1.
Of nief, with a freeman, or her lord, how far an enfranchisement, 123. a. n. 3.
Of villein with a freewoman, its effect, 123. a. n. 6.
Marriage brokage, 206. b. n. 1.
Between obligee and obligor, 232. a. n. 1.
Are voidable by reason of affinity or consanguinity, 235. a. n. 1.
Reference to a writer on the Roman doctrine of marriage, 245. a. n. 1.
Subsequent to the birth of issue, their effect in the civil and canon law, in the law of England, and in France, Germany, and Holland, ibid.
In what degree subject to the authority and influence of the secular power, ibid.
Are not a release of a promise for which an action cannot rise during the coverture, nor in equity of a bond debt, 264. b. n. 2.
Their effect on the wife's lands of inheritance and personal estate, 325. b. n. 2. III.
See more concerning Marriages, 8. a. n. 7. 33. a. n. 10. 34. a. n. 2. 79. a. n. 3. 82. b. n. 1. 84. a. n. 2. 85. b. n. 1. 88. b. n. 11. 14. 16. 107. a. n. 2. 108. a. n. 1. 110. a. n. 5. 123. a. n. 4, 5. 7. 123. b. n. 1, 2. 126. a. n. 2. 134. a. n. 5. 136. a. n. 1. 191. a. note, sect. VI. 11. 237. a. n. 1. 244. a. n. 2. 244. b. n. 2. 345. a. n. 1. 299. a. n. 2.

Masters,
Of ships, what losses responsible for, 89. b. n. 2.
And apprentice, 117. a. n. 1.
And servant, ibid.

Matter,
Of law, 110. a. n. 5.
Of record, 119. a. n. 1.

Maxims,
Reference to a treatise on, 152. b. n. 7.
(The four) urged in favour of bonds of resignation, in a case which condemned them, 186. a. n. 3.
See also, 152. b. n. 6. 153. a. n. 2.

Mayhem,
161. a. n. 4. V.

Measures (Weights and),
159. b. n. 3.

Memory,
Time out of, 86. b. n. *.
Time of, 105. a. n. 1. 109. b. n. 2. 111. a. n. 5.

MI

Merchants,
Joint, 182. a. n. 4.
See more concerning Merchants, 90. b. n. 3. 272. a. n. 7. 191. a. note, sect. VI. 9.

Mercy,
Explanation of the words "And John in mercy, &c." 293. a. n. (A).

Merger,
Of a charge paid off by tenant for life, does not necessarily take place, 239. b. n. 3.
Of right in the freehold, 278. b. n. 1.
Was never favoured at law, and still less in equity, 338. b. n. 4.
Whether there is, of a term for years in a tenant to the præcipe, or in trustees for preserving contingent remainders after their entry for forfeiture, ibid.
Reference to a treatise on, ibid.
What union of estates is not, ibid.
See more concerning Merger, 18. a. n. 4. 28. a. n. 7. 41. b. n. 1. 42. b. n. 2. 185. a. n. 3. 271. b. n. 1. VI. 2.

Merton,
The statute of, 81. b. n. 2.

Mesnalty,
152. b. n. 2. 167. b. n. 1.

Mesne, lord, and tenant,
31. a. n. 2. 150. b. n. 4. 152. b. n. 1. 153. a. n. 1.

Mesne Incumbrances,
290. b. n. 1. XV.

Mesne Profits,
Posthumous son entitled to, if claiming by purchase, 11. b. n. 4.
Secus, if claiming by descent, ibid.
Of personalty during suspense of vesting, accumulate and go with the principal, 55. b. n. 3.
See also, 257. a. n. 2.

Mesne Values,
33. a. n. 2. 4.

Messuage,
What passes by the word, 5. b. n. 1. 56. b. n. 1.

Michaelmas Term,
Abbreviation of, 135. a. n. 2.

Militia,
71. a. n. 1.

Militia Act,
391. a. n. 2. IV. 3.

Mill,
52. a. n. 9.

Mines,
53. b. n. 1. 54. b. n. 2. 165. a. n. 1. 220. a. n. 1*.

Minorities,
Disposition of rents during, 271. b. n. 1. VII. 2.

Mischief,
The law prefers a *private* mischief to a *public* inconvenience, 152. b. n. 6.

Misrecital,
46. b. n. 10.

Mistrial,
125. a. n. 2.

MO

Modus tenendi parliamentum,
60. b. n. 2.

Monasteries,
94. a. n. 2. 129. b. n. 1.

Monstraverunt de rationabilibus divisis,
122. a. n. 7.

Monuments,
Heir shall have action for defacing, 18. b. n. 4. 5.

Mortdancestor, (*Writ of*),
31. a. n. 5. 355. b. n. 1.

Mortgages,
After condition broken, the mortgagee may, by ejectment, recover the possession of the land, without notice, 205. a. n. 1.
The law of,
1st. As to the origin of mortgages;
2dly. What constitutes a mortgage;
3dly. The nature of the estates of the mortgagor and mortgagee;
4thly. The nature of an equity of redemption;
5thly. On general devises by mortgagees in fee of their real estates, 205. a. n. 1.
The debt and securities, how considered in equity, and how at law, ibid.
Who may or shall redeem, and in what proportions, 208. a. n. 1.
Redemption of, by contribution, ibid.
For years, with respect to dower, ibid.
Succinct observations,
1st. On the right of the executors to receive the mortgage debt;
2dly. On the application of the mortgagor's personal estate in discharge of his mortgage debts;
3dly. On limiting the right of redemption to persons not entitled to the ownership of the land, when the mortgage is executed;
4thly. On the length of possession by a mortgagee which bars the mortgagor's right of redemption, 208. a. (208. b. 13th ed.) n. 1.
In fee are chattel interests in equity, 208. a. (208. b. 13th ed.) n. 1. 1st.
Whether the estate or the person receiving the money is to be debtor for it, where such person has only a partial estate, ibid. 3dly.
When discharged by tenant for life, whether the debt continues a subsisting charge, 239. b. n. 3.
Of renewable leaseholds, what provisions should be inserted in, 290. b. n. 1. XI.
When the money secured upon mortgage is settled or assigned upon various trusts, there should be two deeds, ibid. n. 1. XIV. 5.
For long terms of years, 205. a. n. 1. 4thly. 290. b. n. 1. XV.
Forfeiture of, ibid.
In the civil law, ibid.
Mortgagees, lessees, &c. are considered as purchasers, ibid.
See more concerning Mortgages, 171. b. n. 5. 222. b. n. 2. 237. a. n. 1. III. 271. b. n. 1. VII. 2. 290. b. n. 1. XIV. 1, 2, 3, 4. 309. a. n. 1.

Mortmain,
Power of granting licences to alien in, 99. a. n. 1.
Cities and towns having customs to devise in mortmain, 112. b. n. 2.

Mortmain Fees,
65. a. n. 1.

NO

Mulier puisne,
170. b. n. 3. 4.

Municipal Law,
107. a. n. 6.

Murder,
74. b. n. 1. 157. a. n. 4. 161. a. n. 3. 390. b. n. 2.

N.

Name,
And arms of a settler, 327. a. n. 2. II. 2. 3.

Natural life,
132. a. n. 1.

Natural-born subject,
May derive title by descent through his parents though aliens, 8. a. n. 2.
Who, though born beyond sea, 8. a. n. 1. 128. a. n. 2. 129. a. n. 2.

Naturalization,
A bill of, with the usual clause, 129. a. n. 1.
An act of, without any exception, ibid.

Naturalized persons,
Incapacities of, 129. a. n. 1.

Natural child,
(*In the Roman law*), *Filius naturalis, a vulgo barbarorum opponitur, legitimo. Sed revera opponitur filio adoptivo, &c.* 244. a. n. 1.

Negative words,
In a statute declaratory of the common law, 115. a. n. 9.

Neighbourhood or *Visne*,
125. a. n. 2.

Next of blood,
88. b. n. 2. 5, 6, 7. 13.

Nief,
Married to a freeman, whether she is enfranchised for ever, or entitled to dower; and why the issue are free by the common law, 123. a. n. 3, 4, 5. 7.

Nihil dicit,
Recovery on, to bar a lessee of his term, 46. a. n. 3.
Recovery upon, in waste, 355. a. n. 1.

Nobility,
Whether a man may be noble *pur auter vie*, 16. b. n. 7.
Of the nations on the continent, 191. a. note, sect. V. 3.
The English. how it differs from that of foreign nations, ibid. V. 4.
Letters of, in France, 243. b. n. 2.
Of France, as to descent. &c. 325. b. n. 2. III.
See also, 9. b. n. 4. 16. b. n. 4, 5, 6.

Noli prosequi,
Against two after or before judgment against the other, 232. a. n. 1.

Non-claim,
The statute of, 121. a. n. 1.
During five years after a fine levied by an heir bars a devisee, &c. 240. b. n. 2.
By a stranger to a fine, effect of at common law, 262. a. n. (B).
Reference to cases on the present effect of time in barring legal remedies, and conferring titles, ibid.

OA

Non compos mentis,
Whether he can plead his own disability, 2. b. n. 12. 247. a. n. 2.
Distinctions respecting madness, 246. b. n. 1.
Semel furibundus semper furibundus præsumitur, ibid.
Reference to cases on lunacy, ibid.
A fine levied by an ideot or other insane person, is good, 247. a. n. 2.

Non est factum,
(In pleading) 35. b. n. 7.

Non obstante,
120. a. n. 3.

Nonsuit,
139. a. n. 1. 139. b. n. 1. 232. a. n. 1.

Non-user,
261. a. n. 1.

Nota,
Observations on *Coke's* inferences from this word, 17. b. n. 1. 22. a. n. 2.

Notice,
To quit, where and what necessary or not, 57. b. n. 2. 270. b. n. 1.
Of a trust, with respect to privity of persons, 290. b. n. 1. III.
Of a trust, as to responsibility for the application of money paid to trustees, 290. b. n. 1. XIV.
Of a trust, is implied by equity, where a trustee conveys without consideration to a person who has not express notice, 290. b. n. 1. IV. V. 4.
Of a prior incumbrance, ibid. n. 1. XV.
Of a settlement, 342. b. n. 1. VIII.
See more concerning Notice, 47. b. n. 3. 59. a. n. 4. 63. a. n. 2. 66. b. n. 2. 167. b. n. 1. 207. a. n. 1. 209. a. n. 1. V. 1. 270. b. n. 1. 290. b. n. 1. XII. 290. b. n. 1. XIV. 1. 309. a. n. 1.

Notoriety,
Of title, 239. b. n. 2.
Of possession, 375. b. n. 1.
Of livery, 330. a. n. 1.
See more concerning notoriety, 48. a. n. 3. 98. b. n. 1. 250. b. n. 1. 264. a. n. 1. 271. b. n. 1. III. 290. b. n. 1. XIII.

North Sea, (*the*)
107. a. n. 6.

Nuisance in a Highway,
56. a. n. 2.

Nullum tempus occurrit regi,
Exceptions to this rule specified, 119. a. n. 1.
With respect to survivorship before office found, where a purchase is made by an alien and a subject, 180. b. n. 2.

Nuncupative Wills,
111. a. n. 3.

O.

Oath,
Of allegiance, 68. b. n. 1. 2. 172. b. n. 1. 233. a. n. 1. 391. a. n. 2. II. IV. 1.
Of supremacy, 120. a. n. 3. 233. a. n. 1. 391. a. n. 2. II. IV. 1.
Of secresy in a commission to examine witnesses, and with respect to commissions of partition 167. b. n. 3.
Of abjuration 391. a. n. 2. II.

Oath,
Prescribed, for Roman catholics, by 18 Geo. 3. c. 60. 391. a. n. 2. III. 2.
- - - - by 31 Geo. 3. c. 32. 391. a. n. 2. III. 3.
Under the militia act, 391. a. n. 2. IV. 3.
See more concerning Oaths, 65. b. n. 4. 110. a. n. 5. 199. b. n. 1.

Obligation,
Made to the king, 191. a. note sect. VI. 9.
What payment is pleadable as a bar to, 212. b. n. 1.
Difference between it and a feoffment on condition, 220. b. n. 1.
In the disjunctive, 225. a. n. 1.
Where a release to one obligor shall be a discharge to both, 232. a. n. 1.
Where the obligee is made executor by the obligor, 264. b. n. 5.
See *Bond*; and further concerning Obligations, 46. a. n. 8. 172. a. n. 2. 207. a. n. 2. 213. b. n. 1. 230. b. n. 1.

Occupancy,
In what cases, and of what things it may be, 41. b. n. 1, 2, 3, 4, 5.
Special, 22. a. n. 3. 41. b. n. 2, 4.
General, is now prevented by statute, 41. b. n. 4, 5. 298. a. n. 1. 388. a. n. 1.
In time of war, 249. b. n. 2.

Offices,
Judicial whether grantable in reversion, 3. b. n. 5.
Grant of by ecclesiastics, 44. a. n. 1.
Office of sheriff, 120. a. n. 3.
Sale of, ibid.
Of honour, 165. a. n. 8.
Found under the great seal, 180. b. n. 2.
Civil and military, with respect to forfeiture and penalties for not taking the oaths prescribed by several statutes, 233. a n. 1. 391. a. n. 2.
See more concerning Offices, 3. b. n. 3. 6. 15. b. n. 3. 17. b. n. 4. 20. a. n. 1. 30. b. n. 2. 95. a. n. 4. 113. a. n. 2. 120. a. n. 4. 129. a. n. 1. 243. a. n. 2.

Onus probandi,
93. a. n. 2.

Or, construed *and*,
8. b. n. 5.

Orders,
Interlocutory and final, 168. a. n. 2.

Ordinance,
How it differs from a statute, 159. b. n. 2.
See more concerning Ordinances, 42. b. n. 1. 115. a. n. 13. 159. b. n. 1. 260. a. n. 1.

Ore,
165. a. n. 1.

Orphanage monies,
190. a. n. 2.

Original,
And counterparts of a deed, 229. a. n. 3.
Action by. 285. a. n. 1.

Ouster,
Forcible, remedy for, given to persons not having the freehold, 257. b. n. 1. 271. a. n. 1.
See also, 48. b. n. 7. 55. b. n. 14.

Ouster le maine,
48. b. n. 6.

Outlawry,
Whether given by the common law against constructive breaches of the peace, 128. b. n. 1.
Whether a determination of an estate at will, 55. b. n. 13.
In personal actions, whether a disqualification to be a juror, 158. a. n. 1.
See more concerning Outlawry, 41. a. n. 2. 107. a. n. 6. 122. b. n. 4. 128. b. n. 1.

Oxgang,
Varies as to its contents, 69. a. n. 2.

P.

Palfridus,
149. a. n. 1.

Panel,
Of jurors, 125. a. n. 2. 156. a. n. 3. 156. b. n. 1. 4.

Paragium,
Import of the term, 175. b. n. 5.

Paramount Lord,
Act of cannot alter the tenure between the mesne lord, and tenant paravail, 152. b. n. 1.
How his release to tenant paravail operates, 152. b. n. 3.

Parceners,
By the common law, 163. a. n. 1. to 175. b. n. 1. both inclusively.
By custom, 175. b. n. 2. to 180. a. n 1. both inclusively.
See *Coparceners*; and also 59. a. n. 1. 185. a. n. 9. 187. a. n. 3. 188. a. n. 10.

Parco fracto (*de*),
An action, 47. b. n. 5.

Pardon,
Of alienation, 43. a. n. 3.
By prerogative, 120. a. n. 4.

Parliament,
Whether, on an election for a member of, an action lies against a returning officer for refusing a vote, 81. b. n. 2.
Town not corporate may acquire the right of electing representives in, 109. b. n. 2.
Etymology, and first use of the word, 110. a. n. 1. 3.
Scotch, history of, ibid. n. 2.
Origin of the commons in, 110. a. n. 4. 260. a. n. 1.
The power of, 120. a. n. 3.
Privilege of, does not extend to cases of libel, 128. b. n. 1.
Duration of, 110. a. n. 6.
Acts of, 131. b. n. 2.
The rolls or records of, 133. a. n. 2. 133. b. n. 1. 260. a. n. 1.
The English, how it differs from the parliaments of foreign nations, 191. a. note, sect. V. 4.
See more concerning parliament, 16. b. n. 4. 72. a. an. 2. 99. a. n. 1. 120. a. n. 4. 129. a. n. 1. 134. a. n. 1, 2. 134. b. n. 1.

Parliamentum tenendi modus,
Remarks on its antiquity, 69. b. n. 2. 110. a. n. 3.

Parol,
A lease for years may be delivered by attorney appointed by *parol*, 48. b. n. 2.
The reason why a husband's infancy would not warrant the parol to demur, in a suit for the wife's land, is the principle upon which baron and feme may levy a fine of the wife's land, 121. a. n. 1.

PA

Parol,
Agreement, 169. a. n. 3.
Grant, 169. a. n. 4.
Lease, 186. a. n. 9.

Parsons,
Whether they might receive homage, 67. a. n. 1.
Have only a life estate, 325. b. n. 1.
Claiming *jure ecclesiæ* are not barred by warranty, 270. b. n. 1.

Parties and *Privies*,
To a fine, 121. a. n. 1, 2.

Partition,
By infant by deed, whether void, or voidable, 51. b. n. 3.
Of copyhold cannot be made without license of the lord, 59. a. n. 1.
Binding on an infant where, 164. a. n. 1. 169. a. n. 2. 170. a. n. 1. 171. b. n. 2.
Of an advowson, instances of, 164. b. n. 6. 171. b. n. 3.
Of what it cannot be, 165. a. n. 1—4.
Of a manor, how it affects things appendant thereto, 165. b. n. 2.
By writ, and without, difference between, 165. b. n. 4.
Whether the privilege of age in, can be assigned, 166. b. n. 2.
Writ of lies, notwithstanding lease for years by one parcener, 167. a. n. 2.
By writ, and by commission out of Chancery, should both be open proceedings, 167. b. n. 3.
Writ of, 169. a. n. 2. 1.
By release, ibid. II.
By judgment, ibid. III.
By hotchpot, ibid. IV.
Writ of livery and partition, ibid, V.
By the Roman, French, and Scotch law, authors on referred to, 169. a. 2.
Commission of, ibid.
By decree in Chancery on a bill filed, ibid.
In Chancery, 169. a. n. 2. 171. a. n. 3.
Whether parol agreement for, or parol grant of rent for owelty of, would now be good, 169. a. n. 3, 4,
In *pais*, 170. b. n. 3.
In a court of record, ibid.
By agreement between husbands, whether binding on the inheritance of their wives, 171. a. n. 2. 172. b. n. 4.
Tenant by elegit may have writ of, 187. a. n. 2.
See more concerning Partition, 10. a. n. 1. 46. a. n. 5. 153. a. n. 1. 164. b. n. 8. 166. b. n. 4. 167. b. n. 1, 2. 169. b. n. 1. 170. b. n. 4. 173. b. n. 1. 4. 174. b. n. 2. 4, 5. 187. a. n. 1. 3.

Pastura separalis,
A prescription for several pasture may be made against the owner of the soil, 122. a. n. 6.
Why should not a *several piscary* exist without the soil, as well as a *several pasture*? ibid. n. 7.

Patent,
Making a steward of the king's manor, 61. b. n. 1.
Granting a license to alien in mortmain, 99. a. n. 1.

Patria potestas,
88. b. n. 13.

Patron,
And client, in the Roman law, 64. a. n. 1.

Patronage,
Of the crown, in respect to the old and the new deaneries, 95. a. n. 4.

PE

Patronage,
With respect to the deaneries of Wales and Ireland, ibid.
All limitation of suits about the right of, in respect to advowsons, is taken away by statute, 115. a. n. 6.
Of the crown in respect to the old and the new bishoprics, 134. a. n. 1, 2, 3, 4, 5.
In respect to the Irish and Welsh bishoprics, 134. a. n. 5.

Pawnees,
89. a. n. 10.

Peace,
Conservators of the, 114. b. n. 1.
Constructive breaches of, 128. b. n. 1.
What is time of peace, in a legal sense, 249. b. n. 1.

Peer,
Nature of stipend sometimes allowed in creating, 83. b. n. 5.

Peerages,
Of France, as to descent, marriage, parliament, and rank, 325. b. n. 2.

Peine forte et dure,
391. a. n. 1.

Penal statutes,
157. a. n. 4.

Penalties,
120. a. n. 4. 233. a. n. 1.

Pensions,
97. a. n. 3.

Per,
Difference between title in the *per*, and title in the *post*, 271. b. n. 1. II.

Perambulations,
261. a. n. 1.

Perjury,
290. b. n. 1. XIII.

Perpetuity,
The boundaries prescribed by law against, 20. a. n. 5. 271. b. n. 1. V.
A particular or qualified power has a tendency to a perpetuity, 271. b. n. 1. VII. 2.
No nearer approach to, will be supported in equity than will be admitted at law, 290. b. n. 1. XVI.
Every contrivance tending to render property unalienable beyond the limits settled for its suspense, is discouraged by the modern law, 342. b. n. 1.
Attempted in the will of John Duke of Marlborough, 379. b. n. 1.
The utmost stretch towards, is through an exercise of a general power of appointment, ibid.

Personalty,
How far capable of settlement, 18. b. n. 7. 20. a. n. 5.
Period prescribed for the limitation of personal estate, 20. a. n. 5. 271. b n. 1. V.
Disposable by infants, at what age, 171. b. n. 6.
How far customary divisions of, on a person's decease, remain. 176. b. n. 5, 6.
Contingent interests in, how assignable, 265. a. n. 1. m. 4.
Settlement of, by reference to limitation of freehold estates, objectionable, 290. b. n. 1. XII.
Of a wife, 351. a. n. 1.
See more concerning Personalty, 88. b. n. 13. 8

PL

rsonalty,
b. n. 6. 111. a. n. 3. 121. a. n. 1. 176. b. n. 9. 185. b. n. 2.

rsonal Duties,
he indivisibility of, 150. a. n. 2.

rsons,
orn beyond sea, 129. a. n. 2.

ttilence,
20. n. 3.

tit serjeanty,
07. a. n. 4. 108. b. n. 1.

tition,
husband of wife, termor may have petition of right alone, 46. b. n. 5.
Vithout bill, to the chancellor, to appoint a guardian, 88. b. n. 16.
o the king or parliament, how regulated by the common law and by statutes, 257. a. n. 3.

ysicians,
he opinion of, as to the *ultimum tempus pariendi*, 123. b. n. 2.

gnus,
the Roman law, 205. a. n. 1. 1st.

scary,
Whether the ownership of the soil is necessarily included in a several fishery, 122. a. n. 7.
ertain writs, never applicable except to the soil, lie for a piscary, ibid.
Whether the grant of, generally, passes the soil, ibid.

ading, or in respect to pleading,
Who shall be said to be seised in his demesne, 15. a. n. 3. 17. a. n. 3. 17. b. n. 2. 4.
omyn's Dig. referred to, 17. a. n. 1.
ount and plea, diversity between, ibid. n. 3.
o diversity between *ad medietatem rectoriæ* and *rectoriam medietatis*, 17. b. n. 5.
low of a gift to baron and feme, and the heirs of feme by baron, 26. a. n. 1.
Where *profert* of a deed should be made, 35. b n. 6.
Where *non est factum* pleadable, 35. b. n. 7.
eclaration on a joint demise by tenants in common invalid, 45. a. n. 7.
iversity between pleading a lease and count in debt for rent, 47 b. n. 9.
- lessee for years and at will, in count in debt, 57. b. n. 1.
he words *ad voluntatem domini*, material to express copyhold, 58. a. n. 1. 176. a. n. 1.
What should be specially stated or not, 89. a. n. 7.
Where customs must be specially stated, 110 b. n. 3. 175. b. n. 4.
Quod partes finis nihil habuerunt, 121. a. n. 1.
eplication to plea of villenage given by 37 Ed. III. c. 16. 122. b. n. 2.
ecessity of alleging the *locus in quo* in issuable facts, 125. a. n. 2.
ommon appendant need not be prescribed for, 122. a. n. 2.
pecially, 175. b. n. 4. 283. a. n. 1.
A defeasance, what should be stated, 207, a. n. 2.
ease and re-lease may be pleaded as a feoffment, 207. a. n. 3.
In bar, 232, a. n. 1.
Of disability, 247. a. n. 2.
In bar of assize, 251. b. n. 3.
What matter that may be given in evidence, may also be pleaded, 283. a. n. 1.
Plene administravit, ibid.

PO

Pleading, or in respect to pleading,
Many several matters to an action, by way of defence, under 4 Ann. c. 16, 303. a. n. 1.
Where surplusage does not vitiate, 303. b. n. 1.
Order of, 304. a. n. 1.
To jurisdiction and afterwards to writ, ibid.
Estoppels, why allowed, 352. a. n. 1.
Of non-feoffment is good against warranty, 389. a. n. 2.
See *Obligation, Lease and Release, Non Compos Mentis.*
See more concerning Pleading, 3. a. n. 7, 8, 9. 17. b. n. 3. 34. b. n. 6. 11. 35. a. n. 3. 5. 39. a. n. 2, 3. 42. a. n. 6. 47. b. n. 5. 10. 58. a. n. 1. 72. a. n. 3. 98. b. n. 1. 117. b. n. 4. 121. a. n. 6. 127. b. n. 2. 4. 128. a. n. 1. 155. b. n. 5. 160. b. n. 3. 180. b. n. 3. 185. a. n. 4. 212. b. n. 1. 225. a. n. 2. 225. b. n. 3. 226. a. n. 1. 232. a. n. 1. 251. b. n. 3. 271 b. n. 1. VI. 2. 300. b. n. 2. 302. b. n. 1.

Pledges of Prosecution,
161. a. n. 4. I.

Plow-land,
69. a. n. 2.

Polls,
challenge to the, 125. a. n. 2. 156. a. n. 5.

Polygamy,
Import of the term, 80. b. n. 1.

Poor's Rate,
47. a. n. 18.

Port,
The mere grant of, a. 261. a. n. 1.
The soil and franchise of, a. ibid.

Portions,
Filial, 176. b. n. 5. † 7.
Double, ibid. n. 10.
Raised in Ireland were payable in England, in the case stated, 211. b. n. 2.
When vested or lapsed. 237. a. n. 1. I.
See more concerning Portions, 176. b. n. 8. 271, b. n. 1. V. 1. VII. 2. 290. b. n. 1. XV.

Possessio fratris,
Might be of a use before 27 H. 8. c. 10. 14. b. n. 5.
May be,—
Of copyhold, before admittance, ibid. n. 6.
Of divers parcels of land, by entry into one parcel generally, without actual entry into the other parcels, 15. a. n. 8.
Of an equity of redemption, 205. a. n. 1. 3dly.
Of dignities, 15. b. n. 3.
What will amount to, 15. a. n. 2. 4, 5. 7. 15. b. n. 1. 29. a. n. 3.

Possession,
The right of, 238. a. n. 1.
Length of, 262. a. n. (B).
The mere, bare, or naked, 238. a. n. 1. 266 a. n. 1. 266. a. n. (A.)
Where the title to is equal, the party who obtains the right shall be preferred, 276. b. n. 1.
Of *cestui que trust*, is the possession of the trustee, 290. b. n. 4. XV.
See more concerning Possession, 88. a. n. 1. 88. b. n. 12. 117. a. n. 3.

Possessory action,
121. a. n. 1.

Possibility, double,
Instance of, 184, a. n. 1.

Possibility, double,
See more concerning Possibilities, 19. b. n. 1. 25. b. n. 3. 365. a. n. 1.

Post,
Difference between title in the *per*, and title in the *post*, 271. b. n. 1. II.
Abatement, disseisin, &c., are in the *post*, 239. a. n. 2.

Posteriority,
With respect to tenure, 78. b. n. *. 88. b. n. 11.

Posthumous children,
55. b. n. 8. 123. b. n. 2.

Post nati.
(The), of Scotland, 141. b. n. 2.

Post Office,
Master of the, 88. b. n. 3.

Pound,
Where distress for rent may be impounded, under 11 Geo. II. c. 19. 47. b. n. 4.

Power claimed by prerogative,
The dispensing power, as to repealing laws, is annihilated, 120. a. n. 3. 4.
See also, *King; Prerogative.*

Power of the courts of law and equity,
In staying proceedings at law, 202. a. n. 3.

Powers at common law,
Of attorney, whether good if made by indenture, and the attorney be not a party, 52. b. n. 4.
- - - in some cases may be created executory, after the party's death, 52. b. n. 7.
See *Attorney; Letter of Attorney*
Where exercisable by an infant, 52. a. n. 2.
Where given to more than one, by whom they may be executed, 52. b. n. 2.
Naked, exercisable by a feme covert, without her baron, 112. a. n. 6.
Whether a power of selling given to executors shall survive, 113. a. n. 2. 181. b. n. 3. 236. a. n. 1.
To distrain for rent in arrear, and to enter and receive the profits till payment of the arrears, 143. b. n. 5.
Of re-entry, for non-payment of rent, 142. a. n. 2.
See *Distress; Entry; Re-entry.*

Powers in equity, or with respect to equity,
Of declaring trusts, 271. b. n. 1. VIII. 1. 290. b. n. 1.
Cannot be exercised by an infant, 52. b. n. 2. 171. b. n. 5.
A power at common law in nature of a trust, though extinct at law, would be enforced in equity, 113. a. n. 2.
Appointment of a trust with a conveyance from the trustees, is safer for a purchaser than a mere appointment of a use, 271. b. n. 1. VII. 2.

Powers since the statutes of uses and wills, &c.
Testamentary,
As to estates *pur auter vie*, 41. b. n. 5.
As to land generally, 111. b. n. n. 1. 3, 4. 271. b. n. 1. VIII. 1.
As to personalty, 176. b. n. 5, 6. 9.
As to the appointment of a guardian, 88. b. n. 14, 15.
Deriving their effect from the statute of uses, or the statute of wills, discussion on the suspension and extinction of, 342. b. n. 1.
Definition of a power: and what may be termed a power of ownership, and what a limited power, or a power charged with a discretionary trust, 342. b. n. 1.
Powers may be distinguished into powers collateral, and powers relating to the estate of the donee of the power in the land; and the latter may be subdivided into powers appendant to an estate, and powers in gross, ibid. II.
As to the suspense or extinguishment of powers collateral to the land, ibid. III.
As to powers relating to the estate of the donee of the power in the land, ibid. IV.
As to such of the powers relating to the estate of the donee of the power in the land as are said to be powers in gross, ibid. V.
Powers appendant or in gross may be, but are not necessarily extinguished by a feoffment, fine, or common recovery, ibid. VI.
Such conveyances will not have this effect, if they are accompanied by a deed, which directs them to operate, as a confirmation of the subsisting uses, and either declares no other uses, or declares none inconsistent with such subsisting uses, ibid. VI. 1.
Where a tenant for life has a power of appointment, and, by a deed executed in the manner prescribed for the exercise of the power, covenants to levy a fine, and directs it to operate to uses warranted by the power, the fine will not destroy the power, but operate in concurrence with the deed, as an exercise of it, ibid. VI. 2.
In all cases where a fine or common recovery can be so connected with a prior deed, as to make with it one entire assurance, the fine or recovery will operate not to suspend or extinguish, but to strengthen and establish the powers contained in that deed, ibid. VI. 3.
Any contract entered into by the donee of a power, with which an exercise of the power would be inconsistent, prevents, at least in equity, a valid exercise of it, ibid. VII.
It even may be thought doubtful whether the exercise of the power would not be void also at law, on the ground that there can be no *cestui que use* under the statute, who would not have been *cestui que trust* at common law, ibid. VIII.
The effect which conveyances by the person, seised for the time, of the land, have on collateral powers vested in other persons, ibid. IX.
As, where a tenant for life under a settlement containing the usual powers of sale, executes a feoffment, levies a fine, or suffers a recovery, ibid. IX. 1.
The effect of feoffments, fines, or recoveries of tenants in tail, on powers vested in other persons, with respect to certain cases which frequently occur in practice, ibid. IX. 2.
An act which may be considered either as the execution of a power derived from an interest, or as an execution of a power *specially reserved*, may operate in the latter way if it cannot take effect in the former, 112. a. n. 1.
As to lord Coke's distinction between a feoffment *to the use of a last will*, and one *to such uses as the feoffor should appoint by last will*, 112. a. n. 2.
A feme covert may without her husband appoint

Powers since the statutes of uses and wills, &c.
lands in execution of a mere power or authority, 112. a. n. 6.
Of entry limited by way of use, 203. a. n. 3. III.
Of tenant for life, 203. b. n. 1. IV.
Extinguished, ibid.
Special, to raise money by mortgage, 208. a. (208. b. 13th ed.) n. 1. 3dly.
Who shall be entitled to a power of leasing, as assignee, 210. a. n. 1.
Of leasing, 214. a. n. 1.
Effect of an exercise of a power of appointment on the uses limited in default of appointment, 216. a. n. 2.
Whether a power of revocation may be defeated by a defeasance, 236. b. n. 1.
Where the execution is good, and only the excess void, 258. b. n. 1.
It has been contended, that, if lands are conveyed to *A.* and his heirs, to such uses as *A.* shall appoint, and in default of appointment to the use of himself, his heirs and assigns—the power of appointment is void, 271. b. n. 1. VI.
The relation between the deed by which they are created, and the deed by which they are executed, 271. b. n. 1. VII. 2.
Of appointment,
General, 271. b. n. 1. VII. 2.
Particular or qualified, ibid.
Of ownership, ibid.
Of selection, ibid.
Distinction between deeds and wills as to powers, ibid.
The execution of, ibid.
Informal execution of, ibid.
Effect of execution of, by lease and release, ibid.
Two precautions in the exercise of, ibid.
Not well created or suspended, ibid.
Over real and personal estate intended to be subjected to the appointment of husband and wife, should precede their life estates, ibid.
An appointment of a trust with a conveyance from the trustees is safer for a purchaser than a mere appointment of a use, ibid.
Suspended and extinguished by secret acts, ibid.
Of revocation and new appointment, ibid. 379. b. n. 1.
Limited to persons, and the survivor, and his heirs, 271. b. n. 1. VII. 2.
Limited to persons and the survivor, his executors or administrators, ibid.
Infants cannot convey under a power without an act of parliament, ibid.
It should be expressed what uses are, and what uses are not, intended to be over-reached by the execution of a power, ibid.
Of leasing, of sale and exchange of jointuring, of charging with portions, of mortgaging, ibid.
To be exercised by parties when in actual possession under the limitations, ibid.
Whether the statute of uses extends to the statutes of wills, with respect to powers in wills, ibid. n. 1. VIII. 1.
Distinction between powers and trusts, 290. b. n. 1. IX.
Of sale authorizing a purchase of leasehold for years, ibid. n. 1. XII.
To raise from real estate the deficiency of personal estate for debts and legacies, ibid. n. 1. XIV. 4.
By which *B.* appoints an estate to the use of the right heirs of *A.* tenant for life, with respect to the rule in Shelley's case, 299. b. n. 1.

Powers since the statutes of uses and wills, &c.
Reference to a treatise on, 342. b. n. 1. IX. 2.
Difference between general and limited powers of appointment, as to the doctrine against perpetuity, 379. b. n. 1.
See more concerning Powers deriving their effect from the statute of uses, 12. b. n. 2. 53. b. n. 7. 237. a. n. 1. 271. b. n. 1. VI. VII. VIII. 1. 290. b. n. 1. V. 5.

Poyning's Law,
141. b. n. 5.

Practice,
Ancient authorities, should they import that guardianship in socage is assignable, are sufficiently answered by the doctrine and practice of later times, 88. b. n. 13.
The king's right of presentation, in preference to a bishop's executors, may be considered as settled by *authorities* and *long practice*, 90. b. n. 4.
Of the courts, in considering 40 weeks as the usual time for a woman's going with child, 123. b. n. 2.
In trials for crimes, as to hundredors, 125. a. n. 2.
Of conveying titles to estates, 208. a. n. 1.

Prædia stipendiaria,
64. a. n. 1.

Præcipe quod reddat,
122. a. n. 7.

Præmunire,
Is so called from the words of the writ, 391. a. n. 2.
Defined from Mr. Justice Blackstone, ibid. See *Roman Catholics.*
See more concerning Præmunire, 42. b. n. 3. 95. a. n. 4. 134. a. n. 4.

Preamble,
79. a. n. 2.

Prebend,
44. b. n. 8.

Prebendaries,
95. a. n. 2.

Precautions,
Very few of the precautions required by the general practice of the profession, can be safely dispensed with, 290. b. n. 1. XV.

Precedent,
The 17 Ed. II. st. 2, intitled, *Modus faciendi homagium et fidelitatem,* is not a statute, but only a precedent, 67. a. n. 2.

Precedency,
As to foreign dukes, earls, &c., 16. b. n. 4.
Reference to authors on precedency in general, and as to the Irish peers, ibid.
As to the bishops of London, Durham, and Winchester, 94. a. n. 5.

Pre contract,
79. b. n. 2. 4.

Pregnancy,
Probable period of, 123. b. n. 1, 2.

Prelates,
Deans of chapters are minor prelates, 95. a. n. 4.
Whether bishops sit as *prelates of the church* so far as the lords act in a legislative character, 134, b. n. 1.

Premises,
Differing from the habendum, the former being joint, and the latter several, or otherwise, 26. b. n. 4.
Or habendum, how far qualified by a *scilicet*, 180. b. n. 1.
See also 183. b. n. 2, 3.

Prerogative,
Of being entitled to the *bona vacantia*, 191. a. note, sect. VI. 11.
Remedies of the crown for the recovery of debts, 209. a. n. 1.
See more concerning Prerogative, 43. a. n. 3. 58. b. n. 7. 69. a. n. 7. 88. b. n. 11. 16. 90. b. n. 4. 110. a. n. 5. 119. a. n. 1. 120. a. n. 4. 131. b. n. 2. 133. b. n. 1. 165. a. n. 6. 172. a. n. 9. 191. a. note, sect. VI. 9. 201. b. n. 3. 207. b. n. 1. 239. a. n. 5. 261, a. n. 1. 335. a. n. 1.

Prescription,
A warren by prescription, 58. a. n. 8.
Title by, 114. b. n. 1.
Double, 105. a. n. 1.
By the law of the twelve Tables, 325. a. n. 1.
See more concerning Prescription, 83. a. n. 3. 93. a. n. 2. 114. b. n. 2. 115. a. n. 9. 11. 13. 15. 119. a. n. 1. 122. a. n. 2, 3, 4. 6. 165. b. n. 1. 188. b. n. 3. 261. a. n. 1.

Presentation,
Whether grantee of eldest coparcener entitled to priority of, 166. b. n. 2.
See *Simony*.
See more concerning Presentation, 90. b. n. 4. 95. a. n. 4. 119. a. n. 1. 186. b. n. 9.

Presentment,
Of a copyhold surrender, 62. a. n. 1, 2.

Presumption,
Violent against legitimacy, 126. a. n. 2.
That marriage proves legitimacy, ibid.
That a fief was a proper fief, 191. a. note, sect. II.
In some courts on the continent, that land is feudal; in others, that it is allodial, 191. a. note, sect. VI. 1. 4. 8.
Feudal service was always presumed by law to be annexed to a fief, 201. a. n. 1.
That an interlining was made at the time of making the deed, 225. b. n. 1.
That a legacy charged on real estates should not *vest* till the time in which it is made payable, 337. a. n. 1. I.
What is a strong ground for presuming the contrary, ibid.
Degrees of, in favour of the title of a dispossessor, 239. a. n. 1.
When a disseisor enfeoffs his father, 242. a. n. 1.
That a child is legitimate, 244. a. n. 2.
Semel furibundus semper furibundus præsumitur, 246. b. n. 1.
That the heir of a disseisor has a right of possession, 250. b. n. 1. 277. a. n. 1.
And usage are often the sole foundations of public rights, 261. a. n. 1.
Afforded by length of possession, in favour of right, 262. a. n. (B).
That a new lease was obtained by means, or in respect, of the party's interest in the old lease, 290. b. n. 1. XI.
As to right of possession, 325. a. n. 1. 326. b. n. 1. IV.
Of an *assumpsit* to take a benefit, 337. b. n. 1.

Presumption,
That what a man has alleged once is true, with respect to estoppels, 352. a. n. 1.
As to warranties commencing by disseisin, it cannot be presumed that the unjust ancestor will leave a recompense to his heir, 366. b. n. 1.
That the heir receives a recompense, in case of warranty, 367. b. n. 1.
Against a matter of fact, 372. b. n. 3.
Against which no proof is admitted, 352. a. n. 1. 373. a. n. 3.
In case of warranties by tenant for life or years, if no entry for forfeiture was made in the lifetime of such tenant, 373. b. n. 2.
See more concerning Presumption, 24. b. n. 3. 25. b. n. 2. 36. b. n. 6. 65. a. n. 1. 81. b. n. 2. 93. a. n. 2. 122. a. n. 7. 123. b. n. 1, 2. 134. b. n. 1. 144. b. n. 2. 159. b. n. 1, 2. 161. a. n. 4.

Pretender,
92. b. n. 2.

Priests,
The marriage of, 134. a. n. 5.
Secular, 135. b. n. 2. 136. a. n. 1.

Primer Seisins, or Ousterlemains,
85. a. n. 1. 93. b. n. 3. 108. b. n. 1.

Primogeniture,
191. a. note, sect. VI. 4.

Priority,
By means of an implied admittance to copyhold, 60. a. n. 2.
And posterity, as to tenure, 78. b. n. *. 88. b. n. 11.
Of possession of an infant's person, as to guardianship by nature, 88. b. n. 12.

Private Acts,
98. b. n. 1.

Privilege of Parliament,
128. b. n. 1.

Privilege of Sanctuary,
92. b. n. 2.

Privy Council,
110. a. n. 5. 129. a. n. 1.

Privy Seal,
As to a common recovery by an infant, 380. b. n. 1.

Privies,
And Parties to a fine, 121. a. n. 1, 2.

Privity,
Want of, between a lord paramount and a tenant paravail, 152. b. n. 1, 2, 3.
Between a lessee for years of an advowson and the lessor, 249. a. n. 2.
Between a tenant at will and the lessor, 270. b. n. 1.
In estate and confidence in the person between a feoffee and *cestui que use*, at common law, 271. b. n. 1. II.
Between a releasor and the releasee is necessary, where the release operates by enlargement, 272. b. n. 1.
Is not required, as to releases by *mitter le droit*, 274. a. n. 1.
Privity of estate and privity to the person, as to uses at common law, and trusts in equity, 290. b. n. 1. III. IV.
A confirmation may be good, where a release would be void for want of privity, 296. a. n. 2.
There is no privity of contract between an original lessor and an under-lessee, 308. a. n. 1.

PR

Prize-money,
117. a. n. 1.

Process,
Of court in criminal and civil suits, could not be directed to the proper officer, if the issuable fact was not alleged within some county, 125. a. n. 2.
Judicial, 135. a. n. 1.

Prochein Amy,
89. a. n. 2. 135. b. n. 1.

Proclamation,
Of war, as to aliens, 129. b. n. 2.
Prohibiting commerce, ibid.
Of war, how qualified with respect to aliens resident here, 129. b. n. 3.
Of a fine, under 1 R. III. and 4 H. VII. 121. a. n. 1.

Procuratores prædiorum,
64. a. n. 1.

Procurers of Trespass,
181. a. n. 1.

Profert,
Or showing of a deed in court, may be necessary, or not; some rules, cases, and references, on the subject, 35. b. n. 6.
Of a release is evidence of the lease, and sufficient in pleading, in Ireland, 271. b. n. 1. VI. 2.

Professed Persons,
No legal establishment for, in England, 3. b. n. 7.
Foreign professions not noticed by the English law, ibid. 132. b. n. 1. and 206. a. n. 1.
As to baron and feme, 33. a. n. 6.
Lord Coke's mention of, how to be understood, 129. b. n. 1.

Profits,
The 10 and 11 W. III. c. 16. is construed to carry the mesne profits of real estate from the father's death in favour of posthumous children, claiming (by purchase) under the act, 11. b. n. 4. 55. b. n. 8.
On a decent, and in other cases not within the act, the mesne profits of a real estate, subject to a contingency, belonged to the person entitled to the freehold in the mean time, until the contingency arises, ibid.
Of personal estate in suspense or contingency, *generally* accumulate till the vesting of the capital happens, 55. b. n. 8.
Of an infant's estate, with respect to guardianship by nature, in socage, and in chivalry, 88. b. n. 9 *. 11, 12.
Taken by a person as guardian though not guardian *de jure*, 90. a. n. 1.
Of land, cannot be reserved upon a conveyance of the land, 142. a. n. 3.
Taken by a lessor, under a special condition of entry for rent in arrear, must always be accounted for, in equity, to the lessee, 203. a. n. 3.
Mesne, of mortgaged land, must be accounted for, in equity, though the condition is forfeited at law, 205. a. n. 1. 1st.
Of mortgaged land, with respect to usury, 222. b. n. 2.
Tenant by *elegit*, interrupted in taking the profits of land, by reason of war, shall not hold over, 249. b. n. 1.
See also 39. b. n. 4.

Prohibition,
61. n. a. 2. 89. b. n. 6.

PU

Proprietate probandâ,
158. b. n. 3.

Prosecution,
Malicious, remedy for, 161. n. a. 4.
A false and malicious, ibid.

Protection,
Of a crown debtor against the suits of his other creditors, 191. a. note, sect. VI. 9.

Protections,
Women in a camp entitled to, 130. a. n. 1.
Fallen into disuse, 131. b. n. 2.

Protest,
128. b. n. 1.

Province,
94. a. n. 3.

Proxy,
68. a. n. 5.

Public Acts,
98. b. n. 1.

Public Employment,
89. a. n. 6.

Publication,
The passing of, 167. b. n. 3.

Puer,
Whether it imports a child of either sex, 176. b. n. 3.

Purchase,
The different ways of acquiring land by, 18. b. n. 1.
Whether to take by purchase as heir female, it is necessary to be heir as well as female, 24. b. n. 3.
The fruits of tenure incident to purchase, 191. a. note, sect. VI. 11.
By mortgagee for years, for the mortgage money, will not make the term a protection against dower, 208. a. n. 1.
Conditional, 224. a. n. 2.

Purchasers,
From a crown debtor by simple contract, filling at the time a situation, notoriously accountable to the crown, 209. a. n. 1. V. 1.
(In France) with notice of a substitution, before the purchase, might plead the want of registration, 290. b. n. 1. XIII.
Where purchasers or mortgagees are bound to see to the application of the money paid by them for the purchase or mortgage.
1st. Of part of a testator's personal assets, 290. b. n. 1. XIV. 1.
2dly. Of a real estate devised for the payment of debts, ibid. XIV. 2.
3dly. Of a real estate charged with legacies, ibid. XIV. 3.
4thly. Of land devised upon trust or subject by will to a power to raise money in aid of the personal estate (if deficient) for payment of debts and legacies, ibid. XIV. 4.
Mortgagees, lessees, &c. are considered as purchasers, 290. b. n. 1. XV.
Their remedy for a defective title, 384. a. n. 1.
See more concerning Purchase and Purchasers, 3. a. n. 3, 4, 5. 3. b. n. 7. 8. a. n. 8. 9. a. n. 2, 3. 10. a. n. 4. 10. n. b. 2. 11. a. n. 1. 12. b. n. 2. 13. a. n. 2. 14. a. n. 6. 15. b. n. 4. 16. a. n. 2. 18. b. n. 1, 2. 22. b. n. 3, 4. 26. b. n. 2. 47. b. n. 11. 87. b. n. 1. 93. a. n. 2. 164. a. n. 2. 218. b. n. 3. 220. a. n. 2.

Purprestures,
261. a. n. 1.

Q.

Quare Impedit,
Where it lies of a moiety of a rectory, 18. a. n. 1.
Whether a nonsuit, in a *quare impedit*, after appearance, is a bar in another *quare impedit*, 139. a. n. 1.
See more concerning *Quare Impedit*, 46. b. n. 7. 166. b. n. 2. 186. b. n. 6. 9.

Quarantine,
With respect to dower, 32. b. n. 3. 34. b. n. 2.

Quasi,
An entail, 14. a. n. 6. 220. a. n. 2.
A rent service, 153. a. n. 1.
A fee, 180. b. n. 7.
A fief, 191, a note, sect. II.
A stranger, 213. b. n. 1.
A devise upon a limitation or upon a condition broken, 240. b. n. 3.

Quakers,
68. b. n. 1. 159. a. n. 4.
May present to advowsons, 391. a. n. 2. IV. 1.

Que Estate,
Whether a man may plead a *que estate*, of a lease for years, 121. a. n. 6.

Quia Emptores,
The statute of, 111. b. n. 1. 327. a. n. 2. I.
Effect of the statute of, on warranty, and homage ancestrel, 365. a. n. 1.

Quick-sets,
As to waste, 53. a. n. 11.

Quit Rent,
85. b. n. 1.

Quo Warranto,
88. b. n. 16.

Quod ei deforceat,
Whether it lies upon recovery in waste, against tenant in dower, by default, or upon *nihil dicit*, 355. a. n. 1.

Quod permittat,
122. a. n. 7.

R.

Rails,
53. b. n. 4.

Ransom,
257. a. n. 1.

Rasure,
35. b. n. 7.

Ravishment of Ward,
88. b. n. 15.

Real Action,
121. a. n. 1.

Real Estate,
ibid.

Real and Personal Property,
Difference between, in this country, in other countries, in the civil law, 191. a. note, sect. II.

Rebellion,
One killed in, forfeits his lands only when a record of the fact, upon a view of the body is made by the ch. j. of K. B. and returned into that court, 390. b. n. 2.

Receipt,
Upon, default, 28. a. n. 3. 42. a. n. 11. 46. a. n. 2.

Receipts,
For purchase-money, 290. b. n. 1. IX.
Of trustees for money paid to them, 290. b. n. 1. XIV.

Receiver,
Where he may charge his expenses, 89. a. n. 4.
See more concerning a Receiver, 89. a. n. 3. 172. a. n. 7.

Recital (in a release),
Of the lease for a year, is evidence of it, in Ireland, 271. b. n. 1. VI. 2.

Recognizance,
By the statute *de mercateribus*, 191. a. note, sect. VI. 9.
In the nature of a statute staple, ibid.
See also 209. a. n. 1. III. 379. b. n. 1.

Reconciliation after Elopement,
32. a. n. 10.

Record,
Matter of, 47. b. n. 13. 51. a. n. 2.
Mode of proof on the issue *nul tiel record*, 98. b. n. 1.
A private act may be put in issue, and shall be tried by the record, ibid.
In evidence before a jury, a copy of record is sufficient, 117. b. n. 4.
Of a judge's directions to a jury, 155. b. n. 5.
Of nonage in a writ of error by an infant upon a fine levied, 131. a. n. 1.
Courts of, 168. b. n. 2.
Matter of, distinguished from a deed recorded, 363. b. n. (A).

Records,
Cited by Lord Hale, as to escuage, 68. b. n. 3. 74. a. n. 1.
Parliamentary, 133. a. n. 2. 133. b. n. 1.
Of rolls of parliament, 260. a. n. 1.
The public records of the kingdom, ibid.

Recovery, and *Common Recovery*,
By a lien, tenant in tail, before office, its effect, 2. b. n. 3.
Whether tenant in special tail, after possibility, &c. can suffer, 28. b. n. 1.
Against tenant of freehold, by collusion, to bar a lessee for years of his term, as to the statute of Gloucester, and as to waste, 46. a. n. 2.
Against tenant of freehold by collusion, might be falsified by a grantee of a rent charge, or a tenant for years, 46. a. n. 4.
Judgment must be given before the vouchee's death, 135. a. n. 1.
Sunday is not *dies juridicus* for giving judgment, where the return day of the writ of summons happens to be *Sunday*, ibid.
The expression, *a recovery without title*, may be used to mean a *common* recovery, or as distinguished from a *common* recovery, 151. a. n. 4.
Tacit, of common appendant to land, where a man recovers the land in an assize of *novel disseisin*, 154. b. n. 6.
Mode of preserving the old estate and powers of tenant for life joining in, 203. b. n. 1. IV.
Is not impeached by the cesser of the tenant's

Recovery and *Common Recovery*,
estate of freehold after the time of suing the *præcipe*, ibid.
Suffered by heir before assignment of dower, 241. a. n. 2.
Reference to a work on recoveries, 224. a. n. 1.
Vests no freehold till execution served, 266. b. n. 2.
By a devisee tenant in tail, under limitations importing a life estate to him and successive estates tail by purchase to his sons, 271. b. n. 1. VII. 2.
By father and son, tenants for life and in tail of distinct rents, ibid. n. 1. VII. 3.
By default in a feigned action, against tenant for life, 278. b. n. 1.
By a tenant in tail, who, supposing himself seized in fee, has executed a settlement and taken an estate for life under it, ibid.
May now be suffered by the tenant for life and the person in remainder or reversion, ib.
By good title, or with assent of the persons in remainder or reversion, ibid.
By or with the voucher of tenant for life, without the consent of the persons in remainder or reversion, is void, ibid.
When introduced, 290. b. n. 1. V. 3.
Of a trust in tail with which the legal estate is not commensurate, ibid. n. 1. VII.
Real or fictitious against a freeholder, its effect on a lease for years at common law, ibid. n. 1. XV.
Of trust estates, ibid. n. 1. XVI.
Of a rent granted in tail *de novo* without a subsequent limitation of it in fee, 298. a. n. 2.
Bars all limitations subsequent or collateral to an estate tail, 327. a. n. 2. II. 1.
As to discontinuance, 330. a. n. 1. VII.
Suffered by feoffee is void where the feoffment is fraudulent, 330. b. n. 1.
With single voucher, 337. b. n. 2.
Against a tenant to the *præcipe* made by a bargain and sale not inrolled, may be good if the deed can operate as a grant of reversion expectant on leases for years or at will, ibid.
As to powers, 342. b. n. 1. III. IV. V. VI. VI. 3. IX. 1, 2.
As to disseisin, 367. a. n. 1.
Of lands entailed with the reversion in the king, its effect before and since the 34th H. VIII. 372. b. n. 3. 335. a. n. 1.
Tenant to the *præcipe* in, good or not, 379. b. n. 1.
The power to suffer a common recovery, of an estate tail, cannot be restrained either directly or indirectly, ibid. 223. b. n. 1.
Suffered by infants having obtained a privy seal, is good, 380, b. n. 1.
See more concerning Recoveries, and Common Recoveries, 20. a. n. 3. 33. a. n. 1. 46. a. n. 3. 52. a. n. 6. 60. a. n. 3. 60. b. n. 1. 121. a. n. 1. 121. a. n.* 149. a. n. 3. 151. a. n. 3. 191. a. n. 1. 191. a. note sect. VI. 8. 205. a. n. 1. 3dly. 247. a. n. 2. 262. a. n. 1, 2. 265. a. n. 2. 271. b. n. 1. V. VI. VI. 2. 290. b. n. 1. V. 4. 327. a. n. 2. II. 3. 365. b. n. (A).

Rectory,
See *Pleading*, 17. b. n. 5.

Recusancy,
92. b. n. 2. 120. a. n. 4. 391. a. n. 2. II. 2, 3.

Red Book,
68. b. n. 7.

Redemption of a Mortgage,
208. a. n. 1. and Litt. § 337, n. 1. 3dly, 4thly.

Re-disseisin,
Lies not in a court of ancient demesne, 154 a. n. 11.
Lies against baron and feme for the act of the latter, 154. b. n. 1.
Writ of, ibid.
See more concerning Re-disseisin, 154. a. n. 8. 154. 3. n. 4, 5, 6. †. 158. b. n. 3.

Re-entry,
For non-payment of rent, may, by agreement, be without demand, 201. b. n. 1.
So by the king without agreement, ibid. n. 3.
May be for a part only unpaid, 211. b. n. 1.
Actual, unnecessary to support an ejectment, 202. a. n. 3.
When necessary to revest an estate after condition performed, 218. a. n. 2. 218. b. n. 3.
By whom it may be made, 218. a. n. 3.
See more concerning Re-entry, 55. b. n. 14. 141. a. n. 2. 144. a. n. 1. 153. b. n. 2. 202. a. n. 1. 213. b. n. 1. 219. b. n. 1.

Reference,
To a history of the Magna Charta of king John, and that of Hen. 3d. 43. a. n. 4.
How the notes on Littleton should be referred to, 138. a. n. *†.

Referendary,
Or chancellor in the early times of feudal countries, 209. b. n. 1. I. 2.

Regardant,
121. b. n. 6.

Register of Writs,
73. b. n. 1.

Register's Office,
88. b. n. 16.

Registration of Deeds,
The statutes for 290. b. n. 1. XIII.
The registration of deeds and wills was more rigidly enforced in France, ibid.

Re-grant,
Of copyhold, after forfeiture, bars an entail, 60. b. n. 1.

Relation,
Attainder shall relate to the commission of the offence, 13. a. n. 7.
Of a copyhold presentment to the time of surrender, 59. b. n. 5.
In offices finding the king's title, 180. b. n. 2.

Release,
Of copyhold, by and to whom it may be made, 59. a. n. 1.
From lord paramount to tenant paravail, effect of, 152. b. n. 3.
Partition by, 169. a. n. 2.
Where it passes a fee without the word "heirs," 193. a. n. 1. 273. b. n. 2. 274. b. n. 1.
Where made to one obligor shall discharge the other, 232. a. n. 1.
Of a debt, by making the debtor executor, 264. b. n. 1.
Of a debt or action, by marriage, 264. b. n. 2.
Effect of, in cases of disseisin, 264. a. n. 1. 367. a. n. 1.
In law, 264. b. n. 1.
Of a mere right or title to the freehold or inheritance of lands, to whom it may be made, 205. a. n. 1. 274. a. n. 1.

RE

Release,
Of rent and services to the disseisee, 266. b. n. 1.
A release may enure four ways, 267. a. n. 1.
To tenant at will, or by sufferance, 270, b. n. 1.
Operating by enlargement.
Does not require an actual estate in possession in the releasee, 270. a. n. 2, 3.
What estate and privity is necessary in the releasee, 271, b. n. 1. VI. 2. 272. b. n. 1.
Gives only an estate for life to the releasee, if words of inheritance are not used, and in this respect it differs from releases operating by *mitter l'estate* or by *mitter le droit*, 273. b. n. 2. 274. b. n. 1. 296. a. n. 2.
Observations upon releases operating,
By *mitter l'estate* 273. b. n. 2.
By *mitter le droit*, 274. a. n. 1. 274. b. n. 1. 275. a. n. 1. 277. a. n. 1.
To one disseisor, shall not enure to his companion, 275. b. n. 1.
In some cases and for some purposes are tantamount to an entry and feoffment, ibid.
By disseisee to the heir of the feoffee of an infant disseisor, 278. b. n. 1.
Operating by extinguishment, ibid.
Of actions real cannot be pleaded by a disseisor not tenant, 285. b. n. 1.
Personal, 291. b. n. 1.
Of all demands, what passes by, ibid. n. 1, 2.
In what it differs from a confirmation, 296. a n. 2.
Of right by a man, may enure by extinguishment, for the benefit of his wife, 297. b. n. 1.
By enlargement should be distinguished from a conveyance or devise to the right heirs of tenant for life, 299. b. n. 1.
As to discontinuance, 330. a. n. 1. VII.
By tenant in tail, effect of 331. a. n. 1.
How a release differs from a surrender, 337. b. n. 1.
As to powers, 342. b. n. 1. III. IV.
Of warranty may revive an ancient right, 287. a. n. 1.
See more concerning releases, 59. a. n. 2. 186. a. n. 5, 7. 200. 2. n. 1. 208. a. n. 1. 277. b. n. 1, 2.

Relegation,
Or exile for a time, of husband, by act of parliament, with respect to the wife, 133. a. n. 3.

Reliefs,
Distinguished from heriots, 83. a. n. 1.
Are not services, 83. a. n. 2.
Remedy for, 83. a. n. 3, 4. 93. a. n. 2.
Partly abolished, and reserved in respect of what lands, 85. a. n. 1.
On descent of a remainder, or reversion, when payable, 91. b. n. 1
Distinction between reliefs by common law, by custom, and special reservation, 93. a. n. 2.
Socage,
Proper, ibid.
Improper, ibid.
What seisin of tenant will give title to, 239. b. n. 1.
See more concerning Reliefs, 69. b. n. 2. 83. b. n. 1. 3. 84. a. n. 1. 88. b. n. 11. 91. b. n. 3. 4. 107. a. n. 5. 191. a. note, sect. VI. 11.

Religion,
The established, 92. b. n. 2. 120. a. n.

Remainder,
May be forfeited, 14. b. n. 4.
Shall be subject to anterior charges, where, 18. a. n. 4.
What is, and what a reversion, 22, b. n. 3.

RE

Remainder,
Contingent, when destroyed by accession of the inheritance to the particular estates, 28. a. n. 8.
In the king, 48. b. n. 7.
Tenant in, shall have writ of entry against tenant for life aliening in fee, 184. b. n. 1.
A remainder in fee may be executed for some purposes, yet not for granting, 184. b. n. 2.
A remainder in fee and a life estate in one person whether consolidated, 184. b. n. *.
Contingent, whether it can be conveyed, and how, 191. a. n. 1. 265. a. n. 1.
Cross Remainders,
What are, 195. b. n. 1.
In wills, of legal or equitable estates, may arise by implication, ibid.
In deed, of legal estates, cannot be created without express words, ibid.
In deeds, of equitable estates, may arise by implication, ibid.
Two circumstances particularly should be attended to in limiting cross remainders, ib.
Remainders in strict settlement, 203. b. n. 1. IV.
A remainder-man, after the death of his father (the tenant for life) cannot have a rent reserved to the father, his heirs and assigns, in a lease made by them both, 213. b. n. 1.
Contingent, whether it can be conveyed, and how, 191. a. n. 1. 265. a. n. 1.
Distinction between contingent and vested remainders, with respect to the usual estate of trustees, for preserving contingent remainders, 265. a. n. 2.
Vested. what, and what contingent, ibid.
By the limitation of remainders, a complete bar of an entail cannot be postponed beyond a certain period, 271. b. n. 1. V.
A limitation, having once been a contingent remainder, cannot afterwards enure as an executory devise, 271. b. n. 1. VII. 2.
Contingent, of a trust estate, is supported by the legal fee in the trustees, ibid.
The destruction of contingent remainders, 290. b. n. 1. V. 4.
Title depending on a contingent remainder, ibid.
Contingent, whether supported by a freehold created by a distinct deed, ibid.
It is proper to direct how the rents should be disposed of during the suspense, whan contingent remainders are limited to the sons of a person who has himself no life estate, ibid.
Effect of the limitation to trustees to preserve, ibid.
When a contingent remainder should vest at common law, as to a posthumous child, 298. a. n. 3.
Alteration in this respect by statute, ibid.
Remainders after an estate tail were introduced by the statute *de donis*, 327. a. n. 2. I.
Remainder man in fee holds of the chief lord as well as the tenant for life, ibid.
Distinction between a remainder and a conditional, or contingent use, ibid. n. 2. II.
A contingent remainder must be supported by a preceding estate of freehold, 342. b. n. 1.
What principles have in some degrees given rise to this rule, and influenced the doctrines respecting the destruction of contingent remainders, ibid.
Reference to a treatise on contingent remainders, 342. b. n. 1.
See more concerning Contingent Remainders, 28. a. n. 7, 8. 191. a. n. 1. 202. b. n. 2. 218. b. n. 3 ‖. 290. b. n. 1. IV. 1. V. 4. 343. a. n. 1.

RE

Remainder,
Remainders may, perhaps, be considered as carved out of and parts of the reversion, and therefore as within the protection of the statute *de donis;* otherwise they were barred by warranty, both with and without assets, 373. b. n. 2.
See more concerning Remainders in General, 9. a. n. 2, 3. 10. b. n. 2. 11. a. n. 1. 16. a. n. 2. 17. b. n. 4. 21. a. n. 3, 4. 24. b. n. 3. 26. a. n. 3. 26. b. n. 4. 45. b. n. 4. 59. b. n. 2. 115. a. n. 1. 143. a. n. 2. 203. b. n. 1. I.

Remitter,
The general doctrine of remitter, 347. b. n. 1.
I. Where the ancient right and the defeasible estate come together, whether by descent or by other act of law, Litt. sect. 659. n. 1.
II. Where the ancient right comes after the defeasible estate, 348. a. n. 1.
III. There is no remitter to a bare title, nor to an intermediate right, nor to a bare right of action, nor in those cases where a freehold does not accrue to the right, nor where there was default in him who takes the defeasible estate, nor if he takes the defeasible estate by stat. 27 H. 8. c. 10, which executes the possession in the same plight as the use was limited; neither is there a remitter to a term for years, 349. b. n. 1.
IV. If part of the estate comes to the right, it is remitted for that part, 350. a. n. 1.
V. The remitter shall take effect though the estate which made the remitter is voidable, 353. a. n. 1.
VI. A remitter to the particular estate is a remitter to him in the reversion or remainder, 354. b. n. 1.
VII. The remitter defeats the wrongful estate immediately without entry, 357. a. n. 1.
VIII. The remitter defeats the wrongful estate, and consequently every thing annexed to or issuing out of it, 358. a. n. 1.
How affected by the statutes 4 H. 7. 27 H. 8. and 32 H. 8. 347. b. n. 1. 348. b. n. 1. 353. b. n. 1.
To an advowson where the right was remediless before the 7 Ann. c. 18. 349. b. n. 2.
To the bodies politic, 360. a. n. 1.
As to warranty, 390. b. n. 1.
See more concerning Remitter, 30. a. n. 4. 226. a. n. 1. 300. a. n. 2.

Renewal,
Covenants for renewal of messuages in cities are not prohibited by 18 Eliz. c. 11. with respect to leases by ecclesiastical persons, 45. a. n. 2.
What is termed tenant right of renewal, 290. b. n. 1. XI.
What provisions for renewal, should be inserted in mortgages and settlements of leasehold, where a chance of renewal exists, ibid.
By whom the fine and expenses of a renewal should be paid, where a mortgage or settlement contains no provisions on the subject, ibid.
How tenant right of renewal is protected in equity, 290. b. n. 1. XI.

Rent,
Reserved by husbands on lease of his wife's chattel real, whether it shall go to the wife surviving, 46. b. n. 3.
May be reserved by the king out of an incorporeal hereditament, 47. a. n. 1.
Whether action of debt lay at common law, for rent on freehold leases, 47. a. n. 4.

RE

Rent,
Such action is given now, by 8 Ann. c. 14. ibid.
What is sufficient to carry rent to the heir or successor, though not reserved to them in direct terms, 47. a. n. 8, 9.
Chief rents, 47. b. n. 7.
Rents of assise, ibid.
Rent seck, ibid. 153. a. n. 1.
Double, when due for holding over, 57. b. n. 2. 270. b. n. 1.
Acceptance of rent from a tenant at sufferance, or from a tenant for years, after surrender, 57. b. n. 5.
Effect of acceptance of rent, from an assignee in defeating a lessor's remedy against the original lessee, 269. b. n. 3.
A rent *charge, in esse*, issuing out of lands devisable by custom, and having commenced within time of memory, is within the custom of devising, 111. a. n. 5.
Ancient remedy for rent-service by *cessavit*, 142. a. n. 2.
Whether the term of *fee farm* is properly applicable to any rents except rent service, 143. b. n. 5.
Charge, and service, extinct, or not, 147. a. n. 5. 149. a. n. 3. 267. b. n. 2.
Remedy of executors of a tenant for life of a rent-charge, 146. b. n. 1. 162. a. n. 4. 162. b. n. 1.
Charge, shall go to the heir, though not mentioned except in the clause of distress, 148. a. n. 1.
Whether a rent service may be suspended in part by the act of the party, and *in esse* for the other part, 148. b. n. 1.
By surplusage, 150. b. n. 4.
Quasi a rent service, 153. a. n. 1.
Whether a rent may be seck, and yet be distrained for, 153. a. n. 1.
Reserved for equality of exchange is an implied rent charge, ibid.
Issuing out of more than one county, whether one assise lies for, 147. a. n. 4. 154. a. n. 2.
Disseisin of a rent charge, or rent seck, by detainer, 161. b. n. 2.
How affected by 12 Car. 2. c. 24. § 5. 162. b. n. 6.
Statutory provisions for recovery of, ibid.
When it shall go to the heir, and when to the executor, 202. a. n. 2.
Effect of tender of, pending an ejectment, 202. a. n. 3.
Acceptance of, as to a void lease, 211. a. n. 1.
Reserved upon a feoffment, 213. b. n. 1.
Reserved upon a lease, ibid.
Distinction between modes of reserving, 202. a. n. 3. 213. b. n. 1.
May be reserved to remainder-men, under a power of leasing 214. a. n. 1.
Acceptance of, cannot make a new lease; but may continue a voidable lease, 215. a. n. 1.
Grants of a rent-charge by tenants in common, 267. b. n. 1.
Grant of a rent by tenant for life, 267. b. n. 2.
In arrear, 269. b. n. 2.
Rents and profits of real estate being undisposed of by a will, belong to the testator's heir at law, 271. b. n. 1. VII. 2.
Agreement between vendor and vendee to apportion rents, ibid.
At common law, 315. a. n. 1.
Uses of rents are executed, as where lands are conveyed to *A.* and his heirs, to the use, intent, and purpose that *B.* may receive a rent, 271. b. n. 1. VII. 3. 315. a. n. 1.

Rent,
How to limit a rent in strict settlement, 271. b. n. 1. VII. 3. 298. a. n. 2.
The rents should be disposed of during the suspense of a contingent remainder, 290. b. n. 1. V. 4.
Incident to the reversion, and not due, 291. b. n. 2.
A tenant in tail of a rent cannot acquire more than a base fee in the rent, unless the rent is limited over in fee; and in this respect an intail of a rent differs from an intail of lands, 298. a. n. 2.
Rent charge is against common right, ibid.
In fee, 300. a. n. 1.
See more concerning Rents Service, 111. a. n. 5. 153. a. n. 4. 154. a. n. 7. 160. b. n. 3.
See more concerning a Rent Charge, 17. b. n. 4. 32. b. n. 2. 46. a. n. 4. 55. b. n. 13. 146. a. n. 1. 3. 148. a. n. 3, 4. 148. b. n. 2. 150. a. n. 3. 154. a. n. 7. 184. b. n. 6. 185. a. n. 8. 203. a. n. 3. 300. a. n. 2.
See more concerning Rents, in general, 29. a. n. 4. 7. 30. a. n. 2. 32. a. n. 4, 5. 32. b. n. 5. 34. b. n. 10. 36. b. n. 1. 41. b. n. 1. 3, 4. 42. a. n. 6. 44. b. n. 7. 45. a. n. 4. 45. b. n. 1. 47. a. n. 2. 6, 7. 10. 14. 47. b. n. 3, 4. 6. 55. b. n. 3. 16. 57. b. n. 1. 85. b. n. 1. 87. a. n. 1. 93. a. n. 2. 115. a. n. 5. 141. a. n. 2. 142. a. n. 3. 144. a. n. 1. 147. a. n. 2. 147. b. n. 1, 2, 7. 148. b. n. 3. 150. b. n. 3. 152. a. n. 1, 2, 3. 6. 153. a. n. 6. 153. b. n. 2, 3. 154. a. n. 6. 9. 154. b. n. 4. 160. b. n. 4. 161. a. n. 1. 169. b. n. 1. 177. b. n. 1. 186. a. n. 9. 191. a. note, sect. VI. 9. 201. a. n. 1. 201. b. n. 1. 3. 202. b. n. 1. 203. a. n. 1. 208. a. n. 1. 209. a. n. 1. I. 211. b. n. 1. 215. b. n. 1. 230. b. n. 1. 241. a. n. 4. 266. b. n. 1. 271. b. n. 1. II. 290. b. n. 1. III. 291. b. n. 1. 399. a. n. 1.

Repairs,
53. b. n. 3. 54. b. n. 1. 56. a. n. 2. 56. b. n. 2. 57. a. n. 1. 251. a. n. 1.

Replevin,
47. b. n. 7. 145. b. n. 2. 160. b. n. 3.

Request,
To pay money appointed by will to be paid, 210. b. n. 1 2.

Rescue,
Of cattle distrained in the highway, 160. b. n. 4.
Of an innocent person, where not justifiable, 161. a. n. 3.
Of a distress taken by a lord after condition broken by grantee of the seigniory, 202. b. n. 1.

Reservation,
Where covenant to pay rent in a lease will be construed a reservation, and where not, 57. a. n. 7.
Technical meaning of the term, 143. a. n. 1.
For more concerning Reservation, see *Rent*, and 21. a. n. 2. 21. b. n. 3. 44. b. n. 6. 55. b. n. 16. 85. b. n. 1. 93. a. n. 2. 105. b. n. 1. 142. a. n. 3.

Resignation,
Bonds of, 186. a. n. 3. 206. b. n. 1.

Responsa Prudentum,
295. a. n. 1.

Respite,
Of fealty, in case of copyholders, 68. b. n. 5.

Retraxit,
232. a. n. 1.

Return,
Of writs, 121. b. n. 7.
Of more than 12 knights upon a *magna assisa eligenda*, resembles the case of a return of 24 upon a common *venire*, 159. a. n. 2.

Reve-land,
86. a. n. 2.
Coke's explanation of, opposed, 86. a. n. 2.

Reversal,
Of attainder, as to dower, 41. a. n. 3.
Of a fine levied before the bailiffs of Salop, *quia aliquis non potest esse judex et pars*, 141. a. n. 3.

Reversion,
Where land shall revert to the donor, and where escheat to the lord, 13. b. n. 2.
Shall be subject to anterior charges, where, 18. a. n. 4.
What is, and what a remainder, 22. b. n. 3.
Grant of, perfect without attornment, 119. b. n. 2.
Whether extendible, 153. a. n. 4.
On an estate tail, how considered in law, 173. a. n. 2.
Grant of, by one having a previous estate, 184. b. n. 2.
In fee, and a life estate in one person, whether so consolidated, that the reversion cannot be granted separately from the life estate, 184. b. n. *.
Who shall be assignees of, (within the stat. of Henry VIII.) to take advantage of a condition, and how this case differs from that of assignees for voucher, 215. b. n. 1.
Not devested by acceptance of a fine by tenant for life, 252. a. n. 1.
Lease and release cannot be pleaded as a grant of a reversion, 301. b. n. 2.
Or remainder in the king, 335. a. n. 1.
What shall operate as a grant of, 337. b. n. 2.
See more concerning a Reversion, 17. b. n. 4. 22. b. n. 23. a. n. 1. 32. a. n. 5. 33. a. n. 14. 42. a. n. 3. 44. b. n. 7. 46. b. n. 2, 3. 47. a. n. 2. 6. 48. b. n. 1. 54. a. n. 6. 58 b. n. 4. 59. b. n. 2. 113. a. n. 3. 143. b. n. 5. 151. b. n. 5. 152. a. n. 1, 2, 3. 6. 218. b. n. 1.

Reverter,
Whether land, given to a corporation in fee simple, shall revert to the donor, or escheat to the lord, in case the corporation is dissolved, 13. b. n. 2.
The king's possibility of, whether barred, before the statute *de donis*, by alienation *post prolem suscitatum*, 19 b. n. 1.
Formedon in reverter, 115. a. n. 1.

Reviver,
Of a lease avoided, 46. a. n. 7.

Revocation,
Power of, 218. a. n. 2. 342. b. n. 1. III. 379. b. n. 1.
And Appointment, powers of, 271. b. n. 1. VII. 1. 2.
See more concerning Revocation, 59. a. n. 3. 111. b. n. 3. 205. b. n. 1. 236. b. n. 1.

Right,
Paramount, 55. b. n. 10.
Of possession,
Of a disseisee, 277. a. n. 1.
Apparent or presumptive, ibid. 239. a. n. 1.

RO

Right,
Common right, 261. a. n. 1. 298. a. n. 2.
A public right, 261. a. n. 1.
Future and contingent rights, 265. b. n. 1.
Of disseisor and disseisee, 266. a. n. 1, & n. (A).
Of property, 277. a. n. 1.
Cannot die, 278. b. n. 1.
Merger of a right, ibid.
See more concerning Rights, 29. a. n. 6. 265. a. n. 1.

Rights (The Bill of),
120. a. n. 4.

Riot,
What is, 257. a. n. 3.

Roads,
How seisin of a road is to be pleaded, 17. b. n. 4.
Where action on the case will lie for not repairing, 56. a. n. 2.

Robbery,
89. a. n. 5, 6.

Rohan,
Edition of Littleton, 28. b. n. 2. 30. a. n. 6.

Rolls of Parliament, cited,
6 Ed. 2. M. 27. Knighthood, 69. a. n. 7.
8 Ed. 2. M. 7. Fines for alienation, 43. a. n. 3.
9 Ed. 2. M. 4. Bastard, 123. b. n. 1.
14 Ed. 2. 8 M. 4. Escuage, 72. a. n. 5.
19 Ed. 2. M. Knighthood, 69. a. n. 7.
9 Ed. 3. M. 17. Knighthood, ibid.
20 Ed. 3. N. 13. Escuage, 69. b. n. 3.
21 Ed. 3. N. 16. 44. Escuage, ibid.
25 Ed. 3. N. 23. Escuage, ibid.
29 Ed. 3. N. 18. Fines for Alienation, Licence, 43. a. n. 3.
5 Rich. 2. N. 67. Escuage, ibid.
13 Rich. 2. N. 32. Purchase by, and descent to the crown, 15. b. n. 4.
5 Hen. 4. N. 24. Commission of array, 71. a. n. 1.
1 Hen. 5. N. 17. Escuage, 69. b. n. 3.
5 Hen. 5. pars 2. n. 9. Escuage, 69. b. n. 3.
8 Hen. 5. N. 15. Alien, Dower, 31. b. n. 9. 129. b. n. 4.
9 Hen. 5. N. *pro comitissa* Arundell, Alien, Dower, 129. b. n. 4.
9 Hen. 5. N. 9. Alien, Dower, 31. b. n. 9.
3 Hen. 6. N. 29. Special act of parliament for giving mesne value to the wife in *casu comitissæ Marchæ*, 33. a. n. 4.
4 Hen. 6. N. 51. King, Tail, Warranty, 372. b. n. 3.
9 Hen. 6. N. 20. Indenization of one born in Wales, 129. b. n. 6.
11 Hen. 6. N. 57. Wardship, 77. a. n. 1.
18 Hen. 6. N. 42. Wardship, ibid.
18 Hen. 6. N. 43. Knighthood, 69. a. n. 7.
18 Hen. 6. N. 58. Homage, 64. a. n. 3.
20 Hen. 6. N. 18. C. 2. Attaint, Outlawry, 128. a. n. 1.
23 Hen. 6. N. 26. Indenization, 129. b. n. 6.
28 Hen. 6. N. 12. Knighthood, 69. a. n. 7.
38 Hen. 6. N. 29. Fines for Alienation, 43. a. n. 3.
3 and 4 Ed. 4. N. 42. Feme Covert, Treason, 133. a. n. 4.

Rolls of Parliament,
Of a private act, 98. b. n. 1.
See more concerning Rolls of Parliament, 133. b. n. 1. 260. a. n. 1.

Roman,
Law of the 12 tables, 11. a. n. 2.
Law of succession, 88. b. n. 6.

RO

Roman,
Language, as to the formation of nouns from verbs, by the addition of *ment* to the latter, 110. a. n. 1.
Policy, in Britain, whether similar to that of the Saxons, as to territorial government and officers, 168. a. n. 5. 7.
And English law are similar, as to a provision in the statute of distribution, 176. b. n. 10.
Law contrasted with the feudal, 191. a. note, sect. VI. 3, 4, 5.
- - - invested the heir with the absolute dominion over the inheritance, ibid. sect. VI. 5.
See more concerning Roman Law, 80. a. n. 1. 89. b. n. 6. 123. b. n. 2. 126. a. n. 2.

Roman Catholics,
Disabilities of, under 11 and 12 Wm. III. c. 4, and cases on the construction of that statute, 8, a. n. 8.
The offence of *præmunire*, arises from paying to the papal process that obedience which belongs to the king alone, 391. a. n. 2.
On the laws passed prior to the Reformation for restraining papal provision, ibid. I.
The several statutes and regulations against offenders in this respect, stated from Mr. justice Blackstone, ibid. I.
On the laws, which, after the Reformation, were passed against those who continued in communion with the see of Rome, ibid. II.
These laws enumerated, with the penalties for enforcing them, ibid. II.
1. Against their religious worship, ibid. II. 1st.
2. - - - the education of their children in their tenets, ibid. II. 1st.
3. - - - non-conformity to the religion of the established church, ibid. II. 2d.
The distinction between popish recusants, and recusants generally, arose from 35 Eliz. c. 2. ibid. II. 2d.
Other dissenters relieved by 1 Will. ibid. II. 2d.
The difference, under 35 Eliz. c. 2, between
1. Papists,
2. Popish recusants,
3. Popish recusants convict,
} ibid. II. 2d.
Penalties on recusancy, ibid. II. 2d.
Penalties and disabilities following the refusal to take the oath of supremacy, and against transubstantiation, and the declaration against popery, ibid. II. 3.
Refusal to take the oath of supremacy, on requisition by two magistrates, amounted to a conviction of recusancy, ibid. II. 3.
The persons refusing, disqualified from being counsellors, &c. ibid. II. 3.
Effect of the corporation act on persons neglecting to receive the lord's supper, according to the rites of the church of England, ibid. II. 4.
Refusal to make the declaration against transubstantiation disqualifies from all offices, civil and military, ibid. II. 5.
Refusal to make the declaration against popery disqualifies from being a member of either house of parliament, ibid. II. 6.
Refusal to take the oaths of allegiance, supremacy, &c. created a personal inability in recusants above the age of sixteen, to take landed property, in favour of the protestant next of kin to them, ibid. II. 7.
Did not extend to prevent the right of succession to their heirs, ibid. III. 1.

Roman Catholics,
All purchases by, or in trust for, such recusants made void, ibid. II. 7.
Papists incapacitated from presenting to churches, hospitals, &c. ibid. II. 7.
- - - subjected to double land-tax, ibid. II. 7.
- - - obliged to inroll their deeds and wills, ibid. II. 7.
On the laws passed in the reign of king Geo. III. ibid. III.
The 3d Geo. 1st. established the purchases by protestants from papists prior to claim, &c. ibid. III. 1.
It left papists personally becoming purchasers, &c. under the disabilities of the act of 12 and 13 W. III. ibid. III. 1.
By the 18th Geo. III. papists taking the oath in that act relieved from prosecution, imprisonment, and from forfeiture of lands purchased or derived by descent, and not theretofore litigated, ibid. III. 2.
Case of Bunting v. Williamson upon this act, settled, that no person could claim under any such previous litigation, unless he was, or claimed under, the person who had so litigated the title, ibid. III. 2.
The stat. 31. Geo. 3. c. 32. ibid. III. 3.
The oath to be taken, ibid. III. 3.
Repeals the statute of recusancy as against those who take the oath, ibid. III. 3.
Tolerates their religious principles under restrictions, ibid. III. 3.
Exempts them from taking the oath of supremacy and declaration against transubstantiation, ibid. III. 3.
Allows of papists, taking this oath, to be in London, Westminster, &c. irremovable, ibid. III. 3.
No peer taking that oath to be prosecuted for coming into his majesty's presence, &c. ibid. III. 3.
Repeals the laws requiring the registration or inrolment of the deeds and wills of Roman catholics, ibid. III. 3.
The stat. 31. Geo. 3. c. 32, 391, a. n. 2. III. 3.
Allows them to be barristers, &c. without taking the oath of supremacy, or making the declaration against transubstantiation, ibid. III. 3.
Probability that those formerly called papists, and taking the oath, will for the future be distinguished by the name of Roman catholics, ibid. III. 3.
The stat. 43 Geo. 3. c. 39, makes it unnecessary that Roman catholics should take the oath of the 18 of his present majesty, ibid. III. 3.
Till then it was advisable to take the oath of the 18 Geo. 3, to prevent all doubts on ability to take by descent or purchase, ibid. III. 3.
Relieved from double land-tax by an omission of that clause in the annual act, ibid. III. 4.
Comparative situation between protestant dissenters and Roman catholics, ibid. IV.
All penalties against such dissenters, under the toleration and corporation acts, equally affect papists.
Roman catholics are subject to several penalties and disabilities that do not affect protestant dissenters, ibid. IV. 1.

Roman Catholics,
1. They cannot be members of parliament,
2. They cannot vote at elections for members of parliament,
3. They cannot present to advowsons,
} ibid. IV. 1.
1. Quakers
2. Jews
} may present to advowsons,
Reasons submitted evidently to show there is no policy in denying to Roman catholics the privilege of presenting to advowsons, ibid. IV. 1.
Legislative provisions for establishing the election and acts of persons elected contrary to the corporation act, ibid. IV. 2.
Dissenters not eligible to an office, are not fineable for refusing to take that office upon themselves, ibid. IV. 2.
Annual act of indemnity for persons not qualifying for offices, ibid. IV. 2.
Whether Roman catholics are liable to serve in the militia, considered, ibid. IV. 3.
Whether liable to serve on juries, ibid. IV. 4.
Appear to be entitled to be summoned to the meetings of British factories, ibid. IV. 5.
A factory is no corporation within the corporation act, ibid. IV. 5.
This act, and the test act, confined to particular limits, ibid. IV. 5.
The non-attendance of Roman-catholics at former periods raises no objection against their right, ibid. IV. 5.
Means to be pursued to assert it, ibid. IV. 5.
Remedy and consequence in case of refusal, ibid. IV. 5.
Whether Roman catholics may hold offices exercisible abroad, ibid. IV. 6.
Opinions drawn from the test and corporation acts, that they may be,
1st. Ambassadors to foreign courts.
2dly. Officers under the East India Company, &c. ibid. IV. 6.

Royal Family,
88. b. n. 16. 133. b. n. 1.

Ruffhead's Statutes at large,
215. a. n. (B).

Rule,
Of construction, where a devise may operate either in execution of a power derived from an *interest*, or in execution of a power *specially reserved*, 112. a. n. 1.
In Shelley's case, 22. b. n. 2, 3. 299. b. n. 1. See also *Shelley's case*.

S.

Saint George's Channel,
107. a. n. 6.

Salic Law of Descent,
325. b. n. 2.

Sale,
Of offices, 120. a. n. 3.
Time of, 113. a. n. 2, 3.
Power of, 113. a. n. 2. 181. b. n. 3. 342. b. n. 1. II.
Of estates of crown debtors, under 25 Geo. 3. c. 35. 209. a. n. 1. IV.

Sale,
And exchange, power of, 271. b. n. 1. VII. 2. 342. b. n. 1. II. VI. 1.
Power of, in executors, 342. b. n. 1. III.
Usual powers of, 342. b. n. 1. IX. 1.

Sanctuary,
Privilege of, 92. b. n. 2.

Satisfaction
Of dower, in equity, by a devise, or otherwise, 36. b. n. 1. 6.

Saving
Clause, in a private act, 98. b. n. 1.
In a judgment, as in case of felony, for what it will serve, 305. b. n. 1.

Scire facias in Chancery,
169. a. n. 2.

Scotland,
Lord Coke's doctrine in favour of the *post nati* of, incidentally referred to, 141. b. n. 2.
Restraints upon the alienation of lands there, 224. a. n. 1.

Scilicet,
Import and effect of the term, 180. b. n. 1.

Sea
Wall, 53. b. n. 2.
The Caledonian, Deucaledonian, or Scottish, 107. a. n. 6.
Dominion, ibid.
The four seas, ibid.
The British seas, ibid.
Persons born beyond sea, 129. a. n. 2.
See *Infra quatour maria*, *Jus maris*.

Sealing,
Of a deed by a dean and chapter, with or without a letter of attorney to deliver it, 36. a. n. 5.
Of a lease, the want of, on the part of one of several lessees, may be supplied by agreement, so as to charge him with the rent, but not so as to make him party to a condition in gross, 230. b. n. 1.
By sealing a deed, one who is no party to it, may covenant with one who is a party, 231. a. n. 1*.

Seamen
Apprentices, their wages, in certain cases, do not belong to their masters, 117. a. n. 1.

Seck,
Different imports of the term, 151. b. n. 5.

Secular
Chaplain, 135. b. n. 2.
Priest, 136. a. n. 1.

Seigniory,
Suspended and revived, 13. a. n. 4. 148. b. n. 2.
Extinguished or not, by what, 52. a. n. 7. 152. b. n. 4.
Granted by fine, 319. b. n. (A).
See more concerning a Seigniory, 29. b. n. 2. 67. b. n. 1. 150. b. n. 3. 202. b. n. 1.

Seisin,
Of a reversion, will not take away the disabi. ty of half blood, 14. a. n. 6.
In demesne, 15. a. n. 3.
In demesne as of fee, 17. b. n. 2. 4.
In deed, obtained by possession of lessee for years, 29. a. n. 3.

Seisin,
Of remainder expectant on estate tail, sufficient to make it grantable or forfeitable, 14. b. n. 4.
What sufficient to make a *possessio fratris*, 29. a. n. 3.
What to entitle to curtesy, 29. a. n. 3, 4.
Livery of, 48. a. n. 2, 3.
In dominico suo ut de feodo, 184. a. n. 4.
In law, 239. b. n. 1. 266. b. n. (A).
Technical meaning of the word, 266. b. n. 1.
Is, in deed, in law, actual, or expectant, ibid.
Defeated as to some persons, and not against others, 278. b. n. 1.
A tortious, may be a sufficient seisin in a writ of right, 280. b. n. (B).
Of rent under the statute of uses, 315. a. n. 1.
Actual, as defined by Lord Mansfield, 330. b. n. 1.
See *Pleading*, 15. a. n. 3, &c. *Jointenants*, 186. b. n. 6.
See more concerning Seisin, 17. b. n. 3. 26. a. n. 1. 29. a. n. 5. 31. a. n. 4. 6. 31. b. n. 3, 4. 7, 8. 32. b. n. 4. 33. a. n. 1. 5. 40. a. n. 2. 47. b. n. 9. 68. a. n. 6. 115. a. n. 4, 5. 311. a. n. 1.

Seizure,
Of serjeanties aliened without license, 43. a. n. 3.
By the king, without matter of record, 119. a. n. 1.
Of a villein, 135. b. n. 2.
Of land, for default of service, by a process in the lord's court, 142. a. n. 2.

Senatores,
Whether the word was applied by the Romans whilst in Britain, in a sense corresponding to the *aldermani* or *earles*, of the Saxons, 168. a. n. 7.

Sentence,
Of the ordinary, that by reason of a previous contract between them, *B.* shall recover *A.* for her husband, notwithstanding *A.'s* marriage with *C.* (9 & 10 E. 1.), 33. a. n. 10.
Interlocutory, or definitive, in the civil and canon law, 168. a. n. 2.

Sequestration,
Of property, and imprisonment of the party, by the chancellor, for disobedience to his directions, 191. a. note, sect. VI. 11.

Serjeants at Law,
Their antiquity and dignity, 17. a. n 2.

Sergenty,
Seised for alienation without licence, 43. a. n. 3.
Grand, might be due out of as well as within the realm, 105. b. n. 1.
Grand and petite, their several natures, 106. b. n. 2.
Grand, honorary part of, still continues, 108. a. n. 1.
How affected by 12 Car. 2. 108. a. n. 1. 108. b. n. 1.

Servants,
Interest of masters in property acquired by their personal labour, 117. a. n.

Services,
The honorary, of grand serjeanty, are expressly served by 12 Cha. 2, c. 24, 108. a. n. 1.
How affected by the lord's purchase of part of the land, 148. b. n. 5.
Grant of what passes by, 152. a. n. 6.
See more concerning Services, 31. a. n. 2. 31. b. n. 5. 64. a. n. 1. 68. a. n. 6. 73. a. n. 1. 83.

Services,
a. n. 2. 85. b. n. 1. 93. a. n. 2. 141. a. n. 2. 143. b. n. 5, 148. b. n. 1. 152. b. n. 1. 174. a. n. 5. 177. b. n. 1. 201. a n. 1.

Servitium forinsecum,
107. a. n. 5.

Sessio,
153. b. n. 8.

Settlement,
The courts of King's Bench and Exchequer have refused to apply to a *marriage settlement* lord Coke's rule on the construction of *heirs female of the body*, considered as words of *purchase*, 164. a. n. 2.
The modes of,
In France, in Spain, 191, a. note, sect. VI. 7.
In Germany, in Scotland, in England, ibid.
The chief objects of the legislature and judicature of this kingdom, in their regulations upon the subject of uses and settlements, 271. b. n. 1. VIII. 3.
Answer to the objections of foreigners against our family settlements, ibid.
Account of the origin and gradual progress of settlements, 290. b. n. 1. V.
Of chattels real, should not be by reference to limitations of freehold property, ibid. n. 1. XII.
Of two estates with a clause for shifting one of them on the accession of the other in order to raise two families, 327. a. n. 2. II. 1.
Of an estate with a clause enjoining persons to take the name and use the arms of the settler, ibid. n. 2. II. 2.
Sometimes settlements contain an improper injunction for taking a name and using arms, 327. a. n. 2. II. 3.
The plan and effects of a modern settlement in England, with reference to Scotland and other countries, 290. b. n. 1. V. 5.
Of leasehold with tenant right of renewal, ibid. n. 1. XI.
Of money secured by mortgage, ib. n. 1. XIV. 5.

Severance,
(Summons and), of a surviving parcener, in a formedon, 173. a. n. 4.
Coparcenary is not severed if one parcener aliens for life only, 175. a. n. 1.
Marriage articles entered into by an infant are not in equity a severance of a jointenancy, 246. a. n. 1.

Sheep,
Whether they may be distrained, 47. a. n. 17.

Shelley's case (The rule in),
Applies where an instrument contains a limitation to the heirs, &c. of a person who takes under the same instrument an estate for life, either express or by implication, but not if the limitation is to the *heir, &c.* (in the *singular* number), and the heirs, &c. of such heir, 22. b. n. 2, 3, 4.
Applies only to those cases where the limitations for life and to the heirs, &c. are both by the same instrument, 299. b. n. 1.
With respect to a gift of lands to two during their joint lives, with remainder to the right heirs of the pre-deceasing tenant for life, ibid.
Reference to an observation of Mr. Douglas, in his Reports, 319. b. n. 1.
As to the operation of a fine levied and a recovery suffered by husband and wife, of lands before settled by the husband to the use of himself for

Shelley's case, (The rule in),
life, and after to the use of his wife and of the heirs male of her body by him begotten, for her jointure, 365. b. n. (A.)
Mr. Justice Blackstone's analytical observations, (in his argument in Perrin *v.* Blake), upon a gift to *A.* and his heirs, or to *A.* and the heirs of his body, 376. b. n. 1.
His fundamental maxim as to the construction of a devise, ibid. I.
He divides rules of law into three classes, with respect to a testator's intention, and considers the rule in Shelley's case of a very flexible nature, ibid. I.
He says, that the real question is, whether the heirs are intended to take as purchasers or as descendants, ibid. I.
His argument, and conclusion, that the rule applies in Perrin *v.* Blake, ibid. I.
Mr. Hargrave's statement of the different ways in which the rule is considered by its advocates and its opponents, ibid. II.
Mr. Hargrave's opinion, that the rule is imperative; and opposes the intention when there is a concurrence of the circumstances to which the rule applies, ibid. II.
He considers, that the rule applies as often as the ancestor takes an estate of freehold, and the heirs general or the heir special are to take under that denomination, in its general unqualified sense, ibid. II.
His opinion as to the policy of the rule, and the means of discovering whether the rule is applicable or not, ibid. II.
Mr. Fearne's observations on the rule, ibid. III.
His opinion as to its origin, ibid. III.
His reasons for questioning the grounds of the determination in Perrin *v.* Blake, ibid. III.
His statement of lord Thurlow's observations on the rule, ibid. IV.
Mr. Fearne's hypothetical conclusion, that lord Thurlow's doctrine embraces the subject, to the full extent of his expression, ibid. IV.
Mr. Butler's discussion of the grounds and application of this rule, ibid. V.
His discrimination of the leading points upon which the decision of the question must ultimately turn, ibid. V. 1.
1. Whether the express declaration, that the heirs shall take by purchase, will exclude the rule.
2. Whether the words of implication will have this effect.
3. Whether it is sufficient, that it is the intention that the ancestor shall take for life only.
4. Or, it must also appear that the heirs are to take as purchasers.
5. Whether it must appear how, and what estates they are to take.
6. How and what estates, the heirs can take when the ancestor has an estate of freehold, ibid. V. 1.

If the rule is absolutely inflexible, is it so because it is against the law of the land to make the heirs take by purchase in devises of this nature? ibid. V. 2.
Or, in consequence of a fixed and unalterable point of construction? ibid. V. 3.
If a testator's intention is against the rules of law and equity, such intention cannot have effect, ibid. V. 3.

Shelley's case, (The rule in),
How to determine whether a testator's intention is such as the rules of law and equity admit, ibid. V. 4.
Application of this reasoning to the case of Perrin *v.* Blake, ibid. V. 5.
If the heirs in that case take by purchase, there are but three constructions to be put upon such a devise, ibid. V. 5.
Statement and examination of each of these constructions, and conclusions, that the first and second constructions are not reconcileable with the testator's acknowledged intention, and that the rule must apply, unless the third construction is to be admitted, ibid. V. 5.
A formidable objection to the third construction is, that though the estates to arise by that construction be such as the law allows, still such a construction would be in opposition to a series of adjudications from 18 Ed. II. to 17 Geo. II. ibid. V. 6.
What devises Mr. Butler's observations are intended to apply to, ibid. VI.
Reference to a treatise on the rule in Shelley's case, 377. b. n. VI.

Sheriffs,
Their origin and office, 168. b. n. 7.
See more concerning Sheriffs, 32. b. n. 1. 52. a. n. 6. 115. a. n. 10. 11. 125. a. n. 2. 155. a. n. 2. 157. b. n. 7. 161. a. n. 3. 198. a. n. 3. 169. a. n. 2.

Shifting Clauses,
Are attended with singular nicety, and in framing them many circumstances deserve minute attention, 327. a. n. 2. II. 1.
After limitations in strict settlement may be barred by a common recovery, 342. b. n. 1. IX. 2.

Shipwreck,
89. b. n. 2.

Shires,
168. a. n. 6.

Siens,
Import of the word, 123 a. n. 2.

Simony,
A presentation may be void for simony, though the person presented is not privy to the simony, 120. a. n. 1.
Difference between a presentation void and one voidable only, for simony, ib. n. 2.
An incumbent coming in by a simoniacal presentation is disabled to be again presented to the same church, ib. n. 3.
Reference to a treatise on the law of simony, and to a great case respecting the validity of bonds of resignation, 206. b. n. 1.

Slavery,
Domestic, repugnant to the law of England, 117. b. n. 3.
See more concerning Slavery, 79. b. n. 1. 117. a. n. 1. 123. a. n. 3.

Socage,
In capite, 85. b. n. 1. 87. a. n. 1.
The etymology of the word is uncertain, 86. a. n. 1.
Whether guardianship in socage is confined to a descent, 87. b. n. 1.
Who shall be guardian in socage, 88. b. n. 2.
How affected by 12 Car. 2, c. 24, 93. b. n. 3.
Free and common, 108. a. n. 5.

Socage,
See more concerning Socage, 64. a. n. 1. 73. a. n. 2. 85. b. n. 1. 87. a. n. 1. 107. a. n. 4. 108. a. n. 1. 108. b. n. 1. 111. b. n. 1. 4. 191. a. note, sect. VI. 11.

Soil,
A prescription for a *several pasture* may be had against the owner of the soil, 122. a. n. 6.
Whether such a prescription may be had for a *several piscary*, ibid. n. 7.
Whether the soil passes by the grant of a piscary, ibid.
Right to the soil, 261. a. n. 1.
Of a port, ibid.

Soldarii,
Amongst the *ancient Gaule*, 64. a. n. 1.

Soldiers,
In actual service may make nuncupative wills, as before the 29 Cha. 2. c. 3. 111. a. n. 3.

Solinus terræ,
5. a. n. 7.

Specialty,
To the king, by recognizance, obligation or otherwise, 209. a. n. 1.

Stamp duty.
Whether payable for a surrender of a lease by a note in writing, 338. a. n. 1.

Statute Merchant, and *Statute Staple*,
55. b. n. 12. 57. a. n. 1. 150. a. n. 2. 191. a. note, sect. VI. 9. 208. a. (208. b. 13th ed.) n. 1. 1st. 209. a. n. 1. II. 257. b. n. 1. 379. b. n. 1.

Statutes,
Construction of, by equity, 24. b. n. 1.
Where one may elect to take by statute, or at common law, 49. a. n. 1.
Influence of the preamble in expounding the enacting part, 79. a. n. 2.
Public or general, and private or particular, distinguished, 98. b. n. 1.
The framing of the 12 Car. 2, c. 24, was unjustly attributed to lord HALE, 108. a. n. 1.
Affirmative, do not take away the common law, 115. a. n. 8.
Difference between a stat. and an ordinance, 159. b. n. 1, 2. 115. a. n. 13.
Negative, may be prescribed against, if merely declaratory of the common law, 115. a. n. 9. 11. 15.
Penal, 120. a. n. 4.
Whether the statute of uses can relate to any thing which did not exist at the time of its passing, as uses created by devise under the statute of wills, 271. b. n. 1. VIII. 1.
Of uncertain time, *consuetudines et assisa de foresta*, 115. a. n. 15.
Laws of Henry the 1st and Henry the 2d, allowing and expressly recognizing the alienation of lands of purchase, where the party had no son, 191. a. note, sect. VI. 6.
See more concerning Statutes, 11. b. n. 1. 42. b. n. 1. 44. b. n. 9. 69. a. n. 6. 95. a. n. 4. 110. a. n. 5. 115. a. n. 14, 15. 119. a. n. 1. 120. a. n. 3. 121. a. n. 1. 131. b. n. 2. 134. a. n. 5. 141. b. n. 2.

Statutes citeI,

Magna Charta,
Of 17 king John, 71. b. n. 2.
Of king John, escuage, 72. a. n. 5.
Of king John, *commune consilium*, escuage, 110. a. n. 4.
Tourns or leets; view of frank-pledge; prescription, 115. a. n. 10, 11, 12.
Amercements, 127. a. n. 1.
Subinfeudation, 191. a. note, sect. VI. 6.
Debtors to the king, 191. a. note, sect. VI. 9.
9 Hen. 3, magna charta, c. 3, wards, 67. b. n. 1.
- - - magna charta, c. 6, 81. a. n. 1.
- - - magna charta, 71. b. n. 2.
- - - *charta de foresta*, c. 4, 115. a. n. 13.
20 Hen. 3, stat. Merton, c. 2, dower; rent, 32. b. n. 4. 55. b. n. 3.
- - - stat. Merton, c. 8, limitation of writs, 115. a. n. 1.
- - - statute of Merton, c. 9, special bastardy, 245, a. n. 1.
52 Hen. 3, stat. Marlbridge, c. 5, Cart. 21 H. 3. n. 4, confirmed, 43. a. n. 4.
- - - stat. Marlbridge, c. 6. fraud; costs, 88. b. n. 11. 161. a. n. 4. I.
- - - stat. Marlbridge, c. 15, distress; highway, 161. a. n. 4.
- - - c. 16, damages, 355. b. n. 1.
- - - c. 22, distress of freehold; subtraction of services, 47. a. n. 4. 142. a. n. 2.
3 Ed. 1. stat. Westm. I. c. 22, marriage; wardship, Litt. § 103. n. 1.
- - - stat. Westm. I.; the word *parliament*, 110. a. n. 3.
- - - stat. Westm. I. c. 39, limitation of writs, 115. a. n. 1.
- - - stat. Westm. I. c. 40, voucher; counterplea, 385. b. n. (B).
- - - c. 48, 35. a. n. 3.
- - - c. 49, guardian; prochein amy, 135. b. n. 1.
4 Ed. 1. st. 1, s. 4. vesture of land, 4 b. n. 1.
- - - stat. 3, *de bigamis*, c. 4, 249. b. n. 2.
- - - *de bigamis*, c. 5, 80. b. n. 1.
- - - *de bigamis*, c. 6, 384. a. n. 1.
6 Ed. 1. stat. Gloucester, c. 1. 32. b. n. 4. 33. a. n. 3. 57. a. n. 1. 325. b. n. 1.
- - - st. Gloucester, c. 3. warranties, 373. b. n. 2.
- - - st. Gloucester, c. 4. damages; rent; *cessavit*, 47. a. n. 4. 142. a. n. 2. 143. b. n. 5.
- - - stat. Gloucester, c. 6, coparceners; disseisin; actions several, 364. b. n. (A).
7 Ed. 1. st. 2, stat. Mortmain, 2. a. n. 1.
13 Ed. 1. stat. Westm. II. c. 1, *de donis*, 2. a. n. 2. 19. a. n. 1. 5. 19. b. n. 2. 2. a. n. 1. 20. a. n. 1. 3, 4, 5. 24. b. n. 3. 121. a. n. 1. 191. a. note, sect. VI. 7, 8. 224. a. n. 2. 241. a. n. 4. IV. 262. a. n. (B). 290. b. n. 1. V. 2. 326. b. n. 1. 327. a. n. 2. I. 331. a. n. 1. 372. b. n. 3. 373. b. n. 2. 379. b. n. 1.
- - - c. 3, judgment on default as to a wife's land, 121. a. n. 1.
- - - c. 3, recovery by default against tenant for life, 278. b. n. 1.
- - - c. 15, *prochein amy*; eloignment of an infant, 135. b. n. 1.
- - - c. 18, debtors, 191. a. note, sect. VI. 9.
- - - c. 21. 41, writ *cessavit*, 142. a. n. 2.
- - - c. 23, executors; account, 90. b. n. 1.

Statutes cited,

13 Ed. 1. c. 24, writs in Chancery, 290. b. n. 1. I. 2.
- - - c. 25, assise of novel disseisin; alienation in fee by tenant for years, &c. 330. b. n. 1.
- - - c. 25. s. 10, vesture of land, 4. b. n. 1.
- - - c. 31, exception; judge; error, 155. b. n. 5.
- - - stat. *de mercatoribus*; debtors, 191. a. note, sect. VI. 9.
13 Ed. 1, stat. of Winton, assise of arms, 71. a. n. 1.
18 Ed. 1, stat. Westm. III. *quia emptores*, 43. a. n. 2, 3. 72. a. n. 5. 111. b. n. 1. 143. b. n. 5. 191. a. note, sect. VI. 6. 271. b. n. 1. I. 1. 327. a. n. 2. I. 365. a. n. 1. 384. a. n. 1.
20 Ed. 1, stat. of vouchers, 385. b. n. (B).
34 Ed. 1, *de conjunctim feoffatis*, 180. b. n. 3.
- - - st. 5, of forests, 115. a. n. 13.
35 Ed. 1, *stat. de asportatis religiosorum; præmunire*, 391. a. n. 2. I.
1 Ed. 2, stat. *de militibus*, 69. a. n. 6.
9 Ed. 2, *articuli cleri*; parliament, 110. a. n. 3.
10 Ed. 2, stat. of *gavelet*, 142. a. n. 2.
17 Ed. 2, *de prærogativa regis*, c. 1. wardship, 17. b. n. 4. 121. b. n. 2.
17 Ed. 2, *de prærogativa regis*, c. 6, subinfeudation, 191. a. note, sect. VI. 6.
17 Ed. 2, stat. 2. *modus faciendi homagium*, &c. 67. a. n. 2.
1 Ed. 3, st. 2, c. 2, forests, 115. a. n. 13.
14 Ed. 3, st. 3, c. 2, advowson; king, 119. a. n. 1.
18 Ed. 3, st. 3, c. 3, license; mortmain, 99. a. n. 1.
- - - st. 4, judges, 110. a. n. 5.
25 Ed. 3, st. 2, king's children; natural born subjects, 8. a. n. 1.
- - - st. 3. c. 2, advowson, king, 119. a. n. 1.
- - - st. 5, c. 5, account, executors, 90. b. n. 4.
- - - st. 5, c. 17, debtors, 191. a. note, sect. VI. 9.
- - - st. 6, papal provision, 391. a. n. 2. I.
- - - st. 6, c. 17, debtors, 191. a. note, sect. VI. 5.
27 Ed. 3, st. 1, c. 1, papal provision, 391. a. n. 2. I.
- - - st. 2, c. 9, debtors, 191. a. note, sect. VI. 9.
31 Ed. 3, st. 1, c. 11, executors; account, 90. b. n. 4.
34 Ed. 3, c. 16, stat. of non-claim; fines of land, 121. a. n. 1. 262. a. n. (B).
37 Ed. 3, c. 17, replication; villein, 122. b. n. 2.
38 Ed. 3, st. 2, c. 1, 2, 3, 4, papal provision, ibid.
40 Ed. 3, (Irish stat.) against the Brehon law, 141. a. n. 5.
45 Ed. 3, c. 3, tithes of *sylva cædua*, 115. a. n. 15.
1 Rich. 2, c. 9, assise, *cestui que use*, 191. a. note, sect. VI. 11.
3 Rich. 2. c. 3, aliens; *præmunire*, 391. a. n. 2. I.
5 Rich. 2, st. 1, c. 7, forcible entry, 257. a. n. 1.
7 Rich. 2, c. 12, papal provision, 391. a. n. 2. I.
12 Rich. 2, c. 15, papal provision, 391. a. n. 2. I.
13 Rich. 2, st. 1, c. 1, advowson; king, 119. a. n. 1.

Statutes cited,

13 Rich. 2, st. 2, c. 2, papal provision, 391. a. n. 2. I.
- - - - st. 2, c. 3, papal provision; *præmunire*, 391. a. n. 2. I.
15 Rich. 2, c. 2, forcible entry, 257. a. n. 1.
16 Rich. 2, c. 5, the statute of *præmunire*, 391. a. n. 2. I.
1 Hen. 4. c. 14, appeals; court of chivalry, 74. b. n. 1.
2 Hen. 4, c. 3, papal provision; *præmunire*, 391. a. n. 2. I.
- - - - c. 5, merchants, 129. b. n. 6.
4 Hen. 4, c. 8, disseisor with force; forcible entry, 180. b. n. 4. 257. a. n. 1.
- - - c. 22, advowson, king, 119. a. n. 1.
9 Hen. 5, c. 5, dispensation, 120. a. n. 3.
8 Hen. 6, c. 9, forcible entry, 257. a. n. 1.
- - - c. 29, whether a statute; referred to by 22 H. 8. c. 10. 159. b. n. 1.
23 Hen. 6, c. 8, sheriff, *non obstante*, 120. a. n. 3.
1 Rich. 3, c. 1. *cestui que use*, 50. a. n. 1.
- - - c. 7, fines of land, 121. a. n. 1.
4 Hen. 7, c. 17, wardship; *cestui que use*, 88. b. n. 11.
- - - c. 24, fines of land; entry; actions; claim; remitter, 121. a. n. 1. 191. a. note, sect. VI. 8. 223. b. n. 1. 252. b. n. 1. 290. b. n. 1. V. 3. 330. b. n. 1. 353. b. n. 1. 372. b. n. 1.
10 Hen. 7, c. 22, (Irish stat.) Poyning's law, 141. b. n. 3.
11 Hen. 7, c. 20, entails of the gift of a husband; discontinuance, 290. b. n. 1. V. 3. 325. a. n. 1. warranties, 373. b. n. 2.
21 Hen. 8, c. 4, sale; executors, 236. a. n. 1. 290. b. n. 1. IX.
- - - - c. 5, administration; baron and feme, 351. a. n. 1. I.
- - - - c. 15, fictitious recoveries; lessees, 290. b. n. 1. XV. 325. a. n. 1.
22 Hen. 8, c. 10, refers to 8 H. 6, c. 29, as a statute, 159. b. n. 1.
23 Hen. 8, c. 6, debtors, 191. a. note, sect. VI. 9.
- - - - c. 10, superstitious uses, 112. b. n. 2.
- - - - c. 14, forcible entry, 257. a. n. 1.
- - - - c. 15, costs, 161. a. n. 4. II.
25 Hen. 8, c. 20, sect. 7, election of bishops; *præmunire*, 95. a. n. 4. 134. a. n. 4.
26 Hen. 8, c. 13, treason, 74. b. n. 1.
- - - - c. 14, suffragan bishops, 95. a. n. 3.
27 Hen. 8, c. 10, of uses, 19. b. n. 3. 20. a. n. 5. 29. a. n. 6. 48. a. n. 3. 50. a n. 1. 111. b. n. 1. 117. a. n. 3. 123. a. n. 8. 191. a. note, sect. VI. 11. 207. a. n. 3. 272. b. n. 1. 290. b. n. 1. II. IV. V. 5. XIII. 298. a. n. 2. 309. a. n. 1. 330. a. n. 1. 338. b. n. 2. 342. b. n. 1. 347. b. n. 1. 349. b. n. 1. 353. b. n. 1. 367. a. n. 1. 384. a. n. 1.
- - - - c. 16, inrollment of bargains and sales, 147. b. n. 4. 48. a. n. 2. 229. a. n. 2.
31 Hen. 8, c. 1, partition, jointenants, tenants in common, 187. a. n. 2.
- - - - c. 1, sect. 3, partition; aid, 174. a. n. 4.
- - - - c. 3, gavelkind, 140. b. n. 2.
- - - - c. 9, (*repealed*) the new bishoprics, 134. a. n. 3 & 5.
- - - - c. 10, sect. 3, precedency of bishops, 94. a. n. 5.

Statutes cited,

32 Hen. 8, c. 1, of wills, 20. a. n. 5. 111. b. n. 1. 4. 271. b. n. 1. VIII. 1. 309. a. n. 1. 342. b. n. 1.
- - - - c. 2. stat. of limitation, 83. a. n. 2. 93. a. n. 2. 115. a. n. 2. 4, 5.
- - - - c. 16, sect. 13, aliens, 2. b. n. 7.
- - - - c. 27, discontinuance; remitter; baron and feme, 347. b. n. 1.
- - - - c. 27, entails; leases, 290. b. n. 1. V. 3. 333. a. n. 2.
- - - - c. 28, leases, 28. b. n. 1. 229. a. n. 2.
- - - - c. 31, (*repealed*) common recoveries by tenant for life, 278. b. n. 1. 325. a. n. 1.
- - - - c. 32, partition; jointenants and tenants in common, 187. a. n. 2.
- - - - c. 34, condition; assignee of a reversion, 215. b. n. 1.
- - - - c. 36, fines of land, 121. a. n. 1. 191. a, note, sect. VI. 8. 223. b. n. 1. 372. b. n. 1.
- - - - c. 37, executors; rents, 146. b. n. 1.
- - - - c. 37, rent charge *pur autre vie*; executors, 162. a. n. 4. 162. b. n. 1.
- - - - c. 38, marriage; levitical degrees, 235. a. n. 1.
33 Hen. 8, c. 53, treason, 74. b. n. 1.
- - - - c. 39, court of augmentation; English bill; tithes, 159. a. n. 4.
- - - - c. 39, entails; debtors to the crown, 191. a. note, sect. VI. 8. 9. 209. a. n. 1.
34 Hen. 8, c. 5, of wills; 20. a. n. 5. 88. b. n. 11. 111. b. n. 4, 5. 271. b. n. 1. VIII. 1. 309. a. n. 1. 342. b. n. 1.
- - - - c. 20, entail; king, 372. b. n. 2, 3. 273. a. n. 2.
- - - - c. 26, Wales, 285. a. n. 1.
34 & 35 Hen. 8, c. 5, s. 11, of wills, 174. a. n. 3.
- - - - c. 26, s. 74, jury in Wales, 135. a. n. 3.
- - - - c. 26, s. 91 & 128, gavelkind in Wales. 175. b. n. 3.
35 Hen. 8, c. 2, treason, 74. b. n. 1.
- - - - c. 3, King's style, 7. b. n. 4.
- - - - c. 6, jurors in corporate towns, 272. a. n. 1.
37 Hen. 8, c. 12, tithes in London, 159. a. n. 4.
- - - - c. 20. s. 2, 3, 4, tenure in *in capite*, 108. a. n. 3.
1 Ed. 6, c. 2, bishopricks; dower; treason, 41. a. n. 4, 5. 134. a. n. 3, 4, & 5.
- - - c. 4, s. 1, 2, 3, tenure *in capite*, 108. a. n. 3.
- - - c. 12, bigamy, 80. b. n. 1.
2 & 3 Ed. 6. c. 8, office found; heir; age; interpleader, 243. a. n. 2.
5 & 6 Ed. 6, c. 11, dower; treason, 41. a. n. 4.
- - - c. 14, against engrossing corn, 135. a. n. 1.
- - - c. 16, against the sale of offices, 120. a. n. 3.
1 Ma. stat. 2, c. 2, as to 1 Ed. 6, c. 2. 134. a. n. 5.
- - stat. 2, c. 5, of limitation, 115. a. n. 6.
1 & 2 P. & M. c. 8, as to 1 Ed. 6, c. 2, 134. a. n. 5.
4 & 5 P. & M. c. 8, guardianship, 88. b. n. 12. 93. b. n. 3.
1 Eliz. c. 1, as to 1 Ed. 6, c. 2, 120. a. n. 3; oath of supremacy, 134. a. n. 5.
- - - c. 1, oath of supremacy, 391. a. n. 2. II. 3.
- - - c. 2, See of Rome, 391. a. n. 2. II. 1.
2 Eliz. (Irish act) c. 4, s. 1, bishops of Ireland, 95, a. n. 4. 134. a. n. 5.
5 Eliz. c. 1, oath of supremacy, 120. a. n. 3.

Statutes cited,

8 Eliz. c. 2, costs, 161. a. n. 4. s. 2.
13 Eliz. c. 4, debtors to the crown, 191. a. note, sect. VI. 9. 209. a. n. 1. III.
- - - c. 5, fraud, 3. b. n. 9. 290. b. n. 1. XIII.
- - - c. 7, bargain and sale; bankruptcy, 229. a. n. 2.
- - - c. 10. fraud; ecclesiastical persons; alienation, 373. a. n. 2.
- - - c. 10, leases of tenements in cities, 45. a. n. 2.
14 Eliz. c. 8, common recoveries by or with the voucher of tenant for life, &c. 278. b. n. 1. 325. a. n. 1.
- - - c. 11, leases of tenements in cities, 45. a. n. 2.
18 Eliz. c. 11, leases, 45. a. n. 2.
23 Eliz. c. 1, See of Rome, 391. a. n. 2. II.
27 Eliz. c. 2, See of Rome, ibid. n. 2. II. 1.
- - - c. 3, debtors to the crown, 191. a. note, sect. VI. 9. 209. a. n. 1. III.
27 Eliz. c. 4, fraud, 290. b. n. 1. XIII.
- - - c. 5, demurrer, 72. a. n. 3.
- - - c. 9, fines and recoveries; exemplification, 225. b. n. 3.
29 Eliz. c. 6, See of Rome, 391. a. n. 2. II. 1.
31 Eliz. c. 11, forcible entry, 257. a. n. 1.
35 Eliz. c. 1, and 2. 13, adjuration of the realm, 92. b. n. 2.
- - - c. 2, See of Rome, 391. a. n. 2. II. 1. 2.
39 Eliz. c. 7, (*expired*), debtors to the crown, 191. a. note, sect. VI. 9. 209. a. n. 1. III.
43 Eliz. c. 2, s. 13, distress for poor's rates, 47. a. n. 18.
- - - c. 4, entails; charitable institutions, 191. a. note, sect. VI. 8.
1 Jam. 1, c. 4, See of Rome, 391. a. n. 2. II. 1.
- - - - c. 11, polygamy, 80. b. n. 1.
- - - - c. 25, election of bishops, 134. a. n. 5.
3 Jam. 1, c. 4, oath of allegiance and obedience, 391. a. n. 2. II. 3.
- - - - c. 4, 5, See of Rome, 391. a. n. 2. II. 1.
- - - - c. 5, recusancy; offices; advowsons, &c. 120. a. n. 4. 391. a. n. 2. II. 7.
4 Jam. 1, c. 3, costs, 161. a. n. 4. II.
7 Jam. 1, c. 6, See of Rome, 391. a. n. 2. II. 1.
21 Jam. 1, c. 2, limitation of king's title, 119. a. n. 1.
- - - - c. 13, *vicne;* aid after verdict, 121. a. n. 2.
- - - - c. 15, forcible entry; lessees; copyhold, 257. a. n. 1. 257. b. n. 1.
- - - - c. 16. stat. of limitations, 115. a. n. 2. 115. a. n. 7. 250. a. n. 1.
- - - - c. 17, interest; usury, 4. a. n. 1.
- - - - c. 19, entails; bankrupts; creditors of traders, 191. a. note, sect. VI. 8.
- - - - c. 28, military provision, 71. a. n. 1.
- - - - c. 28, s. 7, privilege of sanctuary, 92. b. n. 2.
3 Car. 1, c. 2, See of Rome, 391. a. n. 2. II. 1.
16 Car. 1, c. 20, prerogative; fines, 69. a. n. 7.
12 Car. 2, c. 13, interest; usury, 4. a. n. 1.
- - - - c. 24, tenures; guardian; aids, 39. b. n. 3. 43. a. n. 3. 43. b. n. 2. 67. b. n. 1. 68. b. n. 5. 71. a. n. 1. 74. b. n. 1. 76. a. n. 1. 85. a. n. 1. 88. b. n. 13. 15, 16. 91. a. n. 1. 93. b. n. 3. 108. a. n. 1, 2. 5. 108. b. n. 1. 111. b. n. 169. a. n. 2. sect. 5, 6. 191. a. note, sect. VI. 4. 271. b. n. 1. VIII. 1.
12 Car. 2, c. 24, s. 1, 2, homage ancestrel, 105. a. n. 1.

Statutes cited,

12 Car. 2. c. 24, 5, rents; relief, 162. b. n. 6.
- - - - c. 24, s. 7, copyhold tenure; frankalmoigne; 100, b. n. 1. 141. b. n. 4.
13 Car. 2, st. 1, c. 5, petitions to the king, or parliament, 257. a. n. 3.
- - - - st. 2. c. 1, corporation act, 391. a. n. 2. II. 4. VI. 4. 6.
- - - - st. 2, c. 2. costs, 161. a. n. 4. II.
13 & 14 Car. 2, c. 4, act of uniformity, 391. a. n. 2. IV. 1.
16 Car. 2, c. 1, parliament, 110. a. n. 6.
16 & 17 Car. 2, c. 8, *vicne;* amercements, 125. a. n. 2. 127. a. n. 1.
17 Car. 2, c. 6, s. 3, damages, 33. a. n. 6.
22 Car. 2, c. 1, conventicles, 47. a. n. 18.
22 & 23 Car. 2. c. 1, (the Coventry act), maiming, 127. a. n. 2.
- - - - - - c. 10, stat. of distribution, 176. a. n. 5. 351. a. n. 1.
- - - - - - c. 10, s. 5, advancement; double portions, 176. b. n. 10.
25 Car. 2, c. 2, test act; see of Rome, 126. a. n. 3, 4. 233. a. n. 1. 391. a. n. 2. II. 1. 5. III. 3. IV. 4. 6.
29 Car. 2, c. 3, frauds and perjuries; wills; estates *pur auter vie,* 41. b. n. 4. 48. a. n. 1. 3. 50. a. n. 2. 111. a. n. 3. 111. b. n. 1. 3 & 4. 169. a. n. 4. 290. b. n. 1. XIII. 298. a. n. 1.
- - - - c. 3, s. 3, leases; surrender, 338. a. n. 1.
- - - - c. 3, s. 8, trusts of lands, 290. b. n. 1. X.
- - - - c. 3, § 12, occupancy; estates *pur auter vie,* 41. b. n. 5. 298. a. n. 1.
- - - - c. 3, s. 25, administration; baron and feme, 351. a. n. 1.
30 Car. 2, st. 2, c. 1, recusancy; declaration to be made by members of parliament, 391. a. n. 2. II. 6, 7. III. 3. IV. 1.
1 W. & Ma. sess. 1, c. 8, oaths of allegiance and supremacy, 391. a. n. 2. II. 3. III. 3.
- - - - - sess. 1, c. 9, recusancy, 391. a. n. 2. III. 3.
- - - - - sess. 1, c. 18, toleration act, 391. a. n. 2. II. 2. IV. 1.
- - - - - sess. 1, c. 26, recusancy; advowsons, &c. 391. a. n. 2. II. 7.
- - - - - sess. 2, c. 2, art. 5, bill of rights; right to petition the king, 257, a. n. 3.
- - - - - sess. 2, c. 2, s. 12 & 13, bill of rights, 120. a. n. 4.
2 W. & Ma. stat. 1, c. 5, distress for rent, 47. a. n. 16. 47. b. n. 7. 162. b. n. 6. III.
3 W. & Ma. c. 14, fraud, 290. b. n. 1. XIII.
4 W. & Ma. c. 2, will; custom of the province of York, 176. b. n. 5.
4 & 5 W. & Ma. c. 16, mortgages, 205. a. n. 1. 3dly.
- - - - - c. 24, jurors, 272. a. n. 1.
6 W. & Ma. c. 2, triennial parliaments, 110. a. n. 6.
7 & 8 W. 3, c. 6, tithes under 40 *s.* 159. a. n. 4.
- - - - c. 27, oath of supremacy; elections; see of Rome; 391. a. n. 2. II. 1. IV. 1.
- - - - c. 34, Quakers; tithes under 10 *l.* 159. a. n. 4.
- - - - c. 37, mortmain, license, 99. a. n. 1.
- - - - c. 38, will; custom of Wales, 176. b. n. 5.

Statutes cited,

8 & 9 W. 3, c. 11, costs, 161. a. n. 4. II.
- - - - c. 31, writ of partition, 169. a. n. 2. 1.
10 & 11 W. 3, c. 16, posthumous child; remainder; mesne profits, 11. b. n. 4, 55. b. n. 8.
11 & 12 W. 3, c. 4, oaths of allegiance and supremacy, &c. 8. a. n. 8. 391. a. n. 2. II. 7. III. 1, 2, 3.
- - - - c. 6, descent through aliens, 8. a. n. 2.
12 & 13 W. 3, c. 2, naturalization, 129. a. n. 1.
13 W. 3, c. 6, abjuration of the pretender; civil and military offices; oath of allegiance, 92. b. n. 2. 233. a. n. 1.
1 Ann. st. 1, c. 22, abjuration of pretender, 92. b. n. 2. 233. a. n. 1.
2 & 3 Ann. c. 4, registering of deeds in the West Riding of the county of York, 290. b. n. 1. XIII.
- - - - c. 5, will; custom of province of York, 176. b. n. 5.
- - - - c. 6, s. 17, apprentices at sea; wages, 117. a. n. 1.
4 Ann. c. 16, demurrer; jury; attornment, 72. a. n. 3. 119. b. n. 2. 157. a. n. 4. 309. a. n. 1.
- - - c. 16, s. 4 & 5, pleading several matters for defence; costs, 303. a. n. 1.
- - - c. 16, s. 6 & 7, *visne*; juries, 155. b. n. 2.
- - - c. 16, s. 12, bond; pleading, 212. b. n. 1.
- - - c. 16, s. 16, fines of land; action, 252. b. n. 1.
- - - c. 16, s. 21, warranties, 373. b. n. 1.
- - - c. 16. s. 27, account; executors of a guardian, bailiff, &c. 90. b. n. 5. 172. a. n. 8. 199. b. n. 1.
4 & 5 Ann. (or 4 Ann.) c. 16, *venire facias*; *visne*; costs, 125. a. n. 2. 161. a. n. 4. II.
- - - - (or 4 Ann.) c. 16, hundredors, 272. a. n. 1.
- - - - (or 4 Ann.) c. 16, statute of limitations; entry; fine of land, 250. a. n. 1.
- - - - (or 4 Ann.), c. 16, warranties, 224. a. n. 1. 373. b. n. 2.
- - - - (or 4 Ann.), c. 16, attornment, 215. a. n. 2.
6 Ann. c. 18, s. 1, holding over, 57. b. n. 2.
- - - c. 21, deaneries, 95. a. n. 4.
- - - c. 31, fire accidental, 53. a. n. 7. 53. b. n. 5. 57. a. n. 1.
- - - c. 35, registering of deeds in the East Riding of the county of York, &c. 290. b. n. 1. XIII.
7 Ann. c. 5, persons beyond sea; aliens; treason; natural-born subjects, 8. n. 1. 129. a. n. 2.
- - - c. 18, advowson, 344. b. n. 1.
- - - c. 18, limitation, 115. a. n. 6.
- - - c. 18, remitter; advowson, 349. b. n. 2.
- - - c. 18, parceners; advowson, 166. b. n. 2. 243. a. n. 1.
- - - c. 19, infants seised in trust or by way of mortgage, 171. b. n. 5. 205. a. n. 1. 3dly. 247. a. n. 2. 271. b. n. 1. VII. 2. 290. b. n. 1. VII.
- - - c. 20, registering of deeds in Middlesex, 290. b. n. 1. XIII.
8 Ann. c. 14, rent; distress, 47. a. n. 4. 47. b. n. 6, 7. 162. b. n. 6. II.
- - - c. 14, action of debt, 162. b. n. 6. I. III.
- - - c. 14, sect. 1, distress; execution, 162. b. n. 6. IV.
10 Ann. c. 18, bargain and sale; evidence, 225. b. n. 2.

Statutes cited,

12 Ann. st. 2, c. 14, recusancy; advowsons, &c. 391. a. n. 2. II. 7.
- - - st. 2, c. 16, interest; usury, 4. a. n. 1.
1 Geo. 1. st. 2, c. 4, s. 2, naturalisation, 129. a. n. 1.
- - - st. 2, c. 5, riots, 257. a. n. 3.
- - - st. 2, c. 13, see of Rome, 391, a. n. 2. II. 1.
- - - stat. 2, c. 13, oath of supremacy, 391. a. n. 2. II. 3. III. 3.
- - - c. 13, abjuration of pretender, and oath of allegiance, 92. b. n. 2. 391. a. n. 2. II. 3.
- - - c. 38, septennial parliaments, 110. a. n. 6.
- - - sess. 2, c. 55, rescusancy; registration, 391. a. n. 2. II. 7.
3 Geo. 1, c. 18, recusancy; purchases; registration; inrolment, 391. a. n. 2. II. 7. III. 1.
5 Geo. 1, c. 6, corporations, 391. a. n. 2. IV. 2.
6 Geo. 1, c. 5, Ireland; appellant jurisdiction, 141. b. n. 2.
8 Geo. 1, c. 17, factory in Portugal, 391. a. n. 2. IV. 5.
9 Geo. 1, c. 7, churchwardens, 3. a. n. 4.
11 Geo. 1, c. 18, will; custom of London, 176. b. n. 5. 9.
3 Geo. 2, c. 25, s. 8. pannel to writ of *venire facias*, 155. a. n. 2.
- - - c. 25. s. 9. juries in Wales, 155. a. n. 3.
4 Geo. 2, c. 21, persons born beyond sea; aliens; treason, 8. a. n. 1. 129. a. n. 2.
- - - c. 28, landlord and tenant; rent seck; distress; holding over; double-rent; ejectment; injunction, 47. b. n. 7. 57. b. n. 2. 142. a. n. 2. 162. b. n. 6. III.
- - - c. 28, s. 1, holding over; double-rent; entry; notice, 270. b. n. 1.
- - - c. 28, s. 2. & 4, ejectment; landlord and tenant, 202. a. n. 3.
6 Geo. 2, c. 5, rescusancy; inrolment; purchases, 391. a. n. 2. III. 1.
8 Geo. 2, c. 6, registering of deeds, 290. b. n. 1. XIII.
9 Geo. 2, c. 3, s. 6, (Irish stat.) lease; evidence, 271. b. n. 1. VI. 2.
- - - c. 26, civil and military offices, 391. a. n. 2. IV. 4.
11 Geo. 2, c. 17, recusancy; advowsons, &c. 391. a. n. 2. II. 7.
- - - c. 19, (*altered by* 57 *Geo.* 3. c. 52,) justices of peace; notion on case; distress; holding over: double rent; landlord and tenant; attornment, 47. b. n. 1. 7. 142. a. n. 2. 57. b. n. 2. 142. a. n. 2. 162. b. n. 6. I. III. 309. a. n. 1.
- - - c. 19, s. 10, sale of distress, 47. b. n. 4.
14 Geo. 2, c. 20. occupancy; estates *per auter vie*, 41. b. n. 4. 298. a. n. 1.
- - - c. 20, s. 9, 41. b. n. 5.
15 Geo. 2, c. 30, marriage of lunatics, 80. a, n. 1.
18 Geo. 2, c. 18, s. 4, challenge; panel; knight, 156. a. n. 3.
24 Geo. 2. c. 18, *visne*; actions on penal statutes, 125. a. n. 2. 157. a. n. 4.
- - - c. 48, Michaelmas term, 135. a. n. 2.
25 Geo. 2. c. 39, aliens; descent, 8. a. n. 2.
26 Geo. 2, c. 33, marriage, 79. b. n. 1, 2. & 4.
- - - c. 33, s. 11, marriage; infant; guardian, 88. b. n. 16.
31 Geo. 2. c. 10, s. 10, apprentices at sea; wages, 117. a. n. 1.
- - - c. 14, customary freehold, 59. b. n. 1.
1 Geo. 3, c. 3, (Irish stat.) lease; evidence, 271. b. n. 1. VI. 2.

Statutes cited,
5 Geo. 3, c. 17, lease of tithes; action of debt, 44. b. n. 3. 162. b. n. 6. I.
6 Geo. 3, c. 53, abjuration of pretender, or oath of abjuration, 92. b. n. 2. 391. a. n. 2. II. 3.
9 Geo. 3, c. 16, limitation of king's title, 111. a. n. 1.
12 Geo. 3, c. 11, marriages of the royal family, 133. b. n. 1.
13 Geo. 3, c. 14, aliens, 2 b. n. 2.
- - - c. 21, persons born beyond sea; aliens; treason, 129. a. n. 2.
14 Geo. 3. c. 79, interest; usury, 4. a. n. 1.
17 & 18 Geo. 3, c. 49, s. 1, (Irish stat.) gavelkind in Ireland, 176. a. n. 1.
18 Geo. 3, c. 60, Roman catholics, 391. a. n. 2. III. 2, 3.
22 Geo. 3, c. 53, Ireland; parliament of Great Britain, 141. b. n. 2.
23 Geo. 3, c. 28, parliament and courts of Ireland, 141. b. n. 2.
25 Geo. 3, c. 35, debtors to the crown, 191. a. note, sect. VI. 9. 209. a. n. 1. IV.
26 Geo. 3, c. 107, militia act, (*Repealed by* 42 *Geo.* 3. c. 90, *which prescribes a new oath*), 391. a. n. 2. IV. 3.
31 Geo. 3, c. 32, Roman catholics, 391. a. n. 2. IV. 4. 6.
39 & 40 Geo. 3, c. 67, act of union, 141. b. n. †. under n. 2.
- - - - - - c. 98, accumulation, 290. b. n. 1. XVII.
42 Geo. 3, c. 90. See 26 Geo. 3, c. 107, under the head *Statutes cited* of this Index.
43 Geo. 3, c. 30. Roman catholics, 391. a. n. 2. III. 2.
55 Geo. 3, c. 184. sch. part 1, stamp act, 338. a. n. 1.
- - - c. 192. devise of copyhold, 111. b. n. *. under n. 1.
57 Geo. 3, c. 52. See 11 Geo. 2, c. 19, under the head *Statutes cited* of this Index.
- - - c. 92, commissions in the army and navy, 391. a. n. 2. III. 4.

Stewards,
Of manors, who may be, and how created, 58. a. n. 5. 3 b. n. 4. 61. b. n. 1.
Whether stewards by parol can take surrenders of copyhold, out of court, 59. a. n. 6.

Sterling,
207. b. n. 1.

Strangers,
To a deed may take by way of remainder, 26. b. n. 4.
To a fine are barred unless they claim within five years, 121. a. n. 2.

Stray,
And *waif* may be appurtenant to a leet, 121. b. n. 7.

Subinfeudation,
Of a subject, with respect to tenures of the king *ut de honore*, 108. a. n. 3.
Was resorted to as an artifice, to elude the feudal restraint upon alienation, 191. a. note, sect. VI. 6. 11.
Its effect on warranty, 365. a. n. 1.

Subjects,
A person born beyond sea, whose father, or paternal grandfather, was a natural-born subject, and not a traitor, nor in the service of an enemy, is also a natural-born subject, 8. a. n. 1. 129. a. a. n. 2.
Natural-born, may derive a title by descent through aliens, except in certain cases, 8. a. n. 2.
Though born *in partibus transmarinis*, 128. b. n. 2.
Their right to petition the king and parliament, 257. a. n. 3.

Subpœna,
The writ of *subpœna* was adopted by the court of chancery from the common law courts, 191. a. note, sect. VI. 11. 271. b. n. 1. II.
This introduced a new judicial power into the jurisprudence of England, 290. b. n. 1. I. 3.
A confidence of trust cannot be enforced at common law; and the only remedy is by *subpœna* in chancery, 290. b. n. 1. III.

Substitution,
By the Roman law,
The vulgar, the pupillar, and the *quasi* pupillar, 191. a. note, sect. VI. 5.
Successive fidei commissary, ibid. sect. VI. 7.
By the law of France, ibid. sect. VI. 7.

Succession,
Wardship in chivalry was a subject of succession, but guardianship in socage is not, 88. b. n. 13.
As to sole corporations, and improper socage-reliefs, 93. a. n. 2.
By the civil law, how it differs from succession by the feudal law, 191. a. note, sect. VI. 4.

Successors,
When the word is necessary for passing a fee simple, in case of a gift to a corporation, 94. b. n. 4.

Sufferance,
Tenant at, who is, 57. b. n. 5. 270. b. n. 1.

Suffragan Bishops,
Are distinguished into bishops of dioceses and bishops of an inferior order. It is not usual to appoint the latter, 94. a. n. 3.

Suits,
Actual, 121. a. n. 1.
Civil, 125. a. n. 2.
Criminal, ibid.
False and malicious. See *Actions*, and 131. b. n. 2. 135. b. n. 1.

Summonitio servitii,
171. a. n. 1.

Summons,
The writ of, in a common recovery, must be returned, so that judgment may be given before the vouchee's death, 135. a. n. 1.
And severance of a surving parcener, 173. a. n. 4.

Sunday,
Is not *dies juridicus* for some purposes, yet it is for other purposes, 135. a. n. 1.

Supremacy,
Oath of, 120. a. n. 3. 233. a. n. k. 391. a. n. 2.

Sureties,
For debtors to the crown, 209. a. n. 1. V. 3.

Surplusage,
In pleading, 303. b. n. 1.
Rent by surplusage, 150. b. n. 4.

Surrender,
To one jointenant, enures to both, 183. a. n. 2. †.
By deed by an infant, whether void, or voidable, 51. b. n. 1.
Of copyhold, and common recovery by plaint or better assurance—only *one* fine is due, 302. b. n. 1.
How a surrender differs from a release, 337. b. n. 1.
To give it legal effect, must be made to the immediate reversioner or remainder-man, 337. b. n. 2.
Whether a deed void as a surrender may operate as a covenant to stand seised, 337. b. n. 2.
(Except in case of a copyhold or customary interest) must be in writing, 338. a. n. 1.
Made by note in writing, whether it is liable to stamp duty, 338. a. n. 1.
In law, or by implication, may be made of a future lease, by the lessee's taking a new lease, 338. a. n. 2.
Of terms of years, 338. b. n. 1.
See more concerning Surrenders, 16. b. n. 2. 42. a. n. 5. 49. a. n. 6. 57. b. n. 5. 58. a. n. 4. 58. b. n. 5. 7. 59. a. n. 4. 6. 59. b. n. 2, 3, 4, 5, 6. 60. a. n. 2, 3. 60. b. n. 1. 61. a. n. 2. 62. a. n. 1, 2. 111. b. n. 1. 163. a. n. 1. 190. b. n. 4. 202. b. n. 2. 218. b. n. 1. 271. b. n. 1. VII. 2. 290. b. n. 1. V. 4.

Survivorship,
113. a. n. 2. 180. b. n. 2. 181. b. n. 1. 3. 5. 182. a. n. 1, 2. 185. b. n. 1. 246. a. n. 1.

Suspense, or Suspension,
Of a seigniory, 13. a. n. 4. 148. b. n. 2.
Of curtesy, 29. b. n. 2.
Of laws by legal authority is condemned, by the bill of rights, without any exception, 120. a. n. 4.
Of a rent-service, 148. b. n. 1.

Suspicion,
Rescue from an arrest made *virtute officii*, on just ground of suspicion, is at the party's peril, 161. a. n. 3.

Syngraph,
143. b. n. 4.

System of Tenures,
The remnant of it cannot be duly comprehended without some knowledge of homage, &c. 105. a. n. 1.

T.

Tail,
Whether donee in, may stand seised to an use, 19. b. n. 3.
Male cannot be inherited by female claiming through a male, 19. a. n. 4.
Of what it may be, 20. a. n. 5.
Estates *pur auter vie*, terms for years, and personal chattels, cannot be entailed within the statute *de donis*, 20. a. n. 5.
Settlements answering the purposes of an entail may be made of estates *pur auter vie*, by way of remainder; and of terms for years and personal chattels by executory devise or by deed of trust, ibid.

Tail,
Or not, by devise, 20. b. n. 2. 21. a. n. 1.
Words which before the statute *de donis* would have passed only an estate in frankmarriage, and after the statute an estate tail with a fee expectant, 21. a. n. 1.
Whether the words *heirs* in the premises, and *heirs of the body* in the *habendum*, pass an estate tail without any fee expectant, or an estate tail with a fee expectant, 21. a. n. 2.
Or fee, by deed, 21. a. n. 1. 3. 7. 21. b. n. 2. 27. a. n. 1.
General or special, 21. a. n. 4.
Donee in, of whom he shall hold, 23. a. n. 2, 3, 4.
Female, whether allowable by law, 25. a. n. 1.
Or not, for uncertainty or remote possibility, 25. b. n. 2. 4.
What words give a separate estate tail to husband, what to wife, what a joint estate to both, and what a contingent remainder in tail to the issue, 26. a. n. 3. 26. b. n. 1, 2. 219. a. n. 2, 3.
Whether executed in a tenant for life, where there is a possibility of a mesne estate's interposing, 28. a. n. 7.
Where husband and wife are tenants in special tail, and the husband is attainted, &c. and dies, having issue by his wife, she may lease under 32 H. 8. 28. b. n. 1.
Tenant in tail after possibility, &c. whether he can suffer a recovery, ibid.
Where a tenant in tail has the reversion or remainder in fee by descent, a recovery is preferable to a fine, 121. a. n. *. under n. 1.
Lord Coke allows a present estate tail, in a case of double possibility, 184. a. n. 1.
Power of suffering a recovery, and of levying a fine, is inseparably inherent to an estate tail, 223. b. n. 1.
Effect of wrongful alienations by tenant in tail, 269. b. n. 1. 300. a. n. 2. 331. a. n. 1. 333. a. n. 1. 373. b. n. 1.
Consequences of the introduction of entails by the statute *de donis*, 290. b. n. 1. V. 2.
Baron tenant in, of wife's lands, *et vice versa*, how the tail may be barred, 290. b. n. 1. V. 3.
Of rent and of land, difference between, 298. a. n. 1.
Effect of a feoffment by tenant in tail, 326. b. n. 1. IV.
Effect of the statute *de donis* upon fees simple conditional at common law, 327. a. n. 2. I.
Effect of a common recovery in barring limitations subsequent or collateral to an estate tail, ibid. n. 2. II. 1.
With the reversion in the king, how affected by divers statutes, 372. b. n. 1.
With the reversion in the king since 34 H. 8, c. 20. ibid. n. 2.
What shall be said to be a gift in tail by the king within 34 H. 8, c. 29, ibid. n. 3.
With the reversion in the king was barred at common law by fine or recovery, yet the reversion remained in the king; the law in this respect since the 34 H. 8, c. 20, ibid. n. 3.
With the reversion in the king, as to disseisin, 373. a. n. 1.
With the reversion in the king within 34 H. 8, c. 20, whether it may be barred by a disseisin and a fine, ibid. n. 2.
As to implied warranty, 384. a. n. 1.
What limitations will create or not, 376. b. n. 1.

Tail,
Power of donee in to alien cannot be restrained by
Condition, Limitation, Custom, Recognizance, Covenant, } 379. b. n. 1.
A condition against an attempt to suffer a recovery, or a conclusion to suffer a recovery, cannot be annexed to an estate in, ibid.
A provision for trustees, on the birth of children to whom estates tail are limited, to determine these estates, and limit estates to them for life, and to their children in strict settlement, is within the rule against perpetuities, and void, ibid.
Under a power to appoint the fee generally, as to all persons, estates for life to children unborn at the creation of the power, and remainders to their children in strict settlement, are allowed, ibid.
Otherwise when the objects of the power are specified, ibid.
See *Limitations*.
See more concerning Estates Tail, 19. a. n. 1. to 28. b. n. 2, both inclusively. 30. a. n. 3. 42. a. n. 4. 44. a. n. 2. 44. b. n. 1. 7. 45. a. n. 5. 60. a. n. 3. 60. b. n. 1, 2. 110. b. n. 4. 121. a. n. 1, 2. 154. b. n. 5. 163. b. n. 4. 173. a. n. 3, 4. 173. b. n. 1. 177. b. n. 1. 183. b. n. 5. 184. a. n. 2. 191. a. note, sect. VI. 7, 8. 200. b. n. 1. 202. b. n. 2. 205. a. n. 1. 3dly. 208. a. n. 1. 218. b. n. 2 § 3 ||. 220. a. n. 2. 224. b. n. 1. 226. a. n. 1. 241. a. n. 4. 246. a. n. 1. 271. b. n. 1. V. 290. b. n. 1. VII.

Tailzies,
Or entails of Scotland, 191. a. note, sect. VI. 7. 224. a. n. 1. 290. b. n. 1. V. 5.

Tales,
158. a. n. 5.

Talesmen,
272. a. n. 1.

Tallages,
59. b. n. 7.

Tanistry,
The custom of, 110. b. n. 1. 176. a. n. 1.

Taxes,
In the reign of Edw. I. were levied with the consent of the commons, which gave them great weight, 260. a. n. 1.

Temporalities,
Of bishops, 94. a. n. 3. 119. a. n. 1. 121. b. n. 1.

Tenants in Chief,
108. a. n. 3.

Tenants in Common,
As to waste, 53. b. n. 10.
Under two inconsistent devises in the same will, 112. b. n. 1.
By partition, *i. e.* by severance of the unity of title, with respect to parceners, 167. b. n. 2.
With respect to partition, by common law, and by statute, 169. a. n. 2. I. 187. a. n. 2.
Remedy of one against the other, 172. a. n. 8.
By prescription, 188. b. n. 3.
Whether a tenancy in common may be implied by *equally to be divided*, or by *equally*, 190. b. n. 4.

Tenants in Common,
Cannot release to each other, 193. a. n. 1.
With respect to cross-remainders, 195. b. n. 1.
With respect to actions by or against them, ibid. n. 2.
As to actions of account under 4 Ann. c. 16, 199. b. n. 1.
Grant by, how it operates, 267. b. n. 1.
See *Jointenants, Leases*, 45. a. n. 7.
See more concerning Tenants in Common, 183. b. n. 5. 184. a. n. 2. and 189. b. n. 3. to 200. b. n. 1. both inclusively.

Tenants by Copy of Court Roll,
See *Copyhold* and *Customary Freehold*, and Litt. § 73. n. 1. and 58. a. n. 2. to 63. a. n. 3. both inclusively.

Tenants by Curtesy,
See *Curtesy*, and 29. a. n. 3. to 30. b. n. 6. both inclusively.

Tenants in Dower,
See *Dower*, and 30. b. n. 7. to 41. a. n. 5. both inclusively.

Tenants in Fee,
See *Fee*, and 1. a. n. 1. to 18. b. n. 7. both inclusively.

Tenants for Life,
Paying off a charge, may keep it on foot, 239. b. n. 3.
Or for years, as to warranties, 373. b. n. 2.
See also *Estates*, and 41. b. n. 1. to 43. b. n. 2. both inclusively, and 57. a. n. 1. 180. b. n. 7.

Tenant to the Præcipe,
See *Tail*, 203. b. n. 1. IV. 265. a. n. 2.

Tenant Right of Renewal,
290. b. n. 1. XI.

Tenants by Statute Merchant, by Statute Staple, or by Elegit,
55. b. n. 12. 163. a. n. 1. 187. a. n. 2. 249. b. n. 1. 251. b. n. 3. 257. b. n. 1. 330. b. n. 1.

Tenants by Sufferance,
Or at will, as to disseisin, 330. b. n. 1.
See also 57. b. n. 4, 5. 7. 270. b. n. 1. 272. b. n. 1.

Tenants in Tail,
Having the reversion or remainder in fee by descent, should rather suffer a recovery than levy a fine, 121. a. n. *.
Their alienation,
With respect to the issue, 326. b. n. 1.
As to the reversioner, 327. a. n. 1.
As to those in remainder, 327. a. n. 2.
Their feoffment reduces the issue to a formedon, 331. a. n. 1.
A bargain and sale, release, covenant to stand seised, or any other conveyance operating by way of grant, by tenant in tail, passes a base fee, and reduces the issue in tail to entry, or action to avoid it, 331. a. n. 1.
See also *Tail*, and 19. a. n. 1. to 27. b. n. 1. both inclusively, and 121. a. n. 1. 135. a. n. 1.

Tenants in Tail after Possibility of Issue extinct,
As to waste, and the property of trees cut down, 27. b. n. 2.
As to forfeiture, 28. a. n. 1, 2.
See also 28. a. n. 3. to 28. b. n. 2. inclusively.

Tenants by the Verge,
61. a. n. 2. to 63. a. n. 3. both inclusively.

Tenants at Will,
49. a. n. 1. 55. a. n. 1. to 57. b. n. 7. both inclusively, 67. b. n. 2. 270. b. n. 1.

Tenants for Years,
As to waste, 57. a. n. 1.
As to holding over, 67. b. n. 2.
Every tenant, according to modern determinations, is a tenant for a year or more, and not a tenant at will, 270. b. n. 1.
From year to year, ibid.
Their possession is the possession of the immediate freeholder, 316. b. n. 1.
Tenancy for years and remainder for life are both held of the reversioner, ibid.
See also *Terms for Years*, and 44. a. n. 1. to 54. b. n. 4. both inclusively.

Tender,
Effects of, at different times, 160. b. n. 4. 202. a. n. 3.
To an heir where assigns only are mentioned, 225. b. n. 1 †.
Good or not, 207. a. n. 3. 207. b. n. 3. 211. a. n. 1.

Tenement,
Extent of the word, 6. a. n. 2.
May include dignities and titles of honour having relation to some place, 20. a. n. 3.
Includes rents, 164. a. n. 6, 7.

Tenendum
Ut de honore et non in capite, 108. a. n. 3.

Tenet,
The various applications of the verb, 167. a. n. 1.

Tenures,
Origin and history of, 64. a. n. 1. 191. a. note.
Of lands in the hands of subjects, universally feudal in England, 65. a. n. 1.
Where allodial land subsists, ibid.
Military, abolished by 12 Car. 2. 67. b. n. 1. 85. a. n. 1. 191. a. note, sect. VI. 11.
Feudal, whether established in England before the conquest, 76. b. n. 1. 83. a. n. 1.
In capite, 67. b. n. 1. 77. a. n. 1. 87. a. n. 1. 88. b. n. 11. 108. a. n. 3. 5. 108. b. n. 1. 111. b. n. 4. 169. a. n. 2.
Of the king *ut de persona*, 77. a. n. 1. 108. a. n. 2, 3.
Ut de corona, 77. a. n. 1. 87. a. n. 1. 108. a. n. 2, 3.
Ut de honore, 77. a. n. 1. 108. a. n. 3. 111. b. n. 4.
What, and what incidents to, abolished, and what preserved by 12 Car. 2. 85. a. n. 1. 141. b. n. 4.
By rent for castle guard, their nature, 87. a. n. 1.
Their several incidents, 73. a. n. 2. 106. b. n. 2. 107. a. n. 2. 5.
Guardianship in chivalry abolished by 12 Car. 2. c. 24. 88. b. n. 11.
In capite is improperly mentioned in 12 Car. 2, 108. a. n. 5.
In burgage are not varied by 12 Car. 2. c. 24. 116. a. n. 1.
Baronial, 134. b. n. 1.
Tenure in England is universal, 191. a. note, sect. VI. 1.
Military, the abolition of, ibid. VI. 11.

Tenures,
Under the statute *quia emptores*, 327. a. n. 2. I.
See *Serjeanty.*
See more concerning Tenures, 1. b. n. 1. 3. 6. 21. a. n. 2. 23. a. n. 2, 3, 4. 28. a. n. 8. 65. a. n. 2. 68. b. n. 5. 70. b. n. 2. 93. a. n. 1.
See also *Tenants in Fee*, &c. 105. a. n. 1.

Term,
All Saints and All Souls not within Michaelmas Term, 135. a. n. 2.

Terms,
Legal import of several explained, 266. b. n. 1.

Terms for Years,
What things shall go with, as accessory to the land, 8. a. n. 10.
Not intailable within the stat. *de donis*, though capable of being settled to answer the purposes of an intail, 20. a. n. 5.
How, and by whom, interests in, in the nature of an estate tail, may be barred, ibid.
Pass by a general devise, 42. a. n. 9.
Creation of, by will, cannot be without observing the requisites of the statute, 29 Car. c. 2, 111. b. n. 3.
In esse, are disposable by will as personal estate, yet with some distinction between terms in gross and terms vested in trustees *to attend the inheritance*, 111. b. n. 3.
Assigned to attend the inheritance, 208. a. n. 1.
As they affect dower, ibid.
Merged in the freehold, 278. b. n. 1.
Limited in trust, 290. b. n. 1. II.
Attendant upon the inheritance, inquiry into the doctrine of equity respecting, 290. b. n. 1. XV.
The custody of the deeds and a declaration of trust in favour of a second incumbrancer, are equivalent to an actual assignment, 290. b. n. 1. XV.
When it is safe or unsafe for a purchaser to leave them in the old trustee, ibid.
The possession of a termor for years was considered the possession of the freeholder, 330. b. n. 1.
Whether a term for years merges in a freehold *en auter droit*, 338. b. n. 3.
Are not merged by a fine or feoffment to the termors to the use of strangers, or for making a tenant to the præcipe, 338. b. n. 4.
There is no remitter to, 349. b. n. 1.
For more concerning Terms for Years, see *Conveyancers; Lease; Tenants for Years*, and 44. a. n. 1. to 54. b. n. 4. both inclusively, 111. b. n. 1. 184. b. n. 6. 185. a. n. 1. 185. b. n. 3. 271. a. n. 1. 271. b. n. 1. V.

Test Act,
120. a. n. 3, 4. 391. a. n. 2. II. 5.

Testaments,
Reference to a dissertation on the *lex loci*, with respect to testaments, &c. in general, 79. b. n. 1.
In many countries in Europe the father may appoint guardians by testament, 88. b. n. 6.
To whom we ought principally to resort for information on testamentary subjects, 89. b. n. 6.
See *Devise; Will.*

TI

Testamentum,
The true source of derivation for this, and other similar Latin words, 110. a. n. 1.

Teste me ipso,
Clause of, when first introduced, 7. a. n. 2.

Thane-Land,
Coke's explanation of, opposed, 86. a. n. 2.

Thane, and Thane-Land,
5. b. n. 3.

Timber,
To whom it belongs, if cut by tenant in tail after possibility, &c. 27. b. n. 2.
If cut by tenant for life, ibid.
Beech and whitethorn may be timber, by custom, 53. a. n. 10.
See also 53. b. n. 1. 115. a. n. 15. 220. a. n. 1*.
See *Waste*.

Time,
Of memory, 44. a. n. 1. 86. b. n.*. 105. a. n. 1. 109. b. n. 2. 111. a. n. 5.
Distinction of time, as to the question, whether the *new* deaneries are *donative* or *presentative*, 96. a. n. 4.
Limitation of time, 115. a. n. 1, 2, 3, 4, 5, 6, 7.
Lapse of time may make a title against the king by prescription, &c. or drive the king to a suit; or wholly extinguish his title, if not exerted within a limited number of years; for the rule, *nullum tempus occurrit regi*, is subject to various exceptions, both at *common law* and by *statute*, 119. a. n. 1.
Whether the *ultimum tempus pariendi* allowed by law may be extended beyond forty weeks, 123. b. n. 1, 2.
Priority of time in an instant, 185. b. n. 1.
Length of time is against a claim for dower, 206. a. n. 1.
The effect of time in barring legal remedies and conferring titles, 262. a. n. (B).
See *Limitation of Time*.

Tithes,
Whether demesne, 17. b. n. 4.
Lands, purchased by the religious orders after the council of Lateran, not exempt from, 18. b. n. 2.
With respect to dower, 32. a. n. 3.
Leases of, how affected by 5th Geo. 3, c. 17, 44. b. n. 3.
Whether rent on lease for years of tithes is incident to the reversion, 47. a. n. 2.
Grantable as copyhold by copy, 58. b. n. 9.
Whether tithe of timber may be prescribed for against the statute of *sylva cædua*, 115. a. n. 15.
Remedy for predial tithes under 2 Ed. 6, c. 13, 159. a. n. 3.
Under £. 10, how recoverable from Quakers in London, by 7 & 8 W. 3, c. 34, 159. a. n. 4.
Under 40 *s.* how to be recovered by 7 & 8 W. 3, c. 6, ibid.
In London, are recoverable before the lord mayor, with an appeal to the chancellor, ibid.
Equitable remedy for tithes, by bill either in Chancery or the Exchequer, ibid.
Whether formerly cognizable in Chancery or the Exchequer, ibid.
Extra-parochial, some insist, were ever cognizable in the Exchequer as a court of revenue, ibid.
Reference to cases, &c. ibid.

TR

Title by which bishops sit in parliament,
134. b. n. 1.

Titles of honour,
Whether they admit of curtesy, 29. b. n. 1. 325. b. n. 2.
With respect to descent, curtesy, and the king's prerogative in case of abeyance, 165. a. n. 6, 7.
The effect of superadding an earldom in tail *male* to one having before a barony in fee, with respect to descent, 165. a. n. 7.
See *Dignities*.

Titles (*in respect to estates*),
Mere rights and titles in *law* are deemed *estates* in *equity*, as to curtesy, 29. a. n. 6.
By prescription, 114. b. n. 1.
It is more equitable to leave the validity of subsisting titles to the courts of justice than to destroy them by a retrospective act of parliament, 120. a. n. 4.
Fines are levied to guard a title against claims, which under the common statutes of limitation, might subsist for 20 years, or a much longer time, 121. a. n. 1.
Dormant, may be extinguished by a fine, ibid.
Paramount, 148. b. n. 3.
Under a devise to two and the survivor of them, and the heirs and assigns of the survivor, are accepted, with a conveyance from the trustees, and without the concurrence of the heir at law, 191. a. n. 1.
Are excepted, notwithstanding the wife, or husband, of a mortgage in fee is entitled at law to dower or curtesy, 205. a. n. 1. 4thly.
The practice of conveying titles to estates, with respect to terms of years, and right of dower, 208. a. n. 1.
Of entry, 252. b. n. 1.
And rights might be released, but were not assignable at common law; how the common law is altered in this respect, 265. a. n. 1.
Depending on the destruction of contingent remainders, 290. b. n. 1. V. 4.
The different degrees of title, in a disseisor, &c. 347. b. n. 1.
Where the purchaser has fair notice of a defect, and the covenants do not extend to it, 384. a. n. 1.
As to the purchaser's remedy, for a defect, exclusively of the warranty or covenants, or where the same do not reach the defect, ibid.

Tourns,
Frequency of holding, how affected by *Mag. Char.* 115. a. n. 10, 11, 12, 13.

Towns,
Difference between a *town* and a *borough*, 108. b. n. 2, 3. 4.
Upland, 110. b. n. 2.
Corporate, 112. b. n. 2.
See also 110. b. n. 2. 125. a. n. 2.

Trade,
47. a. n. 14. 172. a. n. 7. 182. a. n. 4. 191. a. note, sect. VI. 8, 9. 206. b. n. 1.

Transmutation of possession,
Distinction between uses raised by transmutation of possession, and those raised without such transmutation, 123. a. n. 8. 271. b. n. 1. VI.

Traverse,
Seisin of fealty doth not estop the tenant from traversing the seisin of other services, 68. a. n. 6.

Treason,
13. a. n. 7. 35. b. n. 2. 74. b. n. 1. 125. a. n. 2. 133. a. n. 4. 156. a. n. 4, 5. 156. b. n. 2. 157. a. n. 4. 157. b. n. 8.
See *Attainder*.

Treasure trove,
119. a. n. 1.

Trees,
Whether trespass (by a copyholder) lies against the lord for cutting trees, 61. a. n. 4.
Cut down by tenant for life liable to impeachment of waste, may be seized by the person having the first remainder of inheritance, 218. b. n. 2.
See *Waste*.

Trespass,
Action of, where it lies, 57. b. n. 4. 60. b. n. 4.
Procurers of, statutes relative to, 181. a. n. 1.
Whether *cestui que use*, before entry, has the possession for all purposes, except trespass, 266. b. n. (A).
See more concerning Trespass, 33. a. n. 10. 57. a. n. 4. 57. b. n. 3. 61. a. n. 4. 88. b. n. 15. 122. a. n. 7.

Trials,
Difference in the mode of trying the existence of public and private statutes, 98. b. n. 1.
For crimes, are liable to be delayed, by challenges for default of hundredors, or with respect to the *visne* of the indictment, 125. a. n. 2.
New trials may be granted in civil cases, but not in criminal or penal cases, 155. b. n. 5.
Error on the determination of facts cannot be reversed but by an attaint or a new trial, 259. b. n. 1.
By wager of battle, 294. b. n. 1.
See more concerning Trials, 16. b. n. 3. 74. a. n. 4. 74. b. n. 1. 115. a. n. 4. 125. b. n. 1. 126. a. n. 2. 129. b. n. 2. 132. b. n. 1. 154. a. n. 2. 155. b. n. 4. 206. a. n. 1. 272. a. n. 1.

Trinity College, Cambridge,
Whether the visitatorial power granted to the bishop of Ely over the college, extended to his successors, 94. b. n. 5.

Triors,
Of challenges to jurors, 158. b. n. 2.

Trover,
A remainder-man in fee or tail may bring an action of trover, in respect to trees cut down and made use of by tenant for life, where no action of waste would lie, by reason of an interposed estate of freehold, 218. b. n. 2.

Trusts,
Whether discharged by forfeiture, 13. a. n. 7.
Whether guardianship in socage is a trust so *personal* as not to be transmissible to executors or grantees, 90. b. n. 1.
To sell after death of a tenant for life, at what time a sale is authorised, 113. a. n. 2.
Whether a power given to executors to sell is a *personal* trust, ibid.

Trusts,
Equity never wants a trustee, 113. a. n. 2. 290. b. n. 1. VI.
Constructive trusts are not within 7 Ann. c. 19, 171. b. n. 5.
Are subject, as far as may be, to the established rules of the feud, and are not governed by the rules of the civil law, 191. a. note, sect. VI. 11.
Attempt to fix on trusts the feudal incident of escheat, ibid.
Of personal estate corresponding with cross remainders of real estate, 195. b. n. 1.
Trust estates pass by a general devise, 205. a. n. 1. 5thly.
Of lands devised, to pay off debts, 208. a. (208. b. 13th ed.) n. 1. 2dly.
Instance of, under which *cestui que trust* became virtually entitled, and his creditors were excluded, 223. b. n. 1.
Of money to be raised under a term for years, with no prior estate tail, should not protract the vesting of the money beyond the boundary prescribed for the suspense of personal estate, 271. b. n. 1. V.
Should follow the legal estate of the land, ibid. n. VII. 2.
Reference to works upon uses and trusts, ibid. n. 1. VIII.
Notice express or implied of a trust. See *Notice*, 290. b. n. 1.
An elementary outline of some leading points in the doctrine of trusts affecting real property, 290. b. n. 1.
The introduction of trusts into English jurisprudence, ibid. I.
One of the principal circumstances to which trusts owe their rise, ibid. I. 1.
The other principal circumstance, ibid. I. 2.
New judicial power introduced by the writ of *subpœna*, ibid. 1. 3.
There are three ways of making a trust notwithstanding the statute of uses, ibid. II.
Trust, definition of, and distinction between trusts and commons, rents, &c. ibid. III.
On limitations to trustees for preserving contingent remainders, and the doctrines of equity on cases arising from the destruction of those remainders by the trustees, ibid. IV.
The gradual progress of settlement, ibid. V.
The first attempt at a settlement, ibid. V. 1.
The gradual progress of settlements, &c.
Mode of settlements after the statute *de donis*, ibid. V. 2.
- - - - - - - - after the introduction of common recoveries and fines, ibid. V. 3.
The fourth system of settlement, and the introduction of trustees for preserving contingent remainders, ibid. V. 4.
The fifth and ultimate stage of settlements, and the introduction of powers under the statute of uses, ibid. V. 5.
Trustees either are such by the express or implied declaration of the party, or are made such by a court of equity, ibid. VI.
Equity acts upon the person and not upon the thing, ibid. VII.
It is sometimes doubtful, whether an estate be legal or equitable, ibid. VIII.

Trusts,
An elementary outline, &c.—*continued*.
Distinction between powers and trusts, ibid. IX.
Implied trusts are not within the statute of frauds ibid. X.
On tenant right of renewal, ibid. XI.
On settlements, where real estate is limited in strict settlement, and a leasehold for lives, or a leasehold for years or other personal estate is intended to be settled upon corresponding trusts, ibid. XII.
Attempts made by the legislature, at different times, to remedy the mischief arising from the secret transfer of property to which the statute of uses has given rise, ibid. XIII.
The courts have in part remedied the mischief arising from the admission of trusts, with respect to the *cestui que* trust, by making persons paying money to trustees, with notice of the trust, answerable, in some cases, for the proper application of it, ibid. XIV.
With regard to personal estate, ibid. XIV. 1.
With respect to the devise of a real estate for the payment of debts, ibid. XIV. 2.
As to legacies, ibid. XIV. 3.
Where lands are devised to trustees, upon trust to raise as much money, as the personal estate shall fall deficient, in paying the testator's debts and legacies, ibid. XIV. 4.
Where money secured upon mortgages is made the subject of marriage settlements, and assigned upon various trusts, ibid. XIV. 5.
The manner in which courts of equity have attempted to prevent the mischief arising from the admission of trusts, with respect to the public at large, ibid. XV.
Analogy between the decisions of courts of equity and the decisions of courts of law, with respect to the rule that equity followeth the law, ibid. XVI.
In one remarkable instance, this analogy has been altogether abandoned, ibid. XVII.
To pay over rents, &c. 290. b. n. 1. II.
Breach of trust, ibid. V. 4. XI.
Implied may be rebutted by circumstances in evidence, 290. b. n. 1. X.
Of accumulation, ibid. XVII.
Executory, of a term of years, how far good, 327. a. n. 2. II. 1.
A release of power, may be a breach of trust, and therefore inoperative, 342. b. n. 1. IV.
Construction of the statutes respecting administration, where a wife is entitled only to the trust of a chattel real, or other trusts, &c. and the husband survives, 351. a. n. 1.
See more concerning Trusts, 29. a. n. 6. 31. b. n. 3. 36. b. n. 5. 48. a. n. 3. 88. b. n. 11. 16. 111. b. n. 1. 3. 112. a. n. 6. 112. b. n. 2. 129. a. n. 1. 169. a. n. 2. 205. a. n. 1. 4thly. 271. b. n. 1. II. III.

Trustees,
Discharged, if robbed without their wilful default, 89. a. n. 5.
Infant trustees within 7 Ann. c. 19. may by order of chancery upon petition convey the estates. But infants cannot convey under a power without an act of parliament, 171. b. n. 5. 271. b. n. 1. VII. 2.
Infant trustees within 7 Ann. c. 19. may both levy fines and suffer common recoveries, 247. a. n.
Trustees for preserving contingent remainders take a vested estate, 285. a. n. 2. 337. b. n. 2.
The distinction between trusts and commons, rents, &c., is particulary important, with respect to limitations to trustees for preserving contingent remainders, 290. b. n. 1. IV. V. 4.
What gave rise to the introduction of trustees for preserving contingent remainders, ibid. V. 4.
Distinction between a trust to sell and a mere *power* to sell, 113. a. n. 2. 290. b. n. 1. IX.
Whether, in case of a feoffment, &c. by tenant for life, the estate of the trustees for preserving contingent remainders vests in them in possession, before their entry for their forfeiture, 342. b. n. 1. IX. 1.
It is not desirable that the legal fee should be outstanding in a single trustee, 379. b. n. 1.
Conveying merely as trustees may convey by the word "grant," 384. a. n. 1.
With what qualification it is usual for trustees to convey, 384. a. n. 1.
See more concerning Trustees, 13. a. n. 7. 57. b. n. 2. 112. a. n. 6. 112. b. n. 2.

Turf,
Effect of a covenant by a purchaser that the vendor his heirs and assigns might dig turf, 165. a. n. 1.

Turning to a right,
The usual meaning of the expression, and its more general sense, with respect to the operation of fines, 332. b. n. 1.

V. & U.

Value,
And damages with respect to dower, 33. a. n. 1.
As to waste, 54. a. n. 9, 10, 11.
Double (under two acts of Geo. II.) for holding over 57. b. n. 2.
Guardian in chivalry might have had the single value of marriage without tender, 82. a. n. 1.
Treble (under 2 Ed. VI. c. 13.) for not settling out tithes, 159. a. 3.

Vassal and *Lord*,
64. a. n. 1.

Vellum MSS, of Littleton,
163. a. n. 1.

Vendor,
Cases in which purchasers often rest, in some measure at least, on the honour of the vendor, 271. b. n. 1. VII. 2.
See *Powers, Purchase, Purchasers*.

Venire facias,
125. a. n. 2. 125. b. n. 1. 156. b. n. 3. 157. b. n. 3. 158. a. n. 4. 169. a. n. 2. 272. a. n. 1.

Verdict,
General, 155. b. n. 5.
Special, ibid.
See more concerning Verdicts, 125. a. n. 2. 156. b. n. 5. 226. a. n. 2. 202. b. n. 1. 303. a. n. 1.

Vergivian Sea,
107. a. n. 6.

Vestura (Sola) Terræ,
122. a. n. 6.

Vesture,
Where the vesture of land means *all* the profits, 4. b. n. 1.
Difference between grants by the *king*, and those by a subject, as to vesture of land, ibid.

Viceconsul,
Among the Romans, 168. a. n. 5.

View,
Feoffment within view, 48. b. n. 4.
Of frankpledge, 115. a n. 10.
Of the forester, as to woods cut down within a forest, 115. a. n. 13.

Villenage,
How far the marriage of a villein or neif with a free person was an enfranchisement, 123. a. n. 3. 6.
Tenure by villeinage is not altered by 12 Car. II. c. 24, 141. b. n. 4.
Villein regardant, 151, a. n. 3.
See more concerning Villenage, 116. a. n. 2. to 141. b. n. 4. both inclusively.

Virgata Terræ,
69. a. n. 2. 69. b. n. 1.

Visne,
Out of a wrong place, by assent of parties, and so entered of record, whether it shall stand, 126. a. n. 1.
See also 125. a. n. 2. 125. b. n. 1.

Ultimum tempus pariendi,
123. b. n. 2.

Uncertainty,
8. b. n. 5. 6. 25. b. n. 4. 42. a. n. 7. 60. a. n. 1. 208. a. n. 1. 290. b. n. 1. XIII.

Underlease,
Is no breach of a covenant not to assign a lease or the estate thereby demised, 308. a. n. 1.
There is no privity of contract between an original lessor and an underlessee, 308. a. n. 1.

Undertaking special,
To carry safely, 89. a. n. 9.

Union,
Between Great Britain and Ireland, 141. b. n. †.

Unity,
Of interest is essential to a jointenantcy, with respect to two inconsistent devises in the same will, 112. b. n. 1.

Voir dire,
Jurors, as well as witnesses, may be examined upon a *voir dire*, 158. b. n. 2.

Vote,
No person holding by *copy of court roll* is on that account entitled to vote at the election of knights of the shire, 59. b. n. 1.

Vote,
Whether bishops can vote in the preliminary steps of a bill of attainder, 134. b. n. 1.

Voucher,
In wardship in dower, how, 38. b. n. 2.
Where judgment shall be against an heir, and where against a vouchee, with respec to dower, 39. a. n. 6.

Voucher,
Judgment (in a common recovery) after the vouchee's death, is too late, 135. a. n. 1.
In France, of a second or third person to warranty, 365. a. n. 1.
Of both heir at common law and heir in borough English, 376. a. n. 1.
As to curtesy, 384. b. n. 1.
The averment or counterplea allowed by the statute of vouchers, 385. b. n. (B).
By feoffee as assignee, ibid. n. 2.
One of two who are vouched, makes default, the *grand cape* may issue against the defaulter, 386. b. n. 1.
One of two who are vouched dies, the survivor only, or the survivor and heir jointly, may be vouched, ibid.
For more concerning Voucher, see *Warranty*, and 39. a. n. 2. 46. b. n. 5. 215. b. n. 1. 278. b. n. 1. 366. b. n. 1.

Voyages royal,
71. a. n. 1. 108. a. n. 1.

Usage,
95. a. n. 4. 134. b. n. 1. 141. a. n. 2. 4. 261. a. n. 1. 270. b. n. 1.

Uses,
Effect of a covenant to stand seised to the use of an alien, 2 b, n. 1.
Effect of a feoffment to an alien and another to uses, ibid.
Effect of a feoffment (before 27 H. 8, c. 10.), by an heir seised *ex parte materna* to the use of him and his heirs, 13. a. n. 1.
The doctrine, that a use (at common law) ensues the nature of the land, ought to be understood with many restrictions, ibid.
Cases in which *cestui que use* is in of his ancient use, and not by purchase, 12. b. n. 2. 13. a. n. 2. 22. b. n. 2.
Whether the land is discharged of the uses, when a feoffee to uses is attainted, or has only committed treason, at the time of the conveyance, 13. a. n. 7.
Sense in which the doctrine, that the king cannot be a trustee, should be understood, ibid.
Charitable uses, 112. b. n. 2.
Superstitious uses, ibid.
In what cases uses may be raised or declared, 123. a. n. 8.
Distinction between uses raised by transmutation of possession, and those rated without such transmutation,
With respect to bastards, 123. a. n. 8.
Generally, in respect to the mode by which conveyances to uses operate, 271. b. n. 1. VI.
Difference between an estate executed by the statute of uses, and an estate at common law, with respect to jointenancy and tenancy in common, 188. a. n. 13.
The introduction of uses (at common law) is one of the most important circumstances in the

Uses,
history of the decline of the feud, 191. a. note, sect. VII. 11.
The stat. 1 Rich. 2, c. 9, was one of the steps taken to extirpate uses, ibid.
The 27 H. 8, c. 10, was intended to extirpate uses entirely, ibid. 271. b. n. 1. III. 290. b. n. 1. I. 3.
Nature of a power of entry limited by way of use; as in case of a feoffment, &c., to the use intent and purpose that *B.* may receive out of the land conveyed a certain annual sum, &c. 203. a. n. 3. III.
The statute of uses greatly contributed to the introduction of conditional limitations, 203. b. n. 1. III.
By the revocation of a tenant for life, uses may determine without entry or claim, 218. a. n. 2.
Whether under the statute of uses, *cestui que use* has the possession for all purposes except trespass, 266. b. n. (A).
Some observations on conveyances at common law, and those which derive their effect from the statute of uses, 271. b. n, 1.
Of feoffment and grants, ibid. I.
Definition and explanation of a feoffment, ibid. I. 1.
Signification of a grant, ibid. I. 2.
Difference supposed to exist in the operation of feoffments and grants, ibid. I. 3.
The introduction of uses; and the difference between uses at common law, and uses since the statute, 27 H. 8, ibid. II.
Uses have been preserved under the appellation of trusts, ibid. III.
The nature of the estates of the feoffee and the *cestui que use,* ibid. IV.
The limitations and modifications of landed property, unknown to the common law, which have been introduced under the statute of uses, ibid. V.
The mode by which conveyances to uses operate, 271. b. n. 1. VI.
With respect to a bargain and sale, and covenant to stand seised, ibid. VI. 1.
With respect to a feoffment, fine, common recovery, and lease and release, ibid. VI. 2.
The doctrine of powers deriving their effect from the statute of uses, ibid. VII.
As to the mode in which such powers operate, ibid. VII. 1.
As to the relation which the deeds, by which powers are executed, bear to the deeds by which the powers were created, ibid. VII. 2.
On uses of rents, ibid. VII. 3.
On uses not executed by the statute, ibid. VIII.
Whether the statute extends to uses created by wills, ibid. VIII. 1.
As to copyhold estates, ibid. VIII. 2.
As to leases for years, ibid. VIII. 3.
To serve uses limited in contingency, it is necessary that there should be a seisin somewhere, ibid. n. 1. IV.
With respect to the difficulty about the precise nature of the seisin to serve contingent uses, two systems were found to be open to unanswerable objections; and by a third system, or the doctrine of *scintilla juris,* the difficulty was cleared up, ibid.
Springing or secondary, limited on a fee, must necessarily vest within a certain period, ibid. n. 1. V.
Secondary uses limited upon or after an estate in tail may be limited generally, ibid.
Uses arise either by the act of God, or by the act of man, ibid. VII. 1.
There is, at least, ground to argue that, generally speaking, the use limited by the power last executed will take place of all the uses created by powers previously executed, unless the contrary is expressed or implied in the deed, ibid. VII. 2.
Some of the most interesting doctrines of the law of uses are involved in the points in Hopkins *v.* Hopkins, ibid.
One of the chief objects, both of the legislature and the judicature of this kingdom, in their regulations upon the subject of uses, ibid. VIII. 3.
Writers upon uses and trusts, ibid. II. VIII. 3.
A use upon a use is not executed, ibid. VII. 1. 290. b. n. 1. II.
What is provided and declared by the statute of uses, ibid.
With respect to the destruction of contingent uses at common law, two things are said to be necessary to the standing seised to a use at common law, ibid. IV.
It is sometimes doubtful whether a use or trust is executed or not; result of the cases upon the point, ibid. VIII.
Uses have been preserved under the name of trusts, ibid. XIII.
When rent is limited by way of use under the statute, the use is immediately executed, 315. a. n. 1.
Conditional or contingent uses should be distinguished from a remainder, 203. b. n. 1. 271. b. n. 1. V. 327. a. n. 2. II.
How far shifting and secondary uses are good, 327. a. n. 2. II. 1.
Form of a clause enjoining persons, to whom estates are limited in strict settlement, to take the name and use the arms of the settler, ibid. II. 2.
Conveyances under the statute of uses, as to discontinuance, 330. a n. 1.
Whether uses under the statute are executed in any case where no use or trust would have arisen at common law, 342. b. n. 1. VIII.
Springing or shifting, or executory uses, whether arising under a limitation, or by the exercise of a power, are (in the opinion of the editor) equally to be barred by a common recovery, ibid. IX. 2.
In what respects the doctrine of remitter was altered by the statute of uses, 347. b. n. 1. 348. b. n. 1. 349. b. n. 1. 353. b. n. 1.
For more concerning uses, see *Powers,* 299. b. n. 1. and 14. b. n. 5. 19. b. n. 3. 22. b. n. 2. 23. a. n. 1. 42. a. n. 7. 10. 48. a. n. 3. 49. a. n. 1. 88. b. n. 11. 111. b. n. 1. 5. 112. a. n. 1, 2. 117. a. n. 3. 272. b. n. 1.

Usufrust and Usufructuary,
In the civil or Roman law, 192. a. note, sect. II. VI. 5.

Usurpation,
With respect to advowson, 115. a. n. 6. 186. b. n. 6. 249. a. n. 2.

Usury,
Reference to a remarkable case on the statutes of usury, 4. n. a. 1.

Usury
An agreement expressed in a mortgage deed, that the mortgagee should have the profits, is an usurious contract, and consequently the deed and mortgage are void, 222. b. n. 2.

Utrum or *Juris utrum*,
155. a. n. 1.

W.

Wages,
And prize money, earned by apprentices in the *seafaring* way in another service, have been recovered by those to whom they were bound, 117. a. n. 1.

Waifs,
121. b. n. 7. 119. a. n. 1.

Wainscot,
53. a. n. 5.

Wait (*Lying in*)
127. a. n. 2.

Waived,
A woman is not outlawed, but waived, 122. b. n. 4.

Waiver or *Waver*,
33. b. n. 10. 34. b. n. 1. 36. b. n. 7. 52. a. n. 3. 99. a. n. 1. 120. a. n. 4.
See *Baron and Feme, Dower, Election.*

Wales,
Gavelkind descent in, abolished, 175. b. n. 3.
The customary division of personalty on a death, in restraint of the testamentary power, except as to a third or moiety, prevailed in various districts of Wales, &c., 176. b. n. 5.
See more concerning Wales, 59. b. n. 7. 61. a. n. 1. 95. a. n. 4. 155. a. n. 3. 157. a. n. 4. 176. a. n. 1. 176. b. n. 9.

War,
Aliens are disabled to sue in a personal action, by a proclamation of war against their country, but not so by a proclamation prohibiting commerce, 129. b. n. 2.
How a proclamation of war is usually qualified as to such subjects of the enemy as are resident here, 129. b. n. 3.
What is time of war, in a legal sense, and how triable, 249. b. n. 1.

Wards and Liveries,
the court of, 85. b. n. 1.

Wardship,
Of land held by knight's service belonged to the lord, but the father had the custody of the body, and the marriage, even against the king, 84. a. n. 2.
Of the heir of a disseisee, 266, b. n. 1.
For more concerning Wardship, see *Guardian*, and 23. a. n. 4. 33. a. n. 3. 38. b. n. 1. 39. a. n. 2. 46. b. n. 4, 5. 54. a. n. 4. 67. b. n. 1. 78. a. n. 1. 79. a. n. 1. 90. b. n. 4. 107. a. n. 2. 108. a. n. 1. 115. a. n. 6. 121. b. n. 2. 161. a. n. 4. 169. a. n. 2. 191. a. note, sect. VI. II. 271. b. n. 1. II.

Warrant of the Peace,
181. b. n. 4.

Warrantia Chartæ,
291. b. n. 1.

Warranty,
By a person who dies seised only in law, does not bind the heir, 11. b. n. 3.
The benefit of a warranty annexed to land, shall go as incident thereto, to a special heir, or assignee, 12. a. n. 1.
Lineal, how far a bar, 173. a. n. 3.
Paramount, 174 a. n. 4. 174. b. n. 2.
Its effect, 265. b. n. 1.
As to the issue in tail and the reversioner, 327. a. n. 1. V.
Distinction between warranty descending *to* and warranty descending *upon* the heir, 328. a. n. (A).
As to discontinuance, 330. a. n. 1. VII.
Outline of the doctrine of warranty, as to what it was formerly, and what it is at present, 365. a. n. 1. 373. b. n. 2.
In law or deed, among the civilians, 365. a. n. 1.
When an action of warranty might be brought by the Roman law, and when by the law of France, ibid.
As to voucher, and the degrees, &c. in France, ibid.
Warranty, in this country, is of feudal extraction, ibid.
The doctrine and practice of warranty in the early ages of the feudal law, ibid.
Implied by homage, ibid.
Annexed to homage ancestrel differed from express warranty, ibid.
Rebutted the lord from claiming the land, &c. as well as bound him to defence and recompense, ibid.
How affected by subinfeudation and the statute *quia emptores*, ibid.
There is no voucher to warranty, it is said, in a writ of *nouvelle disseisine*, 366. b. n. 1.
Commencing by disseisin, 366. b. n. 1. 373. b. n. 2.
Warranty of ancestor, tenant for life, may, in case of forfeiture, be defeated by the heir's entry or claim in the ancestor's lifetime, 367. b. n. 1.
Lineal and collateral, difference between, 370. a. n. 1.
And assets, barred the king of a possibility of reverter, at common law, and the reason of it, 370. b. n. 1. 372. b. n. 3.
Of a parson, &c. why it does not bind his successor, 370. b. n. 1.
Estate tail barred by, where, 372. b. n. 1.
Warranties by tenants for life, and collateral warranties by ancestors having no inheritance in possession, are made void by statute, 373. b. n. 1. 224. a. n. 1.
The effects and operation of warranty at common law,
1. In conveyances in fee,
2. - - - - - - in fee simple conditional,
3. - - - - - - for life,
4. - - - - - - for years,
} 373. b. n. 2.
Since the statute of Gloucester, 373. b. n. 2.
Since the statute *de donis*, ibid.
Since the statute 11 H. 7. c. 20. ibid.
Since the statute 4 & 5 Ann. c. 16. ibid.
At the common law, and since the statutes, as to the purpose of rebutter, ibid.
The cases, where the operation of warranty still prevails, ibid.
Warranties are all collateral in one sense of the word collateral, ibid.

Warranty,
Why in some cases warranty bars the heir from claiming, and in others it does not, ibid.
Why by the statute *de donis* the warranty of tenant in tail did not bar issue without assets, but was a bar with assets, ibid.
How the doctrine of the binding of lineal and collateral warranty, was considered by lord Vaughan and lord Holt, ibid.
Collateral warranty is allowed to be a bar, for the security of purchasers and persons in possession under a title by descent, ibid.
Reference to lord Vaughan's reports on the subject of warranty, 374. a. n. 1.
As to voucher, 376. a. n. 1. 384. b. n. 1. 386. b. n. 1.
Trustees may safely convey by the word *grant*, ibid.
The word *grant* implies no covenant when there is an express covenant;—or, implying a covenant, the express covenant qualifies its import, ibid.
In some conveyances, the word *grant* is necessary as the operative word, ibid.
Conveyances that may have effect without the word *grant*, ibid.
Whether implied at this day by the word *grant*, or *give*:
1. In conveyances in fee,
2. - - - - - - - in tail,
3. - - - - - - - for life,
4. - - - - - - - for years,
} ibid.
In conveyances in fee simple by the word *give*, since the statute *quia emptores*, warranty is personal to the grantor, unless it arises from express contract, ibid.
In gifts in tail, and in leases for life, by the word *give*, warranty is a necessary consequence of tenure, and cannot be restrained by express covenant, ibid.
The word *give* in feoffments creates a warranty from the person of the feoffor, under the statute *de bigamis*, ibid.
Is not implied by the word *grant* in a conveyance of an inheritance, ibid.
The word *grant* originally created a warranty only when there was a tenure between the party granting and the party to whom the grant was made, ibid.
Whether it is implied, where a person having a term of years only, conveys the lands as an estate in fee simple to another and his heirs by the word "*grant*," ibid.
Warranty is implied in a lease for years, and is in nature of an implied general covenant, and may be restrained by an express covenant, ibid.
Implied in a conveyance by a trustee, would be restrained by his covenant against encumbrances, 384. a. n. 1.
The reason of the implied covenant is a presumed contract, to give a recompense to a purchaser taking a defective title, and paying a valuable consideration, 384. a. n. 1.
Trustees conveying as trustees, cannot be presumed to warrant, ibid.
Trustees, to prevent all question, should, by words of declaration, negative the effect of the word grant, to create a warranty, ibid.
Observations on the remedy of purchasers for defects of title, from facts or circumstances which the express words of the covenant to them, do not extend.

Warranty,
1. By action of deceit,
2. By bill in chancery,
3. Under inherent covenants from former vendors,
} ibid.
When a purchaser consents to take a defective title, his agreement to do this should be expressed, ibid.
The question whether the heirs shall vouch, where there is a warranty to a man without the words "and his heirs," was discussed in a recent case, 384. b. n. (N.)
Is joint where the estate is joint, and several where the estates are several, 385. b. n. 3.
Warranty cannot be created by will, 385. b. n. 4.
Effect of warranty by a father and his heir apparent, 386. a. n. 1.
Warranty does not extinguish the right; it only suspends the exercise of it: and a release of the warranty leaves the right at large, 387. a. n. 1.
Where warranty is temporary, the thing recovered may be of perpetual duration. A warranty *of a fee* is not a warranty *in fee*, 387. a. n. 2.
A fee simple may be recovered upon a warranty for life, ibid.
Determines, if the estate to which it is annexed is defeated entirely, and not as to a particular estate only, 387. a. n. 1. 388. a. (388. b. 13th ed.) n. 1. 389. a. n. 2.
Warranty and voucher of heir at law, and heir in Borough English, 390. a. n. (B).
Feffee cannot take advantage of the warranty to him unless he is tenant, 389. a. n. 2.
Upon a covenant to warrant, and defend the land to a lessee, covenant lies whether the lessee is evicted rightfully or tortiously, 389. a. n. 2.
There may be a remitter because a warranty is not executed, as in the case of a fine *sur render*, 390. b. n. 1.
See more concerning Warranty, 12. a. n. 2. 20. a. n. 1, 2. 21. a. n. 2. 7. 23. a. n. 6. 31. a. n. 6. 35. a. n. 8. 39. a. n. 6. 50. b. n. 1. 67. b. n. 1. 121. a. n. 1. 173. b. n. 4. 185. a. n. 3. 187. a. n. 3. 191. a. note, sect. VI. 8. 213. b. n. 1. 215. b. n. 1. 239. b. n. 1. 251. b. n. 3. 271. b. n. 1. I. 1. 291. b. n. 1. 390. a. n. (A).

Warren,
Ferrets and nets may be distrained for *damage feasant*, but not if they are in the hands of a man, or out of the warren, 47. a. n. 13.
Distinction between a legal warren and mere land stored with conies, as to waste by ploughing the land, 53. a. n. 8.
Stopping and digging coney burrows is not waste, ibid.

Waste (*Act or action of*),
By or against donee in tail after possibility, &c. 27. b. n. 2.
How and by whom it shall be brought or assigned, 53. a. n. 2. 53. b. n. 7. 10.
What is, 53. a. n. 3, 4, 5, 6, 8, 9, 10, 11. 53. b. n. 1. 3, 4, 5.
Amongst tenants in common, 53. b. n. 1.
Whether it lay, at common law, against tenant by the curtesy, ibid. n. 11.
Where, though it does not lie, equity will interpose by injunction, 54. a. n. 5.
Where it lies, or not, ibid. 54. b. n. 1. 57. a. n. 4. 218. b. n. 2. 273. a. n. 2. 331. a, n. 1.

WH

Waste (Act or Action of),
Grantee of reversion shall have waste, 54. a. n. 6.
Of what value it shall be, ibid. n. 9. 10.
Permissive, action on the case lies not for, unless on an express agreement, 57, a. n. 1.
The progress of the law as to the accidental burning of houses, so far as regards landlord and tenant, ibid.
Tenants by stat. merchant and stat. staple are not punishable for waste, ibid.
On the death of one of two parceners, who shall join in action of waste, 63. a. n. 1.
Whether *permissive* waste is a forfeiture, in respect to copyhold estates, ibid.
Equity sometimes relieves against a forfeiture for waste, in respect to copyhold estates, ibid. n. 2.
Where an action of waste lies, 218. b. n. 2. 272. b. n. 2. 273. b. n. 1.
Things wasted and severed from the inheritance may be seized by the owner of the fee, or he may bring trover where no action of waste would lie, 218. b. n. 2.
The privilege given by the words, *without impeachment of waste*, is annexed to the privity of estate, 220. a. n. 1.*
Effect of the words *without impeachment of waste*, ibid.
Destructive or malicious waste, ibid.
To what time recovery in an action of waste relates, 234. a. n. 1.
Whether *quod ei deforceat* lies upon recovery by default, or by *nihil dicit*, against tenant in dower in waste, 355. a. n. 1.
Attaint lies, if in waste the jury find falsely, or if it be found against the tenant by false oath, where the assise is awarded for default, ibid.
Whether in waste, the damages, and not the place wasted, are the principal, ibid.
The right of depasturing is originally lodged in the owner of the waste whereof he is lord, 261. a. n. 1.
See more concerning Acts and Actions of Waste, 28. a. n. 6. 42. a. n. 3, 4. 44. b. n. 7. 46. a. n. 2. 53. a. n. 1. 11. 53. b. n. 2. 6. 8, 9. 54. a. n. 1, 2, 3, 4. 7, 8. 11. 54. b. n. 3. 57. a. n. 2. 155. a. n. 3. 158. b. n. 3. 219. b. n. 1. 251. a. n. 1. 271. a. n. 1.

Water,
Is not by that name demandable in a *præcipe*, 4. a. n. 3.
The soil does not pass, if a man grant *aquam suam*, 4. b. n. 3.
By what name land covered with water shall be demanded, ibid.

Ways,
56. a. n. 3.

Weights,
159. b. n. 3.

Westminster,
Though not a borough corporate, is a city by express creation, 109. b. n. 2, 3.
Effect of 4 Ann. c. 16, and 24 Geo. 3. c. 18, with respect to actions or suits at Westminster, 157. a. n. 4.

WO

White-thorn,
May be timber by custom, 53. a. n. 10.

Whole Blood,
14. a. n. 4.
See *Half Blood*.

Wife,
113. a. n. 2.
See *Baron and Feme*.

Will,
Of personal estate, at what age it may be made, 89. b. n. 6.
History of the power of disposing of land by will, 111. b. n. 1.
Of lands devisable by custom, is within 29 Car. 2. c. 3. 111. a. n. 3.
The statute of wills, 88. b. n. 11. 111. b. n. 3. 174. a. n. 3.
In writing, 111. b. n. 4.
Nuncupative, ibid. 111. a. n. 3.
Rule of construction, 112. a. n. 1.
Declaring that lands shall be sold by executors, 236. a. n. 1.
Construction of wills as to general and particular intention, 271. b. n. 1. VII. 2.
Construction of wills, as to technical expressions, ibid.
Powers under wills, 271. b. n. 1. VIII. 1.
Uses created by will, ibid.
As to disseisin, 367. a. n. 1.
As to warranty and frankmarriage, 385. b. n. 4.
For more concerning Wills, see *Devise*, and 12. b. n. 2. 24. b. n. 3. 111. a. n. 6. 111. b. n. 5. 112. a. n. 2. 112. b. n. 1. 113. a. n. 2. 164. a. n. 2. 171. b. n. 6. 176. b. n. 5. 9. 185. a. n. 10. 185. b. n. 2. 190. b. n. 4. 191. a. note, sect. VI. 10. 205. a. n. 1. 5thly. 208. a. (208. b. 13th ed.) n. 1. 2dly. 213. b. n. 1. 223. a. n. 1. 237. a. n. 1. I. 240. b. n. 3.

Will (Tenant at,)
Who is, and how his estate may be created, 55. a. n. 1. 3. 57. b. n. 5.
His privileges, 55. a. n. 4.
What is a determination of his estate, 55. a. n. 13, 14, 15.
When rent is payable by tenant at will, after his estate is determined, 55. b. n. 16.
Shall have an action against a stranger for cutting trees, 57. a. n. 2.

Within the four seas,
107. a. n. 6.

Witnesses,
6. b. n. 5. 111. b. n. 3. 167. b. n. 3. 246. b. n. 1. 271. b. n. 1. I. 1.
See *Evidence*.

Wood,
Whether a grant of *wood* includes the soil, 4. b. n. 6.

Woods,
Being excepted in a lease (under 32 H. 8. c. 28), at certain rent, a new lease at the same rent without such exception is bad, 44. b. n. 6.

Woodward,
The office of woodward, and the privilege of having

Woodward,
the bark of felled trees, may be appurtenant to a manor, 165. b. n. 1.
Quære, how such office and privilege are affected by a partition of the manor, 165. b. n. 2.

Words,
Construction of the words, *in posterum procreandis*, 20. b. n. 3.
A lease made by *A.* lessee for life to *B.* & *C.* on condition, that, in a certain event, the land shall revert to *A.*, without determining any estate certain in the grant, passes all *A.*'s estate, 42. a. n. 11.
Difference between the words "*from the day of making*" and "*from the making*," 44. a. n. 4.
Difference between "*date*" and "*day of the date*," 46. b. n. 8, 9.
With respect to livery of seisin, 48. a. n. 6.
As to a determination of a tenancy at will, 55. b. n. 15.
Meaning of the term *arrested*, 173. b. n. 2.
Difference where the repugnancy of words, in a bond, or lease, appears, and where it does not, 213. b. n. 1.
See *Limitations*, *Tail*, &c.

Wreck,
Is a royal franchise, but by grant or prescription may belong to a subject, either in gross, or as part of his manor, &c. 261. a. n. 1.

Writ,
De ventre inspiciendo, proceedings on the writ, where a wife is married to a second husband, 8. b. n. 1.
Where grantable, and necessity of altering the present mode of proceeding on the writ, 8. b. n. 2, 3.
Antiquity of the writ, 123. b. n. 1.
Of annuity, 146. a. n. 1. 147. a. n. 5. 448. a. n. 4. 300. b. n. 1.
Whether a personal or a mixed action, 285. a. n. 1.
Of assise, 155. a. n. 2. 239. a. n. 1. 278. b. n. 1.
As to damages, 355. b. n. 1.
De non ponendis in assisis et juratis, 155. b. n. 2. 156. b. n. 5. 158. a. n. 2.
De magna assisa eligenda, what a good return to, 159. a. n. 2.
Of ayel, 164. a. n. 5.
To a bishop, 206. a. n. 1.
Capias ad satisfaciendum, 191. a. note, sect. VI. 9. 289. a. n. 2.
Casus matrimonii prælocuti, 240. b. n. 1.
Of *cessavit*, 141. a. n. 2.
Of conspiracy, where it lies, 161. a. n. 4. III.
De corrodio habendo et de annua pensione, 190. a. n. 1.
Of cosinage, aiel, and besaiel, as to damages, 355. b. n. 1.
Of covenant, 230. b. n. 1.
Against lessor of tenant for years, 389. a. n. 2.
De custode admittendo, 88. b. n. 16.
De custodia, ibid.
Of deceit, lies for a wife, against her husband, for levying a fine in her name, 133. a. n. 4.
Diem clausit extremum, 191. a. note, sect. VI. 9. 209. a. n. 1. IV.
Of disseisin, 278. b. n. 1.
Sheriff's duty in executing, 154. a. n. 11.

Writ,
Of novel disseisin,
As to damages, 355. b. n. 1.
As to warranty, 366. b. n. 1.
Of dower, 205. a. n. 1. 4thly.
Dum fuit infra ætatem, 278. b. n. 1.
Droitural, 278. b. n. 1.
Elegit, 191. a. note, sect. VI. 9.
Of entry, 239. a. n. 1.
In consimili casu, 184. b. n. 1.
As to remitter, 347. b. n. 1.
As to damages, 355. b. n. 1.
Of error, 32. b. n. 4. 131. a. n. 1. 161. a. n. 4. I. 259. b. n. 1.
Of extent, 191. a. note, sect. VI. 9. 209. a. n. 1. IV.
Of execution, 209. a. n. 1. V. 3.
Of false judgment, 259. b. n. 1.
Fieri facias, 191. a. note, sect. VI. 9.
Of forcible entry, 257. b. n. 1.
Ex gravi querela, 240. b. n. 2.
Habere facias seisinam, 330. a. n. 1.
De capiendo homagio, 67. b. n. 1.
De homine replegiando, may be sued by two jointly, 145. b. n. 2.
Levari facias, 191. a. note, sect. VI. 9.
Of livery and partition, 169. a. n. 2.
Of *mandamus*, 249. b. n. 1.
Of *miserata misericordia*, 101. a. n. 4. I.
Of *moderata misericordia*, 127. a. n. 1.
Of mortdancester, as to damages, 355. b. n. 1.
Nuper obiit, 175. a. n. 4.
Original, 121. a. n. 1. 290. b. n. 1. I. 2.
Of occupation, 249. b. n. 2.
Of partition, 167. b. n. 3. 169. a. n. 2. 187. a. n. 1, 2.
De partitione facienda, 164. a. n. 1. 164. b. n. 4. 169. a. n. 2. 175. a. n. 2.
De perambulatione facienda, 169. a. n. 2.
Possessory, 115. a. n. 4.
Of *ad quod damnum*, 99. a. n. 1.
Of *quod ei deforceat*, 188. a. n. 9.
Where it lies, 355. a. n. 1.
De rationabili parte, as to parceners, 175. a. n. 4.
De rationabili parte bonorum, 176. b. n. 3.
Whether it lay at common law or by custom, 176. b. n. 6.
Of ravishment of ward, 88. b. n. 16.
Of redisseisin, 154. a. n. 8. 158. b. n. 3.
Where and against whom it lies, 154. a. n. 11. 154. b. n. 1.
Of right, 115. a. n. 1. 4. 121. a. n. 1. 156. b. n. 1. 188. a. n. 9. 239. a. n. 1. 280. b. n. (B).
By remainder man against the disseisor of tenant for life, 278. b. n. 1.
The gist, in a writ of right, ibid.
Of *subpœna*, 135. a. n. 1. 191. a. note, sect. VI. 11. 271. b. n. 1. II. 290. b. n. 1. I. 3.
Of trespass *quare consanguineum et hæredem cepet*, 88. b. n. 12.
To inquire of waste, 158. b. n. 3.
See more concerning Writs, 38. b. n. 1. 33. a. n. 11. 69. a. n. 6. 115. a. n. 6. 122. a. n. 7.

Writing,
Where necessary under the 29 Car. 2, c. 3. 48. a. n. 3.
And other forms required in a will of real estate by 29 Car. 2, c. 3. 111. b. n. 3.

Wrong,
Is unlimited, and cannot be qualified, 180. b. n. 7.

YE

Y.

Yard-land,
69. a. n. 2.
Year and day,
250. b. n. 1.

YO

York,
The customary division of personalty on a death, in restraint of the testamentary power, prevailed in the province of York, 176. b. n. 5. 5 †. 9.

END OF INDEX TO NOTES.

THE

FIRST PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND.

Chap. 1. Fee simple. Sect. 1.

[1. a.] *TENANT in fee simple is he which hath lands or tenements to hold to him and his heires for ever. And it is called in Latin,* feodum simplex, *for* feodum *is the same that inheritance is* (1), *and* simplex *is as much as to say, lawfull or pure. And so* feodum simplex *signifies a lawfull or pure inheritance.* Quia feodum idem est quò hæreditas, et simplex idem est quod legitimum vel purum. Et sic feodum simplex idem est quòd hæreditas legitima, vel hæreditas pura. *For if a man would purchase lands or tenements in fee simple, it behooveth*

(1) Sir Thomas Smith and Dr. Cowell find fault with Littleton for this explanation of *fee;* but without the least reason. Though *fee,* in its *general* acceptation, signifies *land holden,* as distinguished from *land allodial;* yet in our law, it is most frequently used in a *particular* sense, to denote the *quantity* of estate in land, which is *always* the sense of the word when we say, that one is *tenant* or *seized in fee.* Therefore Littleton is not *merely* justified in writing, that *fee is the same as inheritance;* for if in describing who is *tenant in fee simple,* he had explained the word otherwise, he would have misled the student. The censure of Littleton would have been spared, if the difference between attempting to give the etymology of *fee* and its *general* sense, and professing only to explain a *particular* use of the word, had been attended to. See *Smith's Commonwealth of Engl.* b. 3. c. 10. *Cowp. Interp.* verbum *Fee,* and Wright's Ten. 149. In this last book Littleton is well defended. Lord Coke's comment on *fee* is very full to the same purpose. See post, 1. b.

behooveth him to have these words in his purchase, To have and to hold to him and to his heires: for these words (his heires) make the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him for ever; or by these words, To have and to hold to him and his assignes for ever: in these two cases he hath but an estate for term of life, for that there lacke these words (his heires), which words onely make an estate of inheritance in all feoffments and grants.

Vide Sect. 85.

"TENANT," in Latin *tenens*, is derived of the verbe *teneo*, and hath in the law five significations. 1. It signifies the estate of the land: as when the tenant, in a *præcipe* of land, pleads *quòd non tenet, &c.* this is as much as to say, that he hath not seisin of the freehold of the land in question. And in this sense doth our author take it in this place: and therefore he saith, tenant in fee simple is he which hath lands to hold to him and his heires. 2. It signifieth the tenure or the service whereby the lands and tenements be holden; and in this sense it is said in the writ of right, *quæ clamat tenere de se per liberum servitium, &c.* And in this signification he is called a tenant or holder; because all the lands and tenements in England, in the hands of subjects, are holden mediately or immediately of the king (1). For in the law of England we have not, properly, *allodium*, that is, any subjects land that is not as it is holden; unlesse you will take *allodium* for *ex solido*, often taken in the Booke of *Domesday* (2): and tenants in fee simple are there called *alodarii* or *alodii*. And he is called a tenant, because he holdeth of some superior lord by some service. And therefore the king in this sense cannot be said to be a (3) tenant, because he hath no superior but God Almighty; *prædium domini regis est directum dominium, cujus nullus author est nisi Deus.* And, as Bracton saith, *Omnes quidem sub eo, et ipse sub nullo, nisi tantùm sub Deo.* The possessions of the king are called *sacra patrimonia*, and *dominica coronæ regis*. But though a subject hath not properly *directum*, yet hath he *utile dominium*. Of these tenants our author speaketh in his second booke. 3. Also, *tenere* signifieth performance, as in the writ of covenant, *quòd teneat conventionem*, that is, that he hold or performe his covenant. 4. And likewise it signifieth to be bound, as it is said in every common obligation, *teneri et firmiter obligari*. Lastly, It signifieth to deeme or judge; as in 38 E. 3. c. 4, it shall be holden for none; (that is) judged or deemed for none; and so we commonly say, it is holden in our bookes. And these several significations doe properly belong to our tenant in fee simple. For he hath the estate of the land, he holdeth the land of some superiour lord, and is to perform the services due, and thereunto

8 H. 7. 12. 18 E. 3. 35. 24 E. 3. 65, 66. 44 E. 3. 5. 48 E. 3. 9. (2 Inst. 501.) (4 Inst. 192.) (12 Co. 9. Case of Stanneries) Mir. des Just. c. 1. sect. 3. Customs de Normandy, cap. 28. Le st. de 16 R. 2. cap. 5. 14 El. y. 313. a. 1 Co. 47, in Alton Wood's case. (Cro. Cha. 82.) Bract. lib. 1. cap. 8.

[1. b.]

(1) Same doctrine, 50 Ass. pl. 1. Post. 65. Plowd. 498. The origin and principle of this doctrine is well explained in Wright's Ten. 58, and 2 Blackst. Comm. 48. ed. 5. See also Wright's Ten. 137, and Mad. Baron, Anglic. 25.

(2) See post. 5. a. For particulars concerning *Domesday* Book, see the books cited in Wright's Ten. 56, in note p. and also an Account of Domesday Book, and an Account of Danegeld, both printed by order of the Antiq. Soc. in 1756.

(3) For examples and consequences of this doctrine, see Dy. 154. Plowd. 212. Post. 16. a. 6 Co. 5. b. Finch, fol. ed. 7. 2 Ro. Abr. 513, 514. Post. 2. b. n. 4.

thereunto he is bounden by doome and judgement of law. Of the severall estates of land our author treateth in his first booke; and beginneth with fee simple, because all other estates and interests are derived out of the same.

Brit. fo. 83. 207, 208. Fleta, lib. 5. cap. 5. & lib. 3. cap. 8. Bract. lib. 4. 263.

(4 Inst. 202.) Domesday. Mir. des Just. cap. 2. sect. 15. 17.

"Fee simple." Fee (4) commeth of the French *fief*, (*i. e.*) *prædium beneficiarium*, and legally signifieth inheritance, as our author himselfe hereafter expoundeth it. And simple is added, for that it is descendible to his heires generally, that is, simply, without restraint to the heires of his body, or the like. *Feodum est quod quis tenet ex quâcunque causâ sive sit tenementum, sive redditus, &c.* In *Domesday* it is called *feudum*. [a] Of fee simple, it is commonly holden that there be three kinds, *viz.* fee simple absolute, fee simple conditionall, and fee simple qualified, or a base fee (5). But the more genuine and apt division were to divide fee, that is, inheritance, into three parts, *viz.* simple or absolute, conditionall, and qualified or base. For this word (simple) properly excludeth both conditions and limitations, that defeat or abridge the fee. *Hereby it appeareth, that fee in our legall understanding signifieth, that the land belongs to us and our heires, in respect whereof the owner is said to be seised in fee; and in this sense the king is said to be seised in fee. [b] It is also taken as it is holden of another by service, and that belongeth onely to the subject; *Item dicitur feodum alio modo ejus qui alium feoffat, et quod quis tenet ab alio, ut si sit qui dicat, talis tenet de me tot feoda per servitium militare.* And Fleta saith, *Poterit unus tenere in feodo quoad servitia, sicut dominus capitalis, et non in dominico; aliis in feodo et dominico, et non in servitio, sicut liberè tenens alicujus.* [c] And therefore if a stranger claim a seigniory, and distreyne and avow for the service, the tenant may plead, that the tenancy is *extra feodum, &c.* of him, (that is) out of the seigniory, or not holden of him that claimeth it; but he cannot plead *extra feodum, &c.* unlesse he take the tenancy, that is, the state of the land upon him. Of fee in the first sense our author treateth in this first booke: and as it is taken in the second sense, in his second booke; and of the third you shall read in our author, Sect. 13. 643, 644, 645, and plentifully in our books quoted in the margent.

Bract. lib. 2. cap. 5, 6, 7. Brit. cap. 34. fo. 89. Flet. lib. 3. cap. 2. 8 & 9. & lib. 5. cap. 5.

[a] Bract. fo. 263. & 207. Pl. Com. in Wals. Cas. 7 H. 4. 46. 8 H. 4. 15. 18 H. 8. 3. b. 27 Ass. 33. 18 Ass. 5. 18 E. 3. 46. 24 E. 3. 28. 9 E. 4. 18. 16 H. 7. 4. 10 E. 3. Account 56. 22 E. 2. Disc. 50. 12 E. 4. 3. 15 E. 4. 8. Dy. 8 El. 252, 253. 12 H. 8. 8. 4 H. 7. 2. The case of a person which hath a qualified fee, see in the title of Desc.

*Vide Sect. 4.

[b] Bract. lib. 4. fo. 263. Flet. lib. 5. cap. 5. Brit. fo. 205. 207.

[c] 2 Ass. p. 4. 12 Ass. 38. 12 E. 3. tit. Hors de son fee, 28. 28 Ass. 41.

7 H. 4. 30. 2 H. 6. 1. (9 Co. 20. & 34. b. 2 Inst. 296. Cro. Jam. 127. Hob. 108. Doctr. Plac. 132. 216.)

"Lands or tenements." Here it is to be observed, that a man may have a fee simple in three kinds of hereditaments, (6) *viz.* reall, personall, and mixt. Reall, as lands and tenements, whereof our author here speaketh. Personall, as king Edward the first, in the thirteenth yeare of his raigne, *concessit Edmundo fratri suo charissimo, quòd ipse et hæredes sui habeant, ad requisitionem suam in cancellariâ nostrâ et hæredum nostrorum, justiciarios*

Rot. pat. 13 E. 1. (4 Inst. 314. Cro. Jac. 155.)

---

(4) For the derivation of the word *Fee*, see Wright's Ten. 3, and the books there cited. [See also Preston on Estates, vol. 1. p. 42. 2d edit.]

(5) See the same division of fee in 10 Co. 97. b. 2 Inst. 96. Vaugh. 273. 2 Ld. Raym. 1148; and for instances of a qualified fee, see post. 27. Plowd. 557. 10 Co. 97. 7 E. 4. 12. a. Cro. Ch. 430. Hardr. 147.

(6) For the extent of the word *hereditament*, and the difference between *that* and *tenement*, see post. 6. a.

justiciarios ☞ *ad placita forestarum, quas idem frater noster habet ex dono domini regis Henrici patris nostri, secundum assis. forestæ tenend', &c.* In this case [2. a.] the grantee and his heires had a personall inheritance in making of a request to have letters patents of commission to have justices assigned to him to heare and determine of the pleas of the forrests, and concerneth neither lands or tenements. And so it is if an annuity be granted to a man and his heires, it is a fee simple personall: (1) *et sic de similibus.* And lastly, hereditaments mixt both of the realty and personalty. As the abbot of Whitbye in the county of Yorke having a forrest of the gift of William of Percie founder of that abby, and by the charters of king John and of other his progenitors, king Henry the third did grant *abbati et conventui de Whitbye, quòd ipsi et eorum successores in perpetuum habeant viridarios suos proprios de libertate suâ de Whitbye eligend' de cætero in pleno com. Eborum, prout moris est, ad responsiones et præsentationes faciend' de transgressionibus, quas amodò fieri continget de venatione intra metas forestæ suæ de Whitbye, quam habent ex donatione Willi. de Percey et Alani de Percey filii ejus, et redditione et concessione domini Johannis quondam regis Angliæ patris nostri, et confirmatione nostrâ, coram justiciariis nostris itinerantibus ad placita forestæ in partibus illis et non alibi, sicut viridarii forestæ nostræ hujusmodi responsiones et præsentationes facere debent, et consueverunt. Et si contingat aliquos forenseos, qui non sunt de libertate prædictorum abbatis et conventûs, transgressionem fuere de venatione intra metas forestæ prædicta, quos prædicti viridarii attachiare non possunt, Volumus et concedimus pro nobis et hæredibus nostris quòd hujusmodi transgressores per justiciarios forestæ nostræ ultra Trentam attachientur, ad præsentationem viridariorum prædict. ad respondendum inde coram justiciariis nostris itinerantibus ad placita forestæ nostræ in partibus illis, cùm ibid. ad placitandum venerint prout secundum assisam et consuetudinem forestæ nostræ fuerint faciend'.* Which charter was pleaded upon the claime made by the abbot of Whitbye before Willoughby, Hungerford, and Hanbury, justices in eire in the forrest of Pickering, which eire began *anno* 8 E. 3. And these before them were allowed. And when the king created an earl of such a country or other place, to hold that dignity to him and his heires, this dignity is personall, and also concerneth lands and tenements. (2) But of this matter more shall be said in the next Chapter, Sect. 14 and 15.

Ro. Pat. an. 47 H. 3. Itin. Pickering, 8 E. 3. Ro. 42.

(7 Co. 33.)

Bract. lib. 4. cap. 9. fo. 263. Brit. cap. 32. & 79.

For interpretation of words and etymologies, vid. Sect. 9. 18. 95. 116. 119. 135.

"And it is called in Latin, feodum simplex, for feodum is the same that inheritance is." Here *Littleton* himselfe teacheth the signification of *feodum*, according to that which has been said, which only is to be applied to fee simple pure and absolute. And this and all his other interpretations of words and etymologies throughout all his three bookes (wherein the studious reader will observe many) are perspicuous and ever *per notiora, et nunquam ignotum*

(1) An annuity of inheritance is held to be forfeitable for treason as an *hereditament*, 7 Co. 34. b. yet being only *personal*, it is not an hereditament within the statute of mortmain of the 7 E. 1. st. 2, nor is it intailable within the statute *de donis*. See post. 2. a. b. & 20. a.

(2) Therefore such dignity has been adjudged to be intailable within the statute *de donis*. See post. 20. a.

ignotum per ignotius; and are most necessary, for *ignoratis terminis ignoratur et ars.* 154. 164. 174. 184. 186. 194. 204. 234. 267, 268. 332. 337. 424. 520. 592. 645. 689. 733.

" *Simplex is as much as to say, lawful or pure.*" Hereof he treateth only in this place. And *Littleton* saith well, that *simplex idem est quòd purum. Simplex enim dicitur quia sine plicis; et purum dicitur, quòd est merum et solum sine additione. Simplex donatio et pura est, ubi nulla addita est conditio sive modus; simplex enim datur, quòd nullo additamento datur.* Bract. lib. 2. cap. 39. fo. 92. 62. b. lib. 4. cap. 28. Fleta, lib. 3. cap. 8. Bract. lib. 2. cap. 5, &c. Britt. cap. 34.

" *A lawful or pure inheritance.*" And therefore it is well said, *quòd donationum alia simplex et pura, quæ nullo jure civili vel naturali cogente, nullo precedente metu vel interveniente, ex merâ gratuitâque liberalitate donantis procedit, et ubi nullo casu velit donator ad se reverti quod dedit; alia sub modo, conditione, vel ob causam, in quibus casibus non propriè fit donatio, cùm donator id ad se reverti velit, sed quædam potiùs feodalis dimissio; alia absoluta et larga; alia stricta et coarctata, sicut certis hæredibus, quibusdam à successione exclusis, &c.* And therefore seeing fee simple is *hæreditas legitima vel pura*, it plainly confirmeth that the division of fee is by his authority rather to be divided as is aforesaid than fee simple. And he saith well in the disjunctive, *legitima vel pura*, for every fee simple is not *legitimum*. For a disseisor, abator, intruder, usurper, *&c.* have a fee simple, but it is not a lawful fee. So as every man that hath a fee simple, hath it either by right or by wrong. If by right, then he hath it either by purchase or descent. If by wrong, then either by disseisin, intrusion, abatement, usurpation (3), &c. In this Chapter he treateth onely of a lawfull fee simple, and divideth the same as is aforesaid. Fleta, lib. 3. ca. 3. Plowd. 58. b.

" *For if a man purchase.*" Persons capable of purchase are of two sorts, persons natural created of God, as *I. S. I. N. &c.* and persons incorporate or politique created by the policy of man (and therefore they are called bodies politique); and those be of two sorts, *viz.* either sole, or aggregate of many: again, aggregate of many, either of all persons capable, or of one person capable, and the rest incapable or dead in law, as in the Chapter of Discontinuance, Sect. 655, shall be shewed. Some men have capacitie to purchase, but not abilitie to hold: some, capacity to purchase, and ability to hold or not to hold, at the election of them or other: some, capacitie to take and to hold: some, neither capacitie to take or to hold: and some, specially disabled to take some particular thing. Persons capable of purchase. Who have ability to grant. Vide Sect. 57. 11 Eliz. Dier, 283. 11 H. 4. 26. & 26. 7 E. 4. 29. (1 Rob. Abr. 194.)

If an alien Christian (A) or infidel purchase houses, lands,

---

(3) For the difference between such estates by wrong, see post. 277. a. and that they cannot be said to be by purchase, see post. 3. b. & 18. b.

(A) As to the effect which the treaty in 1783, acknowledging the United States of America to be free, sovereign and independent States, should have on the condition of those natural born subjects of our king who were or previously had become citizens of those States, see 1 Wooddes. 383. 1 B. & P. Rep. p. 44. [2 B. & C. 779.]

lands, tenements, or hereditaments to him ☞ and his heires, albeit he can have no heires, yet he is of capacitie to take a fee simple (1) but not to hold (2). For upon an office found, the king shall have it by his prerogative (3), of whomsoever the land is holden (4) And so it is if the alien doth purchase land and die, the law doth cast the freehold and the inheritance upon the king (5). If an alien purchase any estate of freehold in houses, lands, tenements, or hereditaments, the king upon office found shall have them. If an alien be made a denizen and purchase land, and die without issue, the lord of the fee shall have the escheat, and not the king. But as to a lease for years, there is a diversitie betweene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods, and the like. For if he take a lease for yeares of lands, meadows, &c. upon office found, the king shall have it (6). But of a house for habitation he may take a lease for years as incident to commerce; for without habitation he cannot merchandize or trade (7). But if he depart, or

[2. b.]

32 Hen. 6. 23. Pl. Com. 483.

5 Mar. Br. tit. Denizen, 22.

---

(1) Therefore on a covenant to stand seised, an use will arise for an alien. Godb. 275. But by *act of law*, as by *descent*, he cannot even *take* for the benefit of the king. 7 Co. Calvin's case, 25. a. Post. 31. b. and 1 Ventr. 417. See in Dy. 283. b. the case of a feoffment to an alien and another to uses.

(2) If the purchase is made with the *king's license*, it seems that he may hold. See 14 Hen. 4. 20. How the law is, where an alien purchases in the name of a trustee, see King and Holland, Styl. 20, &c. All. 14, and 1 Ro. Abr. 194. See also 13 Geo. 3. c. 14, which enables aliens to lend money on land, &c. in the West Indies.

(3) But not *before* office, except in case of the alien's death. Adj. 5 Co. 52. b. Before office, recovery by an alien tenant in tail will bar remainders. Adj. Gouldsb. 102. 4 Leon. 84.

(4) If an alien purchases a copyhold, it is said that it shall escheat to the lord. Dy. 2 b. in marg. but see 1 Mod. 17, and All. 14.

(5) See in Plowd. 229, several cases, in which, for a like reason, the king is entitled without office.

(6) Accord. 7 Co. Calvin's case, Dy. b. in marg.

(7) But 32 H. 8. c. 16. s. 13, makes void all leases of houses or shops to an alien being an *artificer* or *handicraftsman*. This law, however contrary it may seem to good policy and the spirit of commerce, still remains unrepealed; but in favour of aliens it has been construed very strictly. See 1 Sid. 309. 1 Saund. 7. 2 Show. 135. 3 Mod. 94. 3 Salk. 29. In the latter book a lease to an *alien artificer* is said to be forfeitable to the king at common law; but for this extraordinary doctrine no authority is cited (*a*). As to the capacity of aliens to take personal chattels, see 2 Ro. Rep. 93.——(*a*) It should be such a lease, viz. of a house or shop: I have no doubt it was meant to be so understood: and so indeed it is, in the referred to passage in 3 Salk. 29. As to the word extraordinary, which I have applied to the doctrine (at end of n. 7), I now hesitate as to its propriety. 16 Feb. 1811: see my opinion, of this date, on a case which required my investigation of the doctrine, as to leases for years to aliens. [The part of the opinion to which Mr. Hargrave refers, applicable to the subject, is as follows: "As to the other points, raised "on the supposition of the party's being an alien, the result of the strict doc- "trine in Co. Litt. 2. b., I conceive to be, that, to prevent forfeiture to the crown,

or relinquish the realme, the king shall have the lease. So it is if he die possessed thereof, neither his executors or administrators shall have it but the king (8); for he had it only for habitation as necessary to his trade or traffique, and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for yeares, albeit it were for his habitation (9); and so it is if he be an alien enemie. And all this was so resolved by the judges assembled together for that purpose in the case of sir James Croft, Pasch. 29 of the raigne of queene Elizabeth. Also, if a man commit felony, and after purchase lands, and after is attainted, he had capacitie to purchase, but not to hold it; for in that case the lord of the fee shall have the escheat (10); and if a man be attainted of felony, yet he hath capacitie to purchase to him and to his heires, albeit he can have no heire, but he cannot hold it; for in that case the king shall have it by his prerogative, and not the lord of the fee; for a man attainted hath no capacitie to purchase (being a man *civiliter mortuus*) but onely for the benefit of the king, no more than the alien-née hath. If any sole corporation or aggregate of many, either ecclesiasticall or temporall (for the words of the statute be *si quis religiosus vel alius*) purchase lands or tenements in fee, they have capacitie to take but not to retaine (unlesse they have a sufficient license in that (11) behalfe); for within the yeare after the alienation, the next lord of the fee may enter; and if he doe not, then the next immediate lord from time to time to have half a yeare; and for default of all the mesne lords, then the king to have the land so aliened for ever, which is to be understood of such inheritance as may be holden. But of such inheritances as are not holden,

Paseh. 29 Eliz. in Sir James Croft's case. 49 Ass. pl. 2. 49 E. 3. 11. (5 Co. 62. b.)

Magna Charta, cap. 36. 7 E. 1. stat. 2. de Religiosis. W. 2. 13 E. 1. cap. 33. 15 R. 2. cap. 5. 23 H. 8. cap. 10. 39 El. cap. 5. 23 H. 3. Ass. 436. 29 Ass. p. 17. Brit. fo. 32. Fleta, lib. 3. cap. 4 & 5. 19 E. 2. tit. Vill. 34. 29 E. 3. Ibid. 13. 21 E. 3. 5.

as

"crown, the alien, taking lease for years, should fall within the description of "a merchant friend, and the house should be for his habitation; and that, "even with those circumstances, the crown will be entitled to the lease, "either on his death, or on his quitting the realm. Whether, however, the "courts would now hold to this extent, I have some doubt: and certainly, "the short case of Trin. 6 E. 6. New Bendl. 36. and 1 And. 25. clashes with "the doctrine; and the case in Cro. Car. 8. on the administration granted on "the death of the Holland agent, Sir Upwell Caroon, might, if such points "should be as stated, require to be closely examined. As to the particular "point on the st. 32 H. 8, c. 16, I think that the party's not being an artificer "or handicraftsman would prevent the statute's being applicable, and conse- "quently, it being a void lease."]

(8) Contra 1 And. 25. N. Bendl. 36. See in Cro. Cha. 8, a case where administration to an intestate alien was granted to his nephews and nieces, who were also aliens, and part of the estate consisted of leases for years.

(9) If this be the common law, ought not its severity to be corrected by the legislature? To deny the right of taking a house for habitations to aliens not being *merchants*, is like forbidding all *other* foreigners to come and reside here. See 7 Co. Calvin's case, 17. a. where lord Coke seems to express himself without distinguishing between aliens being merchants and other aliens.

(10) Tenant in tail is guilty of murder, and before conviction levies a fine. It was a question, whether the fine should bar the issue for the lord's benefit; and the court inclined to think that it should; but no judgment was given. 1 Wils. 2 Part. 220.

(11) As to this, see post. 98. 2.

4 H. 6. 9. 19 H. 6. 63. 65. 3 E. 4. 14. 19 E. 3. Mortm. 8. 34 H. 6. 37. 19 H. 6. 63. (Plowd. 502. a.) 7 E. 4. 14. *Pl. Com. 193. in Wrotesley's case. Le statut. de Religiosis. 7 E. 1. st. 2.

as villeines, rent charges, commons, and the like, the king shall have them presently by a favourable interpretation of the statute. An annuity granted to them is not mortmaine, because it chargeth the person only. Some have said that it is called mortmaine, *manus mortua, qui possessio eorum est immortalis, manus pro possessione, et mortua pro immortali*, and the rather, for that by the laws and statutes of the realme, all ecclesiastical persons are restrained to alien. *Others say it is called *manus mortua per antiphrasin*, because bodies politique and corporate never die. Others say that it is called mortmaine by resemblance to the holding of a man's hand that is ready to die, for what he then holdeth he letteth not goe till he be dead. These and such others are framed out of wit and invention; but the true cause of the name, and the meaning thereof, was taken from the effects, as it is expressed in the statute itself, *per quod quæ servitia ex hujusmodi feodis debentur, et quæ ad defensionem regni ab initio provisa fuerunt, indebitè subtrahuntur, et capitales domini eschaetas suas amittunt*, so as the lands were said to come to dead hands as to the lords, for that by alienation in mortmaine they lost wholly their escheats, and in effect their knights-services for the defence of the realme, wards, marriages, reliefes, and the like; and therefore was called a dead hand, for that a dead hand yeeldeth no service.

I passe over villeins or bondmen, who have power to purchase lands, but not to reteyne them against their lords, because you shall reade at large of them in their proper place in the Chapter of Villenage.

(Cro. Ja. 320. 1 Ro. Abr. 731.)

An infant or *minor* (whom we call any that is under the age of 21 yeares) hath, without consent of any other, capacity to purchase, for it is intended for his benefit, and at his full age he may either agree thereunto, and perfect it, or without any cause to be alledged, waive or disagree to the purchase; and so may his heires after him, if he agreed not thereunto after his full age.

A man of non-sane memory may, without the consent of any other, purchase lands, but he himselfe (12) cannot waive it; but if he die in his madnesse, or after his memory recover, without agreement thereunto, his heire may waive and disagree to the state, without any cause shewed; and so of an ideot. But if the man of non-sane memory recover his memory, and agree unto it, it is unavoydable.

If an abbot purchase lands to him and his successors without the consent of his convent, he himself cannot waive it, but his

43 Ass. p. 23.

successor may upon just cause shewed; as if a greater rent were reserved thereupon than the value of the land, or the like; but

Bract. lib. 2. fo. 12. & 32.

he cannot waive it unlesse it be upon just cause, *et sic desimilibus, prælatus ecclesiæ suæ conditionem meliorare potest, deteriorare nequit.* And in another place he saith, *Est enim ecclesia ejusdem conditionis, quæ fungitur vice minoris.*

But

(12) Fitzherbert argues strongly, that a noncompos may plead his disability to avoid his own acts as well as an infant. Fitz. Nat. Br. 202. See post. 247. a & b, much curious learning on the subject, and also 2 Blackst. Com. ed. 5. p. 291, where the progress of the opinions on this subject is critically stated.

[3. a.] ☞ But no simile holds in every thing, according to the ancient saying, *Nullum simile quatuor pedibus currit* [a]. An hermaphrodite may purchase according to that sexe which prevaileth. A feme covert cannot take any thing of the gift of her husband (1), but is of capacity to purchase of others without the consent of her husband. And of this opinion was *Littleton* in our books, and in this book, Sect. 677, but her husband may disagree thereunto, and devest the whole estate; but if he neither agree nor disagree, the purchase is (2) good; but after his death, albeit her husband agreed thereunto, yet she may without any cause to be alledged waive the same, and so may her heires also, if after the decease of her husband she herselfe agreed not thereunto.

[a] 1 H. 7. 16. 7 H. 4. 17. 18 H. 6. 8. 9 E. 3. 30. 15 E. 4. fol. 1. b. 27 H. 8. 24. (Hob. 204. 5 Co. 119. b.)

[b] A wife (*uxor*) is a good name of purchase, without a Christian name; and so it is if a Christian name be added and mistaken (A), as *Em* for *Emelyn*, &c. for *utile per inutile non vitiatur*. But the queene, the consort of the king of England, is an exempt person from the king by the common law, and is of ability and capacity to purchase and grant without the king. Of which see more at large, Sect. 200.

[b] A name of purchase. 2 H. 4. 25. 1 H. 5. 8. 46 E. 3. 22. 12 Ass. 18. 30 E. 3. 18. F. N. B. 97. a. 1 Ass. 11.

11 H. 4. 33. 9 E. 4. 49. 13 E. 3. Estoppel 231. (4 Co. 23. b. Post. 133. a.)

[c] The parishioners or inhabitants, or *probi homines* of Dale (3), or the churchwardens, are not capable to purchase lands; but goods they are (B), unless it were in ancient time when such grants were allowed (4).

[c] 12 H. 7. 8. 37 H. 6. 30. 10 H. 4. 3. b. (4 Inst. 297.)

An

(1) Adjudged acc. in Chancery, 2 Vern. 385, and 3 Atk. 72. But the doctrine must be understood with various limitations.—1. Though the husband cannot convey to the wife *immediately*, yet he may give to a trustee (*a*) for her benefit, and the gift will be good. Therefore he may convey land to her by way of use, as by enfeoffing or covenanting with another to stand seised, or surrendering a copyhold estate to her use. See post. 112. a. 4 Co. 29. So he may appoint to the wife's use under a power.—2. According to some books, by custom of a particular place, as of York, the wife may take by *immediate* conveyance from the husband. Fitz. *Prescription*, 61. Bro. *Custom*, 56.—3. The husband may give to his wife by *last will;* because such gift cannot take effect till his death, when the coverture is determined. Post. Sect. 168.—4. It seems, that a *donatio mortis causâ* by husband to wife may be good, because *that* is in the nature of a legacy. 1 P. Wms. 441. How the wife may give her separate personal property to her husband, see 2 Ves. 669.

(*a*) Will equity support gift or agreement between husband and wife without intervention of a trustee, see lord Nottingham's MSS. R. ca. 667. Bunb. 207. and in 1 Atk. 271. Lucas *v.* Lucas, before lord Hardwicke, 12 July 1738. Joddrell's MSS. notes, v. 1. p. 120. and Stanning & Style, 3 P. W. 334.

(2) Acc. post. 356. a.

(A) See 10 Co. 57. b. 11 Co. 20. b. to 22. Litt. Rep. 28. Ld. Raymond, 303. Shepp. Touch. 234.

(3) See in Dy. 100, the case of a grant by the crown *probis hominibus de Islington*, rendering a rent.

(B) 4 Vin. 525. Cr. El. 35.

(4) Acc. as to churchwardens, Finch's law, 8vo. ed. 178. See Keilw. 32. a. But by 9 Geo. 1. c. 7, they are enabled to purchase a workhouse for the poor; and by custom, in some places, as in London, the parson and churchwardens are a corporation to purchase lands. Cro. Jam. 532.

(By 59 Geo. 3. c. 12. s. 17, the churchwardens and overseers of the poor of any parish may accept,

take

[d] An ancient grant by the lord to the commoners in such a waste, that a way leading to their common should not be straitened, was good; but otherwise it is of such a grant at this day [e]. And so in ancient time a grant made to a lord, *et hominibus suis, tam liberis, quàm nativis*, or the like, was good; but they are not of capacity to purchase by such a name at this day. But yet at this day if the king grant to a man to have the goods and chattels *de hominibus suis*, or *de tenentibus suis*, or *de residentibus infra feodum*, &c. it is good: for there they are not named as purchasers or takers, but for another man's benefit, who hath capacity to purchase or take [f]. And regularly it is requisite, that the purchaser be named by the name of baptism and his surname, and that speciall heed bee taken to the name of baptism; for that a man cannot have two names of baptism as he may have divers surnames (5). [g] And it is not safe in writs, pleadings, grants, &c. to translate surnames into Latin. As if the surname of one be Fitzwilliam, or Williamson, if he translate him *Filius Willi.* if in truth his father had any other Christian name than William, the writ, &c. shall abate; for Fitzwilliam or Williamson is his surname, whatsoever Christian name his father had, therefore the lawyer never translates surnames. And yet in some cases, though the name of baptisme be mistaken (as in the case before put of the wife), the grant is good.

[d] 32 E. 3. barre, 261. (Hob. 86. 6 Co. 59.)
[e] 33 E. 3. grant 83. 18 E. 3. 50. 12 Ass. 35. 14 H. 6. 12. 34 Ass. p. 11. 40 Ass. p. 21.
[f] Bract. lib. 4. tract. 1. ca. 20. Britton, fol. 121, 122. 3 E. 3. 78. 25 E. 3. 43. 26 Ass. 61. 30 Ass. 16. 46 E. 3. 22. 39 E. 3. 17. 3 H. 6. 25. 19 H. 6. 2. 30 H. 6. 1. 34 H. 6. 19. 11 H. 4. 27. 9 E. 4. 29. 5 E. 4. 46. 65. 14 H. 7. 11.
20 Eliz. Dier, 259. 8 E. 3. 436. 20 E. 3. 25. 1 H. 4. 5. 3 H. 6. 26. 19 H. 6. 2. 34 H. 6. 19. 5 E. 4. 55. 27 H. 8. 11. 1 H. 5. 5. 18 E. 3. 32. 27 E. 3. 85. 8 E. 3. 427. 7 H. 6. 29. 9 H. 5. 9. [g] 40 E. 3. 22. Fitzwilliam. 24 E. 3. 64. Fitzjohn. 39 E. 3. 24. Fitzrobert. 27 E. 3. 85. tit. grant, 67. 18 E. 3. 23, 24. 18 E. 4. 8. b. 14 H. 7. 31, 32. 13 E. 4. 8. 5 E. 3. Vouch. 179. 37 E. 3. 85. where the proper name is mistaken. (6 Co. 65. 10 Co. 132. b. Hob. 32. 2 Ro. Abr. 44. Mo. 232.)

So it is if lands be given to Robert earl of Pembroke where his name is Henry, to George bishop of Norwich where his name is John, and so of an abbot, &c. for in these and the like cases there can be but one of that dignity or name (c). And therefore such a grant is good, albeit the name of baptism be mistaken. If by licence lands be given to the deane and chapter of the holy and individed Trinity of Norwich, this is good, although the deane be not named by his proper name, if there were a deane at the time of the grant; but in pleading he must shew his proper name. And so on the other side, if the deane and chapter make a lease without naming the deane by his proper name, the lease is good, if there were a deane at the time of the (6) lease; but in pleading, the proper name of the deane must be shewed; and so is the booke of 18 E. 4. to be intended; for the same judges in 13 E. 4, held the grant good to

---

take and hold, as a body corporate, on behalf of the parish, all buildings, lands and hereditaments purchased, hired, or taken on lease under that act, and all other buildings, &c. belonging to such parish). [5 B. & C. 433.]

(5) See Cro. Eliz. 27. 222. 328. Cro. Jam. 558. Ld. Raymond, 562. 1016. Salk. 6. pl. 16. 1 Brownl. 47. 6 Mod. 115. *qu.* Bacon L. T. 102. 106.

(c) Str. 316. 2 Vern. 732. Vinn. Comm. on Just. Inst. L. 2. T. 20. text 29, n. 2. Vin. Devise, T. 14. Perk. § 41–2. 1 Brownl. 47. a. Salk. 6. pl. 15. Vin. Grants, D. 1. 17. Nosmes, A. 1.

(6) But not otherwise, post 264. a. See 21 E. 4. 15, 16.

to a maior, aldermen, and commonalty, albeit the maior was not named by his proper name; but in pleading it must be shewed, as is there also holden (7). If a man be baptized by the name of Thomas, and after at his confirmation by the bishop he is named John, he may purchase by the name of his confirmation. And this was the case of sir Francis Gawdie, late chiefe-justice of the court of common pleas, whose name of baptism was Thomas, and his name of confirmation Francis; and that name of Francis, by the advice of all the judges, in *anno* 36 Hen. 8, he did beare, and after used in all his purchases and grants (8).

[*h*] And this doth agree with our ancient books, where it is holden that a man may have divers names at divers times, but not divers Christian names. And the court said, that it may be that a woman was baptized by the name of Anable, and 40 yeares after she was confirmed by the name of Douce, and then her name was changed, and after she was to be named Douce, and that all purchases, &c. made by her by the name of baptism before her confirmation, remain good; a matter not much in use, nor requisite to be put in use, but yet necessary to be knowne. [*i*] But purchases are good in many cases by a knowne name, or by a certaine description of the person without either surname or name of baptism, as *uxori I. S.* as hath been said, or *primo genito filio*, or *secundo genito filio*, &c. or *filio natu minimo I. S.* or *seniori puero*, or *omnibus filiis*, or *filiabus I. S.* or *omnibus liberis seu exitibus* of *I. S.* or to the right heires of *I. S.*(D).

[*h*] 22 R. 2. briefe 936. 12 R. 2. feoffments 58. 9 E. 3. 14. 46 E. 3. 21. 3 H. 6. 26. 34 H. 6. 19. 1 H. 7. 29. 5 E. 2. briefe 741. 14 H. 7. 11.

[*i*] 17 E. 3. 29. 18 E. 3. 59. 30 E. 3. 18. 11 H. 4. 84. Pl. Com. 525. 21 R. 2. devise. 41 E. 3. 19. 15 E. 3. Counter-plea. de vouch. 43.

35 Ass. 13. 37 H. 6. 30. 11 E. 4. 2. 7. H. 4. 5. 40 E. 3. 9. 37 H. 8. Bro. Nosme 40.

[*k*] But if a man do infranchise a villein *cum totâ sequelâ suâ*, that is not sufficient to infranchise his children borne before, for the incertainty of the word *sequela*. [*l*] But regularly in writs, the demandant or tenant is to be named by his Christian name and surname, unlesse it be in cases of some corporations or bodies politique (9).

[*k*] 15 H. 7. 14.

[*l*] 8 E. 3. 437. 29 E. 3. 44. 19 E. 4. 11. 21 E. 4. 19. 7 H. 6. 29.

[3. b.] [*a*] ☞ A bastard having gotten a name by reputation may purchase by his reputed or knowne name to him and his heires, although he can have no heir but of his body. A man makes a lease to *B.* for life, remainder to the eldest issue male of *B.* and the heires males of his body. *B.* hath issue a bastard son, he shall not take the remainder, because in law he is not his issue; for *qui ex damnato coitu nascuntur inter liberos non computentur* (A). And as *Littleton* saith, a bastard is *quasi nullius filius*, and can have no name of reputation as soone as he is borne [*b*]. So it is if a man make a lease for life to *B.* the remainder to the eldest issue male of *B.* to be begotten of the body of *Jane S.* whether the same issue be legitimate or illegitimate. *B.* hath issue a bastard on

[*a*] 39 E. 3. 11. 24. 17 E. 3. 42. 35 Ass. 13. 41 E. 3. 19.

Vide Sect. 118.

[*b*] So it was resolved, M. 38 and 39 Eliz. in Bre. de errore, for land in Port-

(7) See 1 Leon. 307. Dy. 86.

(8) Acc. 2 Ro. Abr. 135. A. [3 Maul. & Sel. 254.]

(D) 2 Ro. Ab. 43. Eq. Abr. 212, ca. 1. 1 Ves. jun. 413, 416. Willes, 557. 2 Bl. 1121.

(9) As to naming of persons in writs and pleadings, see Thelo. Dig. Br. Orig. lib. 3, and 6, and the title *Abatement* in Com. Dig.

(A) 1 T. R. 96.

ington in com. Salop. (S. C. Cro. Eliz. 509. Noy, 35. Mo. 430. 2 Ro. Abr. 43. 44.)

on the body of *Jane S.* this sonne or issue shall not take the remainder; for (as it hath been said) by the name of issue, if there had beene no other words, he could not take; and (as it hath been also said) a bastard cannot take, but after he hath gained a name by reputation (1), that he is the sonne of *B.* &c. [*c*]. And therefore he can take no remainder limited before he be born; but after he be borne, and that he hath gained by time a reputation to be knowne by the name of a son, then a remainder limited to him by the name of the son of his reputed father, is good; but if he cannot take the remainder by the name of issue at the time when he is borne, he shall never take it. And so it seemeth, and for the same cause, if after the birth of the issue *B.* had married *Jane S.* so as he became bastard eigne, and had a possibility to inherit, yet he shall not take the remainder.

[*c*] 39 E. 3. 11. 24. 35 Ass. 13. 41 E. 3. 10. 17 E. 3. 42. (6 Co. 66.)

Persons deformed having human shape (2), ideots, madmen, lepers, deafe, dumbe, and blinde, minors, and all other reasonable creatures, have power to purchase and retaine lands or tenements. [*d*] But the common law doth disable some men to take any estate in some particular things; as if an office either of the grant of the king or subject which concerns the administration, proceeding, or execution of justice, or the king's revenue, or the commonwealth, or the interest, benefit, or safetie of the subject, or the like; if these or any of them be granted to a man that is unexpert, and hath no skill and science to exercise or execute the same, the grant is merely (3) void, and the partie disabled by law, and incapable to take the same, *pro commodo regis et populi*; for

[*d*] 5 E. 4. tit. office & officer. Bro. 48. Vinter's case, 5 Mar. Dier, fo. 150. b. and Scrogg's case, (Hob. 148.)

(Cro. Jam. 17.)

---

(1) The several reports of the case cited by lord Coke in the margin differ very much. According to Noy and Moore, it was held by all but Popham, that the remainder was good, though the bastard was not born till after creating it; and Rolle represents the case as if the opinion had been for the remainder. But Croke agrees with lord Coke, and writes, that a majority of the judges held the remainder void; though indeed it appears by his report, that the party at length claiming as *lawful issue*, it became unnecessary to decide what would be the effect of a remainder to an unborn bastard. The only modern case I meet with on the subject is one, in which lord chancellor Macclesfield inclined against such a remainder, even though to a child *en ventre sa mere*. 1. P. Wms. 529. However, the doctrine doth not seem fully settled. If the objection against the limitation to a bastard not *in esse* is *uncertainty of description*, it must certainly fail where he is described by the *mother only*; and even where the *father* is named, it may sometimes be possible to ascertain him also sufficiently, as well where the limitation precedes, as where it follows the bastard's birth. See Bro. Grant, 17. 2 Ro. Abr. 43, 44. But if the objection is a *policy of law*, which, for the encouragement of marriage, creates a *disability* of providing for illegitimate children before they are born, then lord Coke's doctrine is true in its full extent. See Cro. Eliz. 510. Which of these is the true principle of objection, is left to the judgment of the learned reader. [See 18 Vesey, 152. 528. 1 Maddock, 430.] 14 Vin. 37. Sh. 1168. Pr. Ch. 475. 9 Ves. 359. 22 Vin. 199, pl. 4. Branch, 7, 8.

(2) Who ought to be deemed such, see post. 7. b. 25. b.

(3) See acc. Godb. 391. Hard. 130. Scrogg's case, cited by lord Coke in the margin, is in Dy. 175. Dy. 150. b. post. § 378. 616. 3 Wms. 143, 144. 16 Vin. 104. Finch, 162.

for onely men of skill, knowledge, and ability to exercise the same are capable of the same, to serve the king and his people. [e] An infant or minor is not capable of an office of stewardship of the court of a manor, either in possession or reversion (4). [f] No man, though never so skilful and expert, is capable of a judiciall office in reversion (5), but must expect untill it fall in possession. And see Sect. 378, where bargaining or giving of money, or any manner of reward, &c. for offices there mentioned, shall make such a purchase incapable thereof; which is worthy to be knowne, but more worthy to be put in due execution.

[e] M. 40 & 41 Eliz. in the King's Bench between Scamler and Walters. (Contra March. 43. S. C. W. Jo. 310. Cro. Car. 279. 555.)

[f] 11 Co. 2. in Auditor Curle's case, (5 & 6 E. 6. c. 15. & post. 234. a.) Vide sect. 378.

Some are capable of certain things for some special purpose, but not to use or exercise such things themselves; as the king is capable of an office, not to use but to grant, &c. (6)

A monster borne, within lawfull matrimonie, that hath not human shape, cannot purchase, much lesse reteine any thing. [g] The same law is *de professis et mortuis sæculo*, for they are *civiliter mortui* (7); whereof you shall read at large in his proper place, Sect. 200.

1 H. 7. 31. (Post. 7. b. 29. b.)

[g] Bract. lib. 5. fo. 421. 415. Britt cap. 22. 39. Fleta, lib. 6. cap. 41. 1. E. 3. 9. 44 E. 3. 4. 3 H. 6. 24. 21. R. 2. judgement 263. 7 H. 4. 2. 14 H. 8. 16. Doct. & Stud. 141. Pl. Com. fo. 47. Brit. cap. 33. (Post. 76. a.)

"*Purchase*," in Latin *perquisitum*, of the verbe *perquirere*. *Littleton* describeth it in the end of this Chapter in this manner; *Also purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of dissent from any of his ancestors or of his cousins, but by his own deed.* So, as I take it, a purchase is to be taken, when one cometh to lands by conveyance or title; and that disseisins, abatements, intrusions, usurpations, and such like estates gained by wrong, are not said in law purchases (8), but oppressions and injuries.

Note, that purchasers of lands, tenements, leases, and hereditaments for good and valuable consideration, shall avoid all former fraudulent and covinous conveyances, estates, grants, charges, and limitations of uses, of or out of the same, [h] by a statute made since *Littleton* wrote (9), whereof you may plainly and plentifully read in my Reports, to which I will add this case;

[h] 27 Eliz. cap. 4. 13. Eliz. cap. 5. 3 Co. 80. 82. 83.

I. C.

---

(4) Acc. Scamler's case, and 1 Ro. Abr. 731. J. and Cro. Eliz. 636. But the case in March. 43, in *contra*; and there Mr. Justice Jones affirms, that Scamler's case was also *contra*. However, in Cro. Cha. 556, lord Coke's doctrine seems admitted, where the office is not granted so as to be exercisable by a *deputy*. See Cowp. R. 222.

(5) Acc. 11 Co. 4. a. W. Jo. 264. 2 Lev. 245, and Cas. temp. Talb. 99; but *contra* where it has been the usage so to grant, W. Jo. 311. Hardr. 257. 2 Ventr. 188; and it is said that the king may so grant without any usage. March. 42. 4 Mod. 280. Dy. 295.

(6) See as to this, Plowd. 381.

(7) But it seems that this doctrine has now become inapplicable; for there is no longer any legal establishment for *professed* persons in *England*, and our law never took notice of *foreign professions*. See post. 132. b. 2 Ro. Abr. 43. C. Wright's Ten. 28. 1 Salk. 162.

(8) Accord. ante 2. b. and post. 18. b.

(9) For cases of fraudulent gifts before the 13 Eliz. c. 5, see Dy. 294. b. and 295, a.

Twine's case, 5 Co. 60. Gooche's case, 6 Co. 72. Burrel's case, 11 Co. 74. Pasch, 12 Ja. inter Jones pl. and Sir Rich. Groobham def. in ejectione firmæ in evidence al Jurie.

I. C. had a lease of certaine lands, for 60 yeares, if he lived so long, and forged a lease for 90 years absolutely, and he by indenture reciting the forged lease, for valuable consideration, bargained and sold the forged lease, and all his interest in the land to *R. G.* It seemed to me that *R. G.* was no purchaser within the statute of 27 Eliz. for he contracted not for the true and lawfull interest, for that was not knowne to him; for then perhaps he would not have dealt for it, and the visible and known tearme was forged: and although by general words the true interest passed, notwithstanding he gave no valuable consideration, nor contracted for it. And of this opinion were all the judges in Serjeants-Inne, in Fleet-street.

[i] Hil. 18 R. 3. coram rege in Thesaur.

[i] In ancient time when a man made a fraudulent feoffment, it was said *quòd possuit terram illam in brigam;* where *brigam* doth signify wrangle, contention, or intricacy, for fraud is the mother of them all. [k] And on the other side, purchases, estates, and contracts must be avoided, since *Littleton* wrote, by certain acts of parliament against usurie above ten in the hundred, in such manner and forme as by those acts is provided; which statutes are well expounded in my books of Reports, which may be read there. To them that lend money my cavest is, that ☞ neither directly nor indirectly, by art, or cunning invention, they take above ten (1) in the hundred; for they that seeke by sleight to creepe out of these statutes will deceive themselves, and repent in the end.

[k] 37 H. 8. cap. 6. 13 Eliz. cap. 8. 5 Co. 69. Burton's case. Eodem, lib. 7. Claiton's case. (Lutw. 271.)

(5 Co. 69.)

[4. a.]

Lands and other things to be purchased.

"*Purchase Lands.*" *Littleton* here and in many other places putteth lands but for an example; for this rule extendeth to seigniories, rents, advowsons, commons, estovers, and other hereditaments, of what kind or nature soever.

Pl. Com. 168. b. and 170. a. and 151. 4. Co. 87. b. Lutterel's case. 4 E. 3. 161. and 6 E. 3. 283. 8 E. 3. 377. Temps E. 1. Briefe 811. 28 H. 8. Dyer, 47. (Post. 19. b.)

"*Land*" *Terra*, in the legall signification, comprehendeth any ground, soile, or earth, whatsoever; as meadows, pastures, woods, moores, waters, marishes, furses, and heath. *Terra est nomen generalissimum, et comprehendit omnes species terræ;* but properly, *terra dicitur à terendo quia vomere teritur;* and anciently it was written with a single *r;* and in that sense it includeth whatsoever may be plowed; and is all one with *arvum ab arando.* It legally includeth also all castles, houses, and other buildings (A): for castles, houses, &c. consist upon two things, *viz.* land or ground, as the

(1) Since sir Edward Coke's time, the rate of interest has been gradually reduced to 5 per cent. See 21 Ja. 1. c. 17. 12 Cha. 2. c. 13. and 12 Ann. st. 2. c. 16. But a greater rate of interest is still allowable in Ireland and our Plantations. It has been doubted whether the 12 Ann. did not extend to money lent on lands in Ireland or our Plantations, where the mortgage is executed in Great Britain; but the 14 Geo. 3. c. 79, declares all such securities made previously to that act to be valid, notwithstanding the 12 Ann. where the interest is not more than the established rate of the particular place; and that all *future* securities of a like kind shall also be valid, where the interest is not more than 6 per cent. It is impossible in the compass of a note to cite the numerous cases on the statutes of usury. One of the most remarkable for the great learning and variety of the arguments is that of the earl of Chesterfield and Janssen, 1 Atk. 301, and 2 Ves. 325.

(A) 1 Burr. 141. 3. Comyns, 445. Vin. Grants, T.

the foundation or structure thereupon; so as passing the land or ground, the structure or building thereupon passeth therewith. *Land is anciently called *Fleth;* but land builded is more worthy than other land, because it is for the habitation of man, and in that respect hath the precedency to be demanded in the first place in a (2) *præcipe*, as hereafter shall be said. And therefore this element of the earth is preferred before the other elements: first and principally, because it is for the habitation and resting-place of man; for man cannot rest in any of the other elements, neither in the water, ayre, or fire. For as the heavens are the habitation of Almightie God, so the earth hath he appointed as the suburbs of heaven to be the habitation of man: *Cœlum cœli Domino, terram autem dedit filiis hominum:* All the whole heavens are the Lord's, the earth hath he given to the children of men. Besides, every thing, as it serveth more immediately or more meerly for the food and use of man (as it shall be said hereafter), hath the precedent dignity before any other. And this doth the earth; for out of the earth commeth man's food, and bread that strengthens man's heart, *confirmat cor hominis*, and wine that gladdeth the heart of man, and oyle that makes him a cheerful countenance; and therefore *terra olim Ops mater dicta est, quia omnia hâc opus habent ad vivendum.* And the divine agreeth herewith; for he saith, *Patriam tibi et nutricem, et matrem, et mensam, et domum posuit terram Deus, sed et sepulchrum tibi hanc eandem dedit.* Also, the waters that yeeld fish for the food and sustenance of man are not by that name demandable in a *præcipe* (3); but the land whereupon the water floweth or standeth is demandable; as for example, *viginti acras terræ aquâ coopertas:* and besides, the earth doth furnish man with many other necessaries for his use, as it is replenished with hidden treasures; namely, with gold, silver, brasse, iron, tynne, leade, and other metals, and also with a great varietie of precious stones, and many other things for profit, ornament, and pleasure. And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven; for *cujus est solum ejus est usque ad cœlum* (B), as is holden 14 H. 8. fo. 12. 22 Hen. 6. 59. 10 E. 4. 14. *Registrum origin.* and in other bookes.

* Tr. 7 E. 3. coram Rege Northampt. in Thesaur.

Psal. 115. 16.

Psal. 104. 15. Chrisost. hom. 30.

(Plowd. 313.)

And albeit land, whereof our author here speaketh, be the most firme and fixed inheritance, and therefore it is called *solum, quia est solidum*, and fee simple the most highest and absolute estate that a man can have; yet may the same at severall times be moveable, sometime in one person, and *alternis vicibus* in another; nay sometime in one place, and sometime in another. As for example, if there be 80 acres of meadow which have been used time out of mind of man to be divided betweene certaine persons, and that a certaine number of acres appertaine to every of these persons; as for example, to *A.* 18 acres, to be yearely assigned and lotted out, so as sometime the 18 acres lie in one place, and sometime in another, and so of the rest; *A.* hath a moveable

Vid. Sect. 59. where in this case livery shall be made. (Post. 48. b. 7 Co. 5.)

Vide Sect. 648. how these 18 acres may be charged.

---

(2) Acc. Fitzh. Nat. Br. 2. C. Post. 4. b. and 4 Co. 39. a.

(3) Acc. Yelv. 143. See post. 4. b.

(B) 9 Co. 54. b. 2 Ro. Ab. 140. pl. 12. Ro. Rep. 394. pl. 15. 3 Bulst. 198. 5 Co. 100. b. 6 Mod. 314. Ld. Raymond, 1093.

(1 Ro. Abr. 829. Cro. Eliz. 421.) Hill. 34 Eliz. Rot. 489. in trans. inter Weldon & Bridgewater in Banco Regis. Temps. E. 1. tit. partition. 21. F. N. B. 62. L. Vide 1 Co. 87. per Walmsl. F. N. B. 62. K. (Post. 167. a. 7 Co. 5.) (188. a. post.)

moveable fee simple in 13 acres, and may be parcell of his manor, albeit they have no certaine place, but yearely set out in several places, so as the number only is certaine, and the particular acres or place whercin they lie after the year incertaine. And so it was adjudged in the king's bench upon an especiall verdict (4).

If a partition be made betweene two coparceners of one and the selfe-same land, that the one shall have the land from Easter untill Lammas to her and to her heires, and the other shall have it from Lammas till Easter to her and her heires, or the one shall have it the first yeare, and the other the second yeare, *alternis vicibus, &c.* there it is one selfe-same land wherein two persons have severall inheritances at severall times. So it is if two coparceners have two severall manors by descent, and they make partition, that the one shall have the one manor for a year, and the other the other manor for the same yeare, and after that yeare then she that had the one manor shall have the other, *et sic alternis vicibus* for ever; and albeit the manors be severall, yet are they certaine (c), and therefore stronger than Bridgewater's case; so as this doth make a division of states of inheritances of lands, *viz.* certain or unmoveable, whereof *Littleton* here speaketh, and incertaine and moveable, whereof these three cases for examples have been put. Wherein it is to be noted, that the possession is not onely severall, but the inheritance also.

Vide Sect. 114, where advowsons, &c. may be appendant and in gros.

By what names, &c. lands &c. shall passe.

[a] Vide Sect. 289. (Post. 186. b. Contra 1 Ventr. 393. 14 H. 8. 6. 4 Hen. 7. 3. 10 H. 7. 24. 11 H. 7. 21. 14 H. 7. 4. 6. 21 H. 7. 36, 37. 9 H. 6. 52. 37 H. 6. 35. 22 E. 4. barre 116. 11 H. 4. 90.

☞ It is also necessary to be seene by what names lands shall passe. [a] If a man hath 20 acres of land, and by [4. b.] deed granteth to another and his heires *vesturam terræ*, and maketh livery of seisin *secundum forman chartæ*, the land itselfe shall not passe (1), because he hath a particular right in the land: for thereby he shall not have the houses, timber-trees, mines, and other reall things parcell of the inheritance, but he shall have the vesture of the land, (that is) the corne, grasse, underwood, swepage, and the like, and he shall have an action of trespasse *quare clausum fregit.* [b] The same law, if a man grant *herbagium terræ*, he hath a like particular right in the land, and shall have an action *quare clausum fregit;* but by grant thereof and liverie made, the soile shall not passe, as is aforesaid. [c] If a man let to *B.* the herbage of his woods, and after grant

18 E. 3. Execution 56. 4 E. 3. 48. 8 E. 3. 13. 9 Ass. p. 12. 38 E. 3. 24. [b] Bract. fo. 222. 17 E. 3. 75. 39 H. 6. 38. 11 Elis. Dy. 285. (4 Leon. 43. Post. 47. a. Cro. Cha. 362. Nov. 54.) [c] Pasch. 12 Ja. inter Dockwray & Points in evidence al Jury in Banke le Roy.

all

(4) S. C. Mo. 302. Cro. El. 421. post. 343, b. 486 Vin. C. 1.

(c) Vin. Trespass, H. 6. 8. Feoffment, p. 15. v. 9, &c.

(1) Contra Keilw. 118, and Palm. 174. Also in 1 Ventr. 393, it is argued by North, attorney-general, that *vesture* of land means *all* the profits. But 4 Leo. 43, and Ow. 37, are with sir Edward Coke. Indeed his interpretation is conformable to the use of the word in some ancient deeds, and seems warranted by 4 E. 1. st. 1. s. 4, and 13 E. 1. st. 2. c. 25. s. 10. It also appears most agreeable to the derivation of the word, which is from *vestio.* See Cow. Interpret. ed. 1727, voc. *Vestura* and *Vesture.* Note, the difference taken in Palm. 175, between *vesturam terræ, primam vesturam terræ,* and *primam vesturam terræ, from one quarter to another;* and between such grants by the *king,* and those by a *subject.* As to prescribing for *sola vestura,* see post. 122. a. 5 T. R. 335. 14 Vin. 292. [See also Preston Est. 112.]

all his lands in the tenure, possession, or occupation of *B.* the woods shall passe, for *B.* hath a particular possession and occupation, which is sufficient in this case; and so it was resolved. [*d*] So if a man be seised of a river, and by deed do grant *separalem piscariam* in the same, and maketh livery of seisin *secundum formam chartæ*, the soile doth not passe (2), nor the water, for the grantor may take water there; and if the river become drie, he may take the benefit of the soile; for there passed to the grantee but a particular right, and the livery being made *secundum formam chartæ*, cannot enlarge the grant. [*e*] For the same reason, if a man grant *aquam suam*, the soile shall not passe, but the pischary (3) within the water passeth therewith. And land covered with water shall be demanded by the name of so many acres *aquâ* (4) *coopertas;* whereby it appeareth that they are distinct things. [*f*] So if a man grant to another to dig turves in his land, and to carry them at his will and pleasure, the land shall not passe, because but part of the profit is given, for trees, mines, &c., shall not passe. [*g*] But if a man seised of lands in fee by his deed granteth to another the profit of those lands, and to have and to hold to him and his heires, and maketh livery *secundum formam chartæ*, the whole land itselfe doth passe; for what is the land but the profits thereof; for thereby vesture, herbage, trees, mines, and all whatsoever parcell of that land doth passe (5).

[*d*] Vide Sect. 279. Bract. fo. 208. 40 E. 3. 45. Pl. Com. 154. 10 H. 7. 24. 28. 7 H. 7. 13. 18 H. 6. 29. 34 H. 6. 43. 20 H. 6. 4. 18 E. 4. 4. 4 E. 3. 48. 1 E. 3. 4. 32 E. 3. Scir. fac. 100. 22 E. 4. barre 116. 12 H. 3. Ass. 427. 34 Ass. 11. 13 E. 3. tit. entrie 57. 20 E. 3. Briefe 685. W. 2 c. 24. (2 Ro. Abr. 2.)

[*e*] Tr. 11 R. 2. in tresp. nient Imprimee ne abridg. 11 H. 7. 4.

[*f*] 7 E. 3. 342. 5 Ass. 9, 10. 7 Ass. 9.

[*g*] 45 E. 3. tit. feoffments et faits 90. 14 H. 8. 6. Pl. Com. 541. b. F. N. B. 8. 12 E. 3. Dower 90.

[*h*] By the grant of the boillourie of salt, it is said that the soile shall passe, for it is the whole profit of the soile. And this is called *saliva*, of the French word *salure* for a salt-pit; and you may read *de saliva* in Domesday, and *selda* signifieth the same thing [*i*]; and where you shall reade in records *de lacertâ in profunditate aquæ salsæ*, there *lacerta* signifieth a fathom. A man seised of divers acres of wood, grants to another *omnes boscos suos*, all his woods; not onely the woods growing upon the land passe, but the land itselfe, and by the same name shall be recovered in a *præcipe;* for *boscus* doth not onely include the trees, but the land also whereupon they grow. [*k*] The same law if a man in that case grant *omnes boscos suos crescentes, &c.*

[*h*] Ass. p. 12. 9 E. 3. 443. 466. Domesday. 7 R. 1 int. fines in Thesaur. (1 Sid. 161.)

[*i*] Int. Inquisit. apud Launcast. Anno 6 E. 1. in Thesaur. Mich. 1 H. 5. coram Rege. Rot. 3. in Thesaur.

[*k*] Tr. 7 Eliz. in Banco Regis.

5 Co. 11 Ive's case. 14 H. 8. 1. 46 E. 3. 22. 28 H. 8. Dyer, 19. 32 H. 8. Bro. reservat. 39. 7 E. 6. Dyer, 79.

yet

---

(2) Acc. post. 122. a. but see *contra* by lord Ch. J. Holt, in 2 Salk. 637. The truth is, that the authorities on this subject are very numerous, and seem contradictory. Some agree with Sir Edward Coke; according to others, one having a *several* fishery *must* be owner of the soil; and again some hold, that a *several* fishery and the soil *may* be in *different* persons, but that they shall be *presumed* to be in the same person till the contrary is pleaded. Besides the books cited in the margin, see 17 E. 4. 6. b. 10 H. 7. 26. Bro. Præcipe, 33. and Dav. 55. b. post. 122. a. and n. 7.

(3) Acc. Dav. 55. b. 5 Burr. 2816.

(4) See acc. Yelv. 143.

(5) Adj. acc. in the case of a devise. Cro. Eliz. 190.

yet the land itselfe shall passe, as it hath beene (6) adjudged.

*Glanvill. lib. 8. cap. 3. [l] Domesday. Regist. F. N. B. 2.

* *Frassetum* signifieth a wood, or ground that is woodie. [*l*] If a man hath a wood of elder-trees containing 20 acres, and granteth to another 20 *acras alneti* (with an *n* not a *v*), the wood of elders and the soile thereof shall passe, but no other kinde of woods shall passe by that name. *Alnetum est ubi alni arbores crescunt* †. And *sullings* are taken for elders. [*m*] *Salicetum* doth signifie a wood of willowes, *ubi salices crescunt.* These trees in our bookes are called *sawces.* **Selda* is a wood of sallows, willows, or withies. A brackie ground is called *filicetum, ubi filices crescunt.* A wood of ashes is called *fraxinetum, ubi fraxini crescunt,* and passeth by that name; and *lupulicetum,* where hoppes grow; and *arundinetum* where reeds grow. Some say that *dene* or *denne,* whereof *dena* commeth, is properly a valley or dale. *Dena silvæ,* and the like, [*n*] as *drofden,* or *drufden,* or *druden,* signifieth a thicket of wood in a valley; for *druf,* or *dru,* signifieth a thicket of wood, and is often mentioned in Domesday. And sometimes *dena* or *denna* signifieth, as *villa* and *denne,* a towne.

[m] 8 E. 2. Wast. 111. 7 Ass. 18. 11 Ass. p. 13. 41 E. 3. Wast 82. † Hill. 14 E. 3. coram Rege. Lanc. in Thesaur. *Inter Inquisit. apud Lanc. in com. Cornubie coram Justic. Aud. Anno 6 E. 1. in thesaur. the B. of Excester's case. [n] Domesday.

[*o*] *Cope* signifieth a hill, and so doth *lawe;* as *stanlawe* is *saxeus collis.* [*p*] *Howe* also signifieth a hill. And *hope, combe,* and *stow,* are valleys, and so doth *clough.* And *dunum* or *duna* signifieth a hill or higher ground, and therefore commonly the townes that end in *dun,* have hills or higher grounds in them, which we call downs. It commeth of the old French word *dun.*

[o] Camden, 460. 15]. [p] Pasch. 44 E. 3. coram Rege in Thes.

[*q*] In our Latin a wood is called *boscus. Grava* signifieth a little wood, in old deeds, and *hirst* or *hurst* a wood; and so doth *holt* and *shawe. Twaite* signifieth a wood grubbed up, and turned to arable. *Stethe* or *stede* betokeneth properly a banke of a river, and many times a place, as *stowe* doth; and *wic,* a place upon the sea-shore, or upon a river. *Lea* or *ley* signifieth pasture.

[q] Hill. 13 E. 2. Lanc. coram Rege in Thesaur. Camden Brit. 247. Rot. Par. 18 E. 1. 8. Evesque de Carlisle's case.

[*r*] If a man doth grant all his pastures, *pasturas,* the land itselfe imployed to the feeding of beasts doth passe, and also such pastures or feedings as he hath in another man's soile. *Leswes* or *lesues* is a Saxon word, and signifieth pastures. [*s*] Between *pastura* and *pascuum,* the legall difference is, that *pastura* in one signification containeth the ground itself called pasture, and by that name is to be demanded. *Pascuum,* feeding, is wheresoever cattell are fed, of what nature soever the ground is, and cannot be demanded in a *præcipe* by that name.

[r] Pl. Com. 169. a. 4 E. 2. Briefe 702, 793. 3 E. 3. 86. 4 E. 4. 1. 27 H. 8. 12. [s] 20 Ass. pl. 9.

[*t*] If a man grant *omnia prata sua,* all his meadows, the land itselfe of that kinde passeth: *et dicitur pratum quasi paratum,* because it groweth *sponte* without manurance. [*u*] A man grants *omnes brueras suas;* the soile where heath doth growe passeth, and may be demanded by that name in a *præcipe.* It is derived from *bruyer,* a French word for heath; and it is called *ros* in the British tongue. [5. a.]

[t] Pl. Com. 169. a. 13 E. 3. Briefe 241. 33 E. 3. Entrie 80. [u] Domesday. F. N. B. 2. Regist.

Roncaria or *Runcaria* signifieth land full of brambles and briers, and is derived of *roncier,* the French word which signifieth the

(6) To know when *wood* will include the soil, and when not, see Bro. Grants, 167. Cro. Ja. 487. 524. 2 Ro. Abr. 455. U. Pl. 1. 3. Vin. Reservation, n. c. 25 Burr. 2816.

the same, and as much as *senticetum*. [a] By the grant of *omnes juncarias* or *joncarias*, the soile where rushes do grow doth passe; for *jonc* in French is a rush, whereof *joncaria* commeth. [b] A man grants *omnes ruscarias suas*, the soile where *rusci*, *i. e.* kneholme, or butchers pricks, or broome doe growe shall passe, and so in the verse in the Register it is called; but in F. N. B. fol. 2. in the verse *pischaria* is put instead of *ruscaria*. And *jampna* commeth of *jonc* and *nower*, a waterish place, and is all one in effect with *joncaria*. He that granteth *omnes mariscos suos*, all his fennes or marish grounds doe passe. *Mariscus* is derived of the French word *mares* or *marets;* the Latin word for it is *palus*, or *locus paludosus*. *Mora* is derived of the English word moore, and signifieth a more barren and unprofitable ground than marshes, dangerous for any cattell to go there, in respect of myrie and moorish soyle, neither serves it for getting of turves there. [c] You shall reade in records, that such a man *perquisivit trescent. acr. maretti, &c.* This word *marettum* is derived of *mare* the sea, and *tego*, and properly signifieth a moorish and gravelly ground, which the sea doth cover and overflow at a full sea, and lyeth betweene the high water marke and low water marke, *infra fluxum et refluxum maris*. By grant of these particular kinds, the lands of these particular kinds onely doe passe; but, as hath been said, by the grant of land in generall, all these particular kinds and some others doe passe. *Non mihi si centum linguæ sint oraque centum, Omnia terrarum percurrere nomina possem.* And therefore let us turn our eye to generall words, which doe include lands of several sorts and qualities. [d] By the name of an honor (1), which a subject may have, divers manors and lands may passe. So by the name of an isle, *insula*, many manors, lands, and tenements may passe.

[a] Regist. 1 E. 3. 4. F. N. B. 2.
[b] 16 Ass. p. 9. Register.
Jampna, (Cro. Cha. 179.)
[c] Pasch. 41 E. 3. Coram rege Lincoln. Rot. 28.
[d] Mag. Chart. c. 31. Wallingford Nott. Bolon. Lanc. &c. Trin. 33 E. 1. coram rege in Thes. honor de Huntingdon. Mich. 9 E. 1. coram rege in Ther. 18 E. 2. Ass. 377. 26 Ass. p. 60. 6 E. 3. 56. 47 E. 3. 21. honor de Peverel. 49 E. 3. 324. honor de Egles. 9 H. 6. 27. 36 H. 8. Dyer, 58. honor de Glouc. F. N. B. 265. honor Abbath. de Merle. 5 E. 4. 129. 7 H. 6. 39. 1 E. 3, 4, &c. 13 E. 3. jurisdict. 23. 4 Co. 88. Lutterell's case, 5 H. 7. 9. 14 H. 4. in recordo longo. 8 H. 4. Pl. Com. 168. 8 H. 7. 1. 4 E. 4. 16. (4 Inst. 294.)

Holme or *hulmus* signifieth an isle or fenny ground. *A commote is a great seigniory, and may include one or divers mannors. [e] By the name of a *castle*, one or more manors may be conveyed: *et è converso*, by the name of a manor, &c. a castle may passe (2). In Domesday I read, *Comes Alanus habet in suo castellatu* 200 *maneria, &c. præter castellarium habet* 43 *maneria;* and in that booke a castle is called *castellum*, and *castrum*, and *domus defensibilis*, and *mansus muralis*. [f] But note by the way, that no subject can build a castle or house of strength imbattled, &c. or other fortresse defensible, called in law by the names aforesaid, and sometimes *domus kernellatæ* or *carnellatæ*, *imbattellatæ*, *tenellatæ*, *machecollatæ*, *mese*, *carnelet*, *&c.* without the licence of the king (A), for the danger which might ensue, if every man at his pleasure might do it. And they be called imbattlements, because they are defences against battels in assaults.

* 13 E. 3. jurisdict. 23.
[e] 26 Ass. 54. 29 E. 3. 15. 29 H. 6. travers 4. Bract. fo. 434. 1 E. 3. 4. 5 H. 7. 9. 3 E. 2. Avowry 188. 37 H. 6. 26. 18 H. 6. 11. Lib. rub. scac. fo. 18.
[f] In veter. Mag. Cart. cap. Escheatriæ, fo. 162. Britton, cap. 20.

(1) For the nature of a land honor or barony, see Mad. Bar. Angl. 2.
(2) Acc. 2 Inst. 31.
(A) See Hale's Incepta de Prerog. 129.

assaults. *Tenellare* or *tanellare*, is to make holes or loopes in walls, to shoote out against the assailants. *Machecollare* or *machecoulare*, is to make a warlike device over a gate or other passage like to a grate, through which scalding water, or ponderous or offensive things may be cast upon the assaylants (3). But to returne to the matter from whence upon this occasion we are fallen.

Rot. Parliam. 45 E. 3. nu. 34. 6 H. 4. nu. 19. 1 E. 4. cap. 1. Rot. Parliam. 1 E. 3. 2. pars. Alano Charleton. 22 E. 3. 2. pars Thoma Barkley, &c. (3 Inst. 201.)

By the name of a towne, *villa*, a mannor may passe. In Domesday, *alodium* (in a large sense) signifieth a free mannor (4), and *alodiarii*, or *alodarii*, lords of the same; and *lamemanni* there signifie lords of a mannor, having *socam et sacam de tenentibus et hominibus suis*. [*g*] And by the name of a mannor (B), divers townes may passe. *Quod olim dicebatur fundus nunc manerium dicitur*. By the name of a ferme or fearme (5), *firma*, houses, lands and tenements may passe; and *firma* is derived of the Saxon word *feormian*, to feed or releeve; for in ancient time they reserved upon their leases, cattell and other victuall and provision for their sustenance. [*h*] Note, a fearme in the north parts is called a tacke, in Lancashire a fermeholt, in Essex a wike. But the word fearme is the general word, and anciently *fundus* signified a fearme, and sometime land. [*i*] Lands making a knight's fee (6), shall passe by the grant of a knight's fee *de uno feodo militis*.

[*g*] Lamb. exposit. verb. Ferme. Pl. Com. 195.

[*h*] Pl. Com. 169. Regist. 227. b. Eject. Firmæ.

[*i*] 17 E. 3. fo. 8. 5 E. 3. 213. 16 E. 3. bre. 165. 12 E. 2. bre. 814.

[*k*] *Unum solinum* or *solinus terræ* in Domesday booke containeth two plow-lands and somewhat lesse than an halfe; for there it is said, *septem solini*, or *solina terræ sunt* 17 *carucat'* (7). *Una hida seu carucata terræ*, which is all one as a plow-land, *viz.* as much as a plow can (8) till. *Sullerye* also signifieth a plow-land. *Una virgata terræ*, a yard-land (the Saxons called it *girdland*, and now the *g* is turned to a *y*), is in some countries 10, in some 20, in some 24, in some 30, &c. (9). [*l*] *Una bovata terræ*, an oxgange, or an oxgate of land, is as much as an ox can till (10). [*m*] But *carucata terræ* and *bovata terræ* are words compound, and may containe meadow, pasture, and wood necessary for such tillage. *Jugum terræ* in Domesday containeth halfe a plow-land. And by all these names, in the raigne of R. 1, lands were usually demanded, and long after (11).

[*k*] 4 E. 3. 161. 6 E. 3. 283. 2 E. 3. 5. 35 H. 6. 29. Pl. Com. 168. 7 Ass. 18. 11 Ass. 13. Lamb. Expos. verb. Hyda et Virgat. terræ. Glanvil. lib. cap. Domesday. Bract. lib. 2. cap. 26, 27, & lib. 5. fo. 434. Regist. 72. [*l*] 5 E. 3. fine, 49. 13 E. 3. fine, 67. 39 H. 6. 8. 4. E. 3. 189. 8 E. 3. 377. Bracton, fo. 180. 269. 431. 5 H. 3. Droit. 66. Pl. Com. 168. [*m*] 13 E. 3. bre. 241. 2 E. 3. 57. temps E. 1. bre. 811. Pl. Com. 168.

[*n*] By

(3) See further as to castles, Mad. Baron. Anglican. 17 to 20. Discours. by Emin. Antiq. ed. 1773, v. 1. p. 100. 186. and 191.

(4) See ante, 1. b. Wright Ten. 137.

(B) For Manor, see post. 58. and 121. b. Vin. Ab. Manor, C. Bro. Ab. Manour.

(5) See 2 Inst. 145. 6 T. R. 349.

(6) As to the contents of a knight's fee, see post. 69.

(7) Some think that *solinus terræ* was frequently synonymous with *carucata terræ*. See Somn. Rom. Ports, 82. Cow. Interpr. ed. 1727, voc *solinus terræ*.

(8) See further as to this, post. 69. and 86. b.

(9) See post. 69.

(10) See post. 69.

(11) See further on the dimensions of land in England, post. 200. b. and 69.

[n] By the name of a grange, *grangia*, a house or edifice, not onely where corne is stored up like as in barnes, but necessary places for husbandry also, as stables for hay and horses, and stables and styes for other cattell, and a *curtilege*, and the close wherein it standeth, shall passe; and it is a French word, and signifieth the same as we take it (12).

[n] Pl. Com. 169. Linwood. 44 E. 3. 21. 4 E. 3. 32.

[o] *Stagnum*, in English a poole, doth consist of water and land; and therefore by the name of ☞ *stagnum* or a poole, the water and land shall passe also. [a] In the same manner *gurges*, a deepe pit of water, a gors or gulfe, consisteth of water and land; and therefore by the grant thereof by that name the soile doth passe, and a *præcipe* doth lie thereof, and shall lay his esplées in taking of fishes, as breames and roches. In Domesday it is called *guort*, *gort*, and *gors* plurally: as for example, *de 8 gorz mille anguillæ*.

[5. b.]

[o] 4 E. 3. tit. Feoffments et Faits, 79. 14 E. 3. Formedon, 34. 34 Ass. pl. 11.

[a] 13 E. 3. 4. 4 E. 3. 143. 8 E. 3. 381. 10 E. 3. 482. 13 E. 3.

Entry, 57. F. N. B. 191. b. Domesday.

[b] So it is of a forest, parke, chase, vivarye, and warren in a man's owne ground, by the grant of any of them not onely the privilege, but the land itselfe passes (A), for they are compound. In the book of Domesday, that is called *lewad*, and *leuga*, and *lewed*, and *lewe*, which in Latin is called *leuca*.

[b] Temps E. 1. bre. 861. 4 E. 3. 5. 10 H. 7. 30. 44 E. 3. 12. 43 E. 3. 24. Int. adjudicat.

35 H. 6. 55. 3 H. 6. 2. Domesday. Bracton, lib. 4. fo. 235. coram rege p. 39 E. 3. lib. 3. fo. 95. in Thesaur. (4 Inst. 289.)

[c] *Stadium*, or *ferlingus sive ferlingum*, or *quarentena terræ*, is a furlong of land, and is as much as to say, a furrow long, which in ancient time was the eighth part of a mile; and land will passe by that name. And some hold that by that name land may be demanded. And *de ferlingis et quarentenis*, you shall read divers times in the book of Domesday; and there you shall read, *in insulâ rex habet unum frustum terræ unde exeunt sex vomeres*. *Nota*, *frustum* signifieth a parcell. [d] *Warectum*, or *wareccum*, or *varectum*, doth signifie fallow; *terra jacet ad warectum*, the land lyeth fallow: but in truth the word is *vervactum*, *quasi verè novo victum seu subactum*, *terra novalis seu requieta*, *quia alternis annis requiescat* [e], *tam culta novalia*. [f] By the grant of a messuage, or house, *mesuagium*, the orchard, garden, and curtilage doe (1) passe; and so an acre or

[c] 40 Ass. 38. 4 H. 6. 14. 35 E. 1. ca. 6. Anno 10 R. 1. inter fines in Thes. Ferlingus terræ continet 32 acras. Domesday. Frustum, 16 E. 3. tit. Comon. 9. [d] Mich. 8. H. 3. incipien. 9. coram rege Warr. Ro. 6. [e] Virg. Eclog. 1, 2. [f] Bract. 211. 233. 22 E. 4. trans. 140. Pl. Com. 168. 171. 23 H. 8. Br. Feoffments, 53. 9 Ass. p. 21. 35 H. 6. 44. Pl. Com. 169. (1 Sid. 309.)

more

---

69. Coinpt. on Courts, 222. and Disc. by Emin. Antiq. ed. 1773, v. 1. p. 39 to 50. and 107. 195. and 197.—By what names, and in what order, lands, &c. ought to be demanded, see post. 5. b. Fitzh. N. Br. 2. C. Hugh Comment. on Orig. Writs, 2. and Theloal's Dig. Br. Orig. l. 8. c. 1. p. 118, and particularly the latter book.

(12) *Grange* sometimes comprehends a whole *farm*. See 4 Co. 48. b.

(A) Shep. T. 96.

(1) *Contra* as to the garden, Keilw. 57. Mo. 24. Dal. in. N. Bendl. 29. But see acc. post. 56. a. and b. Plowd. 171. 2 Co. 32. 2 Saund. 401. S. P. adj. acc. in case of a devise. 3 Leon. 214, and Cro. Eliz. 89. See acc. 2 Cha. Cas. 27. See further Litt. Rep. 6, where the court held that the devise of a messuage was not sufficient to pass two acres four miles distant from the messuage, though occupied with it. In Keilw. 57, a difference is taken between *messuage* and *domus*; and it is there said, that *messuage* extends to the *curtilage*, though

not

more may passe by the name of a house: it is derived of the French word *mese*. [*g*] In Domesday, a house in a city or burrough is called *haga;* other houses are called there *mansiones, mansuræ*, and *domus* [*h*]; and in an ancient plea concerning Feversham in Kent, *hawes* are interpreted to signifie *mansiones*. In Normans French it is called *mesiul*, or *mesuil*. *Bye* signifieth a dwelling, *bye*, an habitation, and *byan*, to dwell.

[*g*] Domesday.

[*h*] Pasch. 30 E. 1, coram rege Banc. in Thesaur. Statut. de extent manerii Domesday.

It is to be noted, that in Domesday there be often named *bordarii seu borduanni, cosces, cocet, cotucami, cotarii*, who are all in effect bores or husbandmen, or cottagers, saving that *bordarii*, which commeth of the French word *borde* for a cottage, signifieth there bores holding a little house, with some land of husbandry bigger than a cottage; and *coterelli* are meere cottagers, *qui cotagia et curtilagia tenent* (2).

Villani in Domesday (often named) are not taken there for bondmen, but had their name *de villis*, because they had fermes, and there did worke of husbandry for the lord: and they were ever named before *bordarii, &c.* and such as are bondmen are called there *servi*.

Domesday.

[*i*] Int. placita coram domino rege Mich. 10 E. 3. Rot. 26. Lamb. exposit verb. Thanus.

[*i*] *Coleberti*, often also named in Domesday, signifieth tenants in free socage by free rent; and so it is expounded of record. *Radmans* and *radchemistres* (*rad*, or *rede*, signifieth firme and stable) there also often named; these are *liberi tenentes qui arabant et herciebant ad curiam domini, seu falcabant, aut metebant*, because their estates are firme and stable; and they are many times called *sochemans* and *sokemanni*, because of their plough service.

Dreuchs signifieth free tenants of a mannor, there also named. *Taini* or *thaini mediocres*, were freeholders, and sometime called *milites regis*, and their land called *tainland;* and there it is said, *hæc terra T. R. E. fuit tainland, sed postea, conversa in reveland.*

[*k*] Lib. Rub. cap. 15. & cap. 41 & 76. W. 2. c. 46. 7 H. 4. 38. Lib. d'Entries, tit. Ass. Corps Pol. 2. (4 Inst. 294.) Domesday.

[*k*] But *thainus regis* is taken for a baron; for it is said in an ancient author, *thainus regis proximus comiti est, et ibidem mediocris thainus, et alibi baro sive thainus* (3). *Barquarium* or *bercaria*, commeth of *berc*, an old Saxon word, used at this day for barkes or rindes of trees, and signifieth a tan-house, or a heath-house, where barkes or rindes of trees are laid to tan withal: and *berquarii* are mentioned in Domesday. It signifieth also, and more legally, a sheep-cote, of the French word *bergerie*.

[*l*] 7 H. 4. 28. Fleta, lib. 2. cap. 35. Domesday. 10 R. 1. inter fines.

[*l*] By *vaccaria* in law is signified a dairy-house, derived of *vacca*, the cow. In Latin, it is *lactarium*, or *lactitium;* and *vaccarius* is mentioned in Domesday. And Fleta maketh mention of *porcaria*, a swinestye.

The content of an acre is known. The name is common to the English, German, and French. In legall Latin it is called *acra*, which the Latinists call *jugerum*. In Domesday it is called *arpen prati, silvæ, &c.* 10 R. 1. *inter fines*. *Acra* in Cornwall

continet

---

not to the *garden*, but that *domus* only comprehends buildings. Also in some of the cases cited, particularly that from Plowden, the grant was of a *messuage* with the *appurtenances;* on which *latter* word some stress seems to have been laid. See 2 Term R. 498. 2 Blackst. Rep. 726. 1148.

(2) See as to *cottages*, 2 Inst. 736. 2 Ld. Raym. 1015. 6 Mod. 114.

(3) See further as to *thane* and *thane* land, in Reliq. Spelm. 11, &c. See also post. 6. a. n. 6. 86. a. 116. a. §. 117.

continet 40 *perticatas in longitudine, et* 4 *in latitudine, et quælibet perticata de* 16 *pedibus in longitudine* (4).

[*m*] By the grant of a selion of land, *selio terræ*, a ridge of land which containeth no certainty, for some be greater, and some be lesser; and by the grant *de unâ porcâ*, a ridge doth passe. *Selio* is derived of the French word *sellon*, for a ridge.

[m] 9 E. 3. 39. Temps E. 1. Br. 866. Mich. 30 E. 1. coram rege Glouc. in Thesaur.

[*n*] By the grant *de centum libratis terræ*, *or* 50 *libratis terræ*, or *centum solidatis terræ*, *&c.* land of that value passeth, and so of more or lesse; and in ancient time by that name it might have been demanded. [*o*] And many things may passe by a name, that by the same name cannot be demanded by a (5) *præcipe*, for that doth require more prescript forme; but whatsoever may be demanded by a *præcipe*, may passe by the same name by way of grant.

[n] Bract. fo. 377. 431. 43 E. 3. 27. Regist. fo. 1. 94. 248, 249. F. N. B. fo. 87. F. l.
[o] Regula.

Frythe is a plaine betweene woods; and so is *lawnd* or *lound*. *Combe*, *hope*, *dene*, *glyn*, *hawgh*, *howgh*, signifyeth a valley. *Howe*, *hoo*, *knol*, *law*, *pen*, and *cope*, a hill. *Ey*, *ing*, and *worth*, signifieth a watry place or water. *Falesia* is a bank or hill by the sea-side; it commeth of *falaize*, which signifieth the same.

7 R. 1. inter fines Sussex.

[6. a.] Of all these you shall read in ancient bookes, charters, deeds, ☞ and records: and to the end that our student should not be discouraged for want of knowledge, when he meeteth with them (*nescit enim generosa mens ignorantiam pati*), we have armed him with the signification of them, to the end he may proceed in his reading with alacrity, and set upon, and know how to worke into with delight these rough mines of hidden treasure.

[*m*] By the name of *minera*, or *fodina plumbi*, *&c.* the land itselfe shall passe in a grant, if livery be made, and also be recovered in an assize, *et sic de similibus*.

[m] 17 E. 3. 7. 43 E. 3. 35. b. Regist. 65. 10 H. 7. 21.

Pl. Com. 191. 195. Bract. 211. 326. (5 Co. 12. post. 53. b.)

By the grant of a fouldcourse, or the like, lands and tenements may (1) passe [*n*]. *Tenementum*, tenement, is a large word to passe not only lands and other inheritances which are holden, but also offices, rents, commons, profits apprender out of lands, and the like, wherein a man hath any franktenement (A), and whereof he is seised *ut de libero tenemento* (2). But *hæreditamentum*, hereditament (B), is the largest word of all in that kind; for

[n] 45 E. 3. Vouchee, 72. 33 E. 3. Grant, 102. 11 H. 6. 22. 27. 14 E. 4. 4. 20 Ass. p. 9. 8 E. 4. 19. 11 H. 7. 25.

---

(4) This differs from the common acre, because each perch usually contains 16 feet and an half. In some places the custom is to measure by a perch of 24 feet, and in others by one of 20 feet. See Crompt. on Courts, 222.

(5) See ante 5. a. n. 11.

(1) Here *fold-course* seems to be understood for land used as a *sheep-walk*; but the word has various other senses. Sometimes it signifies land to which is appurtenant the sole right of folding the cattle of others. Sometimes it means merely *such* right of folding. It is also used to denote the right of folding on another's land, which is called *common* of *faldage*. See in W. Jo. 375, and Cro. Cha. 432, a case, in which *common* of *faldage* was claimed; and 2 Ventr. 139, one in which the right of folding the cattle of others is prescribed for.

(A) Shep. T. 92.

(2) See further as to the extent of the word *tenement*, Perk. sect. 114, and 11 H. 6. 22. Str. 100. Comyns, 267. Vin. Grants, p. 2. passim.

(B) See as to Hereditament, Buckridge *v.* Ingram, 2 Ves. jun. 652. 666.

(Post. 19. b. 20. and 154.)

for whatsoever may be inherited is an hereditament, be it corporeall or incorporeall, reall or personall, or mixt (3).

[o] 1 Co. so. 1. & 2, in Seignior Buckhurst's case. 44 E. 3. 11. b. 39 E. 3. 17. a. 19 H. 6. 65. b. 34 H. 6. 1. a. 10 E. 4. 9. b. 18 E. 4. 14, 15. 6 H. 7. 3. b. H. 7. 33. a. (2 Ro. Abr. 31.)

[o] A man seised of land in fee has divers charters, deeds, and evidences, and maketh a feoffment in fee, either without warrantie, or with warrantie only against him and his heirs, the purchaser shall have all the charters, deeds, and evidences, as incident to the lands, *et ratione terræ*, to the end he may the better defend the land himself, having no warrantie to recover in value; for the evidences are, as it were, the sinewes of the land, and the feoffor not being bound to warrantie hath no use of them. But if the feoffor be bound to warrantie, so that he is bound to render in value, then is the defence of the title at his peril; and therefore the feoffee in that case shall have no deeds that comprehend warrantie, whereof the feoffor may take advantage. Also, he shall have such charter, as may serve him to deraigne the warrantie paramount. Also, he shall have all deeds and evidences, which are materiall for the maintenance of the title of the land; but other evidences which concerne the possession, and not the title of the land, the feoffee shall have them (4).

"*To have and to hold.*" These two words do in this place prove a double signification, *viz. to have* an estate of inheritance of lands descendible to his heirs, and *to hold* the same of some superior lord.

Vide Sect. 40. & 370, 371. many things de

There have been eight formall or orderly parts of a deed of feoffment (5), *viz.* 1, the *premises* of the deed implied by *Littleton;*

(3) See further as to *hereditament*, ante 3. Plowd. 58. Mo. 176. 3 Co. 2. Dy. 323. b. pl. 30. With the word *hereditament* lord Coke ends this laborious inquiries about the names by which things will pass in grants and other conveyances. His etymologies and explanations of the several words are certainly open to many observations, besides the few made by the editor of this edition. But the omission on his part proceeds from the nature of his undertaking, which confines him to narrow limits. To supply his unavoidable deficiencies in this instance, and for the sake of recommending assistances which are too much neglected, he refers the student to the Glossaries which are so peculiarly adapted for the libraries of such as study English law, history, and antiquities. Of these a good list is given in a tract by Dr. Thomas Barlow, intitled *Directions for the Study of the English History and Antiquities*, and published in 1742 by Dr. Taylor, with his Commentary on the Decemviral Law *De inope Debitore in partes dissecando*. To this list of Glossaries should be added, Du Fresne's Glossary *ad Scriptores Med. et Infim. Latin ed Par.* 1733, the *Glossarium Novum* by Charpentier, *ed. Par.* 1766, the Glossary by Dr. Kennet, at the end of his Parochial Antiquities, that at the end of Wilkins's Leg. Anglo-Saxon. and Lye's Dict. Sax. & Gothic. Latin ed. 1772.

(4) See Cro. Eliz. 347. Cro. Cha. 442. Noy, 145. In all of these books it is said, that in the case of conveyances to uses the possession of deeds appertains to the *feoffee* or *covenantee*, and not to *cestui que use;* and the reason given is, that it was so at common law; and the statute of uses, though it transfers the legal estate to *cestui que use*, doth not transfer the deeds. But this doctrine seems questionable. See 13 Vin. 46. 62. 1 Ves. jun. 76. Eq. Ca. Ab. 167.

(5) See the observations on this part of the Commentary in Mad. Form. Angl. Dissert. p. 5. See also on the subjects of ancient deeds and charters, the whole of the same Dissertation, and Nich. Engl. Hist. Libr. 2d ed. 240. Seld. Jan. Angl. b. 2. c. 2, and 3, to which may be added Mabillon de Re Diplomatica. Post. 7. a.

ton; 2, the *habendum*, whereof *Littleton* here speaketh; 3, the *tenendem*, mentioned by *Littleton;* 4, the *reddendum;* 5, the *clause of warrantie;* 6, the *in cujus rei testimonium*, comprehending the sealing; 7, the date of the deed, containing the day, the month, the yeare and stile of the king, or of the yeare of our Lord; [*p*] lastly, the clause of *hiis testibus;* and yet all these parts were contained in very few and significant words [*q*], *hæc fuit candida illius ætatis fides et simplicitas, quæ pauculis lineis omnia fidei firmamenta posuerunt.*

cartis et factis. Fleta, lib. 3. ca. 14. Britton, 100, 101. Bract. lib. 5. fo. 396. a. 399. 38 H. 6. 33. 36. Pl. Com. Wrotesleye's case, fol. 96.

[*p*] Vid. Throg-Mildmay's case.

morton's case, Pl. Com. Vid. Sect. 278. (2 Ro. Abr. 23.)

[*q*] 6 Co. 43. in sir Anthony

The office of the *premisses* of the deed is twofold: first, rightly to name the feoffor and the feoffee; and secondly, to comprehend the certainty of the lands or tenements to be conveied by the feoffment, either by expresse words, or which may by reference be reduced to a certaintie; for *certum est quod certum reddi potest.* The *habendum* (c) hath also two parts, *viz.* first, to name againe the feoffee; and secondly, to limit the certaintie of the estate. The *tenendum* at this day, where the fee simple passeth, must be of the chiefe lords of the fee. And of the *reddendum* more shall be said in his proper place, in the Chapter of Rents. Of the *clause of warrantie* more shall be said in the Chapter of Warranties. In *cujus rei testimonium sigillum meum apposui* was added, for the seale is of the essentiall part of the deed. The date of the deed many times antiquity omitted; and the reason thereof was, for that the limitation of prescription, or time of memory, did often in processe of time change; and the law was then holden, that a deed bearing date before the limited time of prescription, was not pleadable; and therefore they made their deedes without date, to the end they might alledge them within the time of prescription. And the date of the deedes was commonly added in the raigne of E. 2, and E. 3, and so ever since.

Brit. fo. 101.

And sometime antiquitie added a place(d), as *datum apud D.* which was in disadvantage of the feoffee; for being in generall he may alleage the deed to be made where he will. And lastly, antiquitie did add *hiis testibus* in the continent of the deed after the *in cujus rei testimonium*, written with the same hand that the deed was, which witnesses were called, the deed read, and then their names entered. [*r*] And this is called charter land; and accordingly the Saxons called it *bockland*, as it were booke land (6); which clause of *hiis testibus* in subjects deeds continued untill and in the raigne of H. 8, but now is wholly omitted. And it appeareth by the ancient authors and authorities of the law, that before the statute of 12 E. 2. c. 2, processe should be awarded against the witnesses named in the deed, *testes in cartâ nominatos;*

[*r*] Lamb. exposit. verb. terra ex scripto. Vid. Fortescue, cap. 32. See the Second Part of the Instit. cap. 38. 12 E. 2. c. 2.

See the Second Part of the Institutes. Marlb. cap. 6. and cap. 14.

(c) Shep. T. 75. 2 Co. 55. a. § 371.

(d) Letters patent still are dated from a place, which long has been Westminster.

(6) See further as to *bockland* and *folkland.* Reliq. Spelm. 12. 39, and Dalrymp. Feud. Prop. 9. In this last book the very spirited writer attempts a new distinction between the two kinds of land, and to show that *bockland* or *thane land* was *feudal,* and that *folk* or *reveland* was *allodial.*

nominatos; [*s*] and that the same statute was but an affirmance of the common law, which not being well understood, hath caused varietie of opinions in our books. But the delay therein was so great, and sometimes (though rarely) by exceptions against those witnesses, which being found true, they were not to be sworne at all, neither to be joined to the jury, nor as witnesses; [*t*] as if the witness were infamous: for example, if he be attainted of a false verdict, or of a conspiracie at the ☞ suite of the king, or convicted of perjury (A), or of a præmunire, or of forgerie upon the statute of 5 Eliz. cap. 14, and not upon the statute of 1 Hen. 5. cap. 3, or convict of felony, or by judgement lost his eares, or stood upon the pillory or tumbrell, or beene *stigmaticus*, branded, or the like (1), whereby they become infamous for some offences, *quæ sunt minoris culpæ sunt majoris infamiæ.* [6. b.]

[*s*] Brit. fo. 65. 101. 11 E. 3. proces. 170. 6 H. 3. proces. 209. 8 H. 3. proces. 210. 4 E. 2. gard. 119.

[*t*] Mirror, ca. 4. sect. de infamies et perjurie. Glanv. lib. 2. cap. 15. Bract. lib. 5. fo. 288. 292. Brit. fo. 134, 135. 101. Fleta, lib. 5. ca. 21. 8 E. 2. Ass. 396. 2 E. 3. 22. 24 E. 3. 34. (5 Co. 99. Flower's case.) 43 E. 3. conspir. 11. 27 Ass. 59. 33 H. 6. 55. 21 H. 6. 36. (4 Inst. 279. 1 Sid. 51. Godb. 288. 2 Bulst. 154. Raym. 369. 1 Ventr. 349. 1 Kelynge, 38. 18. 4 Inst. 279. T. Jo. 155. 2 Ro. Abr. 686.)

[*a*] If a champion in a writ of right become recreant or coward, he thereby loseth *liberam legem*, and thereby becomes infamous, and cannot be a witnesse; for regularly he that loseth *liberam legem*, becometh infamous, and can be no witnesse. Or if the witnesse be an infidell (2), or of non-sane memory, or not of discretion, or a partie interested, or the like. [*b*] But oftentimes a man may be challenged to be of a jury, that cannot be challeged to be a witnesse; and therefore though the witnesse be of the neerest alliance, or kindred, or of counsell, or tenant, or servant to either partie, or any other exception that maketh him not infamous, or to want understanding, or discretion, or a partie in interest, though it be proved true, shall not exclude the witnesse to be sworne[*c*], but he shall be sworne, and his credit upon the exceptions taken against him left to those of the jury, who are tryers of the fact; insomuch as some bookes have said, that though the witnesse named in the deed be named a disseisor in the writ, yet he shall be sworne as a witnesse to the deed. [*d*] A witnesse amongst others named in a deed was outlawed, and no process was awarded against him by the statute, because he was *extra legem;* an an outlawed person cannot be an auditor. And

[*a*] Fortesc. ca. 26. Pat. 55 H. 3. m. 3. Stanf. Pl. Cor. 174. a.

[*b*] Fortescu. ca. 25.

[*c*] 22 Ass. 12. and 41. 23 Ass. 11. 19 E. 2. tit. Ass. 409.

[*d*] 34 E. 1. proces. 208.

(A) 5 El. c. 9. as to perjury. [9 Geo. 4. c. 32. s. 4.]

(1) But according to the modern cases, it is the *infamy* of the *crime*, and not of the *punishment*, which disqualifies from being a witness; and therefore persons stigmatized by an *infamous* punishment, such as being set on the pillory, are admissible witnesses, unless the punishment was inflicted for forgery, perjury, or any species of the *crimen falsi*, or any other crime of an infamous nature. See further on this subject, Gilb. Law. of Evid. 142, the Law of Nisi Prius, 1st ed. 413. and 1 Wils. part 2. p. 18. [9 Geo. 4. c. 32.]

(2) But now it is settled, that all persons professing to believe in a God, though neither believing in the Old or New Testament, may be witnesses, if sworn according to the ceremonies of their own religion. See in 1 Atk. 19. 2 Eq. Cas. Abr. 397, and 1 Wils. part 1. p. 84, the great case of Omichund and Barker, in which lord chancellor Hardwicke, assisted by the two chief justices and the chief baron, determined that the deposition of one who was of the *Gentoo* religion should be read in evidence.

And the courts in some bookes have said that they have not seene witnesses challenged, which is regularly to be understood with the limitations abovesaid; but such as are returned to be of a jurie are to be challenged for the causes aforesaid for outlawry, and divers other causes (for the which a witnesse cannot be challenged), and such process against witnesses (3) is vanished. But seeing the witnesses named in a deed shall be joyned to the inquest, and shall in some sort joyne also in the verdict (in which case if jurie and witnesses finde the deed that is denied to be the deede of the partie, the adverse partie is debarred of his attaint, because there is more than 12 that affirme the verdict) (4), it is reason, that in that case of joyning such exception shall be taken against the witnesse as against one of the jury, because he is in the nature of a juror. [e] And therefore to put one example, if he be outlawed in a personal action, he cannot be joined to the jury; but yet that is no exception against him to exclude him to be sworne as a witnesse to the jury: And the reason of all this is, for that if he with others should joyne in verdict with the jurie in affirmance of the deed, the partie should be barred of his attaint. But note, there must be more than one witnesse that shall be joined to the inquest. And albeit they joyne with the jury, and finde it not his deed, notwithstanding this joyning, the partie shall have his attaint; for it is a maxim in law, [f] that witnesses can nottestifie a negative (5), but an affirmative. And if one of the witnesses named in the deed be one of the panell, he shall be put out of the panell: and all these secrets of law notably appeare in our bookes.

[e] 34 E. 1. tit. Proces. 208. 11 Ass. p. 19, 20. 12 Ass. p. 1. 12. 41. 18 Ass. p. 11. 22 Ass. 15. 23 Ass. 15. 40 Ass. 23. 48 Ass. p. 5. 21 H. 6. 30.

[f] 48 E. 3. 30. 12 H. 6. fo. 6. a. 50 E. 3. 16. 43 E. 3. 32. 12 H. 4. 9. 19 E. 2.

Ass. 408. Pasch. 14 E. 3. coram rege Devon. in Thesaur. Fleta, lib. 6. cap. 6. F. N. B. 106. b. and 97. c. (Post. 303.)

To shut up this point, it is to be knowne, [g] that when a triall is by witnesses, regularly the affirmative ought to be proved by two or three witnesses, as to prove a summons of the tenant, or the challenge of a juror and the like. But when the trial is by verdict of 12 men, there the judgment is not given upon witnesses, or other kinde of evidence, but upon the verdict; and upon such evidence as is given to the jury, they give their verdict. And Bracton saith, there is *probatio duplex, viz. viva*, as by witnesses *vivâ voce;* and *mortua*, as by deedes, writings, and instruments. And many times juries, together with other matter, are much induced by presumptions; whereof there be three sorts, *viz.* violent, probable, and light or temerary. *Violenta præsumptio* is manie times *plena probatio;* as if one be runne thorow the bodie with a sword in a house, whereof he instantly dieth, and a man is seene to come out of that house with a bloody sword, and no other man was at that time in the house. *Præsumptio probabilis* moveth little; but *præsumptio levis seu temeraria* moveth not at all. So it is in the case of a charter of feoffment, if all the witnesses to the

[g] Mirror, car. 3. Pl. Com. fo. 10. Bract. lib. 5, fo. 400. (Post. 373. a.)

Fleta, lib. 60. ca. 33. 8 E. 3. 290. 39 E. 3. 21. b.

(3) See further on this subject of joining with the jury the witnesses named in a deed, and the process for that purpose, 33 H. 6. 19, and in Vin. Abr. *Evidence*, H. a. and J. a.

(4) Acc. 1 Rob. Abr. 280. pl. 14, and 2 Inst. 662. See infra, n. 5.

(5) Acc. 4 Inst. 279, and the references supra in n. 4. But see 1 Ro. Rep. 83. Comb. 18. 57. Gilb. Law of Evid. 157. Law of Nisi Prius, 1st ed. 422.

Glanv. lib. 10. ca. 12. Fleta, lib. 6. ca. 33.

the deed be dead (as no man can keep his witnesses alive, and time weareth out all men), then violent presumption, which stands for a proofe, is continuall and quiet possession; for *ex diuturnitate temporis omnia præsumuntur solemniter esse acta.* Also the deed may receive credit *per collationem sigillorum scripturæ &c. et super fidem cartarum mortuus testibus erit ad patriam de necessitate recurrendum.*

[*h*] Pasch. 10. Ja. in Com. Banco upon the stat. of bankrouts. (1 Brownl. 47. 2 Ro. Abr. 585. Hutt. 115. Raym. 1. 1 Vent. 243. 3 Keb. 193. 1 Sid. 431.)

[*i*] Fleta, lib. 2. cap. 44. 13 E. 1. tit. Vill. 36, 37. 19 E. 2. ibid. 32. (Post. 23.)

[*k*] Tr. 8 Jac. in Com. Banco. Smithe's case, in evidence upon an information upon the statute of usury. Brit. fo. 134. (Raym. 191. 7 Mod. 118.)

Note, it hath been resolved by the justices, that a wife [*h*] cannot be produced either against or for her husband (6), *qua sunt duæ animæ in carne unâ;* and it might be a cause of implacable discord and dissention between the husband and the wife, and a meane of great inconvenience; but [*i*] in some cases women are by law wholly excluded to beare testimony; as to prove a man to be a villeine, *mulieres ad probationem statûs hominis admitti non debent.* It was also agreed by the whole court [*k*], that in an information upon the statute of usury, the partie to the usurious contract shall not be admitted to be a witnesse against the usurer, for in effect he should be *testis in propriâ causâ*, and should avoyd his owne bonds and assurances, and discharge himselfe of the money borrowed; and though he commonly raise up an informer to exhibit the information, yet *in rei veritate* he is the partie (7). And herewith in effect agreeth Britton, that he that challengeth a right in the thing in demand, cannot be a witnesse, for that he is a party in interest (1). But now let us returne to that from the which by way of digression (upon this occasion) we are fallen.

[7. a.]

(1 Sid. 51. 2 Ro. Abr. 685.)

And

(6) There are many exceptions to this rule, as well at common law as under acts of parliament. See Gilb. Law of Evid. 135. Law of Nisi Prius, 1st. ed. 435. See further as to admitting or refusing the evidence of the wife or husband against each other, in Cas. B. R. temp. Hardwicke, 265. Rep. of Cas. B. R. temp. Hardw. 140. 1 Atk. 451. 2 Kel. 62.

(7) But this objection fails where the debtor, previously to his examination, has paid the money borrowed, there being, as it is said, no remedy to recover the money back again; and therefore in such a case his testimony hath been received. See the addit. refer. supra in marg. letter [*k*], and Cas. B. R. temp. Hardw. 266, and Gilb. Law of Evid. 127. See 1 Term Rep. 296. 7 T. R. 60.

(1) Besides the books already cited on the subject of evidence, see *Duncombe's Trials per Pais* in the Chapter on Evidence, the *Law of Evidence*, and the title evidence in the several Treatises on the Pleas of the Crown, and in the several Abridgments of Law and Equity. As to the book intitled the *Theory of Evidence*, it is included in the *Law of Nisi Prius*. The writings of the civilians on evidence are very numerous; and the curious reader may see an account of them in *Buderus's* edition of the *Bibliotheca Juris selecta*, by *Struvius*. Amongst the most admired of their professed writers on the subject are *Menochius de Presumptionibus*, *Mascardus de Probationibus Everhardus de Testibus et Fide Instrumentorum*, and *Farinacius de Testibus*. Struvius's *Bibliotheca Juris* will be found very useful to the diligent student, by introducing him to a knowledge of the principal books on the law of nature and nations, the civil and canon law, and the laws of most of the countries in Europe, and of the characters of the several writers. It is to be wished that we had a *Bibliotheca Juris Anglicani*, written on the same critical and enlarged plan. Such a work has been attempted by Mr. *Gatzert*, a German writer, who has lately published at Gottingen a book intitled *Commentatio Juris Exotici Historico-Litteraria*

And the ancient charters of the king which passed away any franchise or revenue of any estate of inheritance, had ever this clause of *hiis testibus*, of the greatest men of the kingdome, as the charter of creation of nobility yet have at this day. When *hiis testibus* was omitted, and when *teste me ipso* came into the king's grants, you shall reade in the Second Part of the Institutes (2), *Magna Charta*, cap. 38. I have tearmed the said parts of the deed formall or orderly parts, for that they be not of the essence of a deed of feeoffment; for if such a deed be without *premisses*, *habendum*, *tenendum*, *reddendum*, clause of *warrantie*, the clause of *in cujus rei testimonium*, the *date*, and the clause of *hiis testibus*, yet the deed is good. [*f*] For if a man by deede give lands to another and to his heirs without more saying, this is good if he put his seale to the deede, deliver it, and make livery accordingly. [*g*] So it is if *A.* give lands to have and to hold to *B.* and his heires, this is good, albeit the feoffee is not named in the (3) premisses. And yet no well advised man will trust to such deeds which the law by construction maketh good, *ut res magis valeat;* but when forme and substance concurre, then is the deede faire and absolutely good. The sealing of charters and deeds is much more ancient than some out of error have imagined (4); for the charter of king Edwyn, brother of king Edgar, bearing date *anno Domini* 956, made of the land called *Jecklea* in the Isle of Ely, was not only sealed with his owne seale (which appeareth by these words *ego Edwinus gratiâ Dei totius Britannicæ telluris rex meum donum proprio sigillo confirmavi*), but also the bishop of Winchester put to his seale, *ego Ælfwinus, Winton, ecclesiæ divinus speculator, proprium sigillum impressi.* And the charter of King Offa, whereby he gave the Peterpence, doth yet remaine under seale. But no king of England before or since the Conquest sealed with any seale

(2 Inst. 77.)

[*f*] Mirror, cap. 1. sect. 6. & cap. 5. sect. 1. Glanvil. lib. 10. cap. 12. Bract. lib. 5. fol. 396. Flet. lib. 6. ca. 32. Brit. fo. 66.

[*g*] Vid. Tearmes of the Law, verb. Faits. Vid. Glanvil. lib. 10. c. 12. Mirr. c. 1. sect. 3, and c. 3. (2 Ro. Abr. 66. pl. 13. Cro. Eliz. 903.)

Historico Litteraria de Jure Communi Angliæ. But though Mr. Gatzert, when the disadvantage of his being a foreigner is considered, has really done wonders; yet it is not to be conceived that such a work can ever be executed with the requisite judgment, accuracy, and nicety, until the task is undertaken by one of our own country, who hath been regularly trained in the study of the English law, and is familiarly acquainted with all the writers on our laws, constitution, and history.

(2) In the second Institute, sir Edward Coke seems to think, that the clause of *teste me ipso* was first introduced into the king's grants in the time of Richard the *second;* but Mr. Madox dates the use of it much earlier, and gives an instance in the reign of Richard the *first.* See 2 Inst. 77, and Mad. Form. Anglic. Dissert. p. 32.

(3) The cases in 3 Leon. 33, and 2 Ro. Abr. 66. pl. 13, are *contra.* That in Cro. Eliz. 902, and 917, also seems *contra* on the first reading; though on examination the question appears to have been rather on the manner of pleading the deed than on the operation of it. But in Car. Rep. 123, there is a case of the 21 and 22 Eliz. in which the two chief justices and the chief baron certified to the chancellor, that a lease was good in law, though the lessee was named in the *habendum* only; and the case in Allen, 41, is also with lord Coke.

(4) See further as to the antiquity of sealing deeds in Seld. Jan. Angl. b. 2. c. 2. Mad. Form. Anglic. Dissert. p. 27, and Nichols. Eng. Histor. Libr. 2d ed. 241.

seale of armes before king R. 1, but the seale was the king sitting in a chaire on the one side of the seale, and on horsebacke on the other side in divers formes. And king R. 1. sealed with a seale of two lyons, for the Conqueror of England bare two lyons; and king John in the right of Acquitaine (the duke whereof bare one lyon) was the first that bare three lyons, and made his seale accordingly, and all the kings since have followed him. And king E. 3. in *anno* 13 of his raigne, did quarter the armes of France with his three lyons, and tooke upon him the title of king of France, and all his successors have followed him therein.

In ancient charters of feoffment there was never mention made of the delivery of the deed, or any livery of seisin indorsed; for certainly the witnesses named in the deed were witnesses of both: and witnesses either of delivery of the deed, or of livery of seisin, by expresse tearmes was but of later times, and the reason was in respect of the notoriety of the feoffment. And I have knowne some ancient deeds of feoffment having livery of seisin indorsed suspected, and after detected of forgerie. As if a deed in the stile of the king name him *defensor fidei* before 13 H. 8, or *supreme head* before 20 H. 8, at which time he was first acknowledged supreme head by the cleargy, albeit the king used not the stile of *supreme head* in his charters, &c. till 22 H. 8, or *king of Ireland* before 33 H. 8, at which time he assumed the title of *king of Ireland* (5), being before that called lord of Ireland, it is certainly forged; *et sic de similibus.*

21 H. 8. cap. 16.

Vid. 2 H. 4. c. 15, where royall majesty is attributed to the king, and crimen læsæ majestatis farr more ancient.

And some have observed that *grace* was attributed to king H. 4, *excellent grace* to king H. 6, *majestie* to king H. 8, and before, the king was called *sovereign lord, leige lord, highness*, and *kingly highnesse*, which in Latin in legall proceedings is called *regia celsitudo;* as the beginning of the petition of right to the king is *humillimè supplicavit vestræ celsitudini regiæ, &c.* and the like. And upon this occasion it shall not be impertinent, seeing it is part of the formall deed, to set down the several stiles of the kings of England since the Conquest.

William the Conqueror commonly stiled himselfe *Willielmus rex*, and sometimes *Willielmus rex Anglorum.* And the like did William Rufus, and sometimes *Willielmus Dei gratiâ rex Anglorum.*

Henry the first, *Henricus rex Anglorum*, and sometimes *Henricus Dei gratiâ rex Anglorum.*

Mawde, the sole daughter and heir of H. 1, wrote *Matildis imperatrix Henrici regis filia et Anglorum domina;* divers of whose creations and grants I have seene.

King Stephen used the stile that King H. 1, did.

Henry the 2, *Fitz-Empress*, omitted *Dei gratiâ*, and used this stile, *Henricus Rex Angilæ, dux Normanniæ et Aquitaniæ, et comes Andegaviæ*, he having the duchy of Aquitaine and earledome of Poitiers in the right of Elianor his wife heire to both, and the earldome of Anjowe Tournie and Maine, as sonne and heire to Jeffery Plantaganet by the said Mawde his wife, daughter and sole heire of king H. 1. She was first married to Henry the emperor, and after his death to the said Jeffery Plantagenet. Which

(5) See post 7. b. n. 1.

Which duchie of Aquitaine doth include Gascoigne and Guien.

King R. 1, used the stile that H. 2, his father did; yet was he king of Cyprus, and after of Jerusalem, but never used either of them.

[7. b.] ☞ King John used that stile, but with this addition, *dominus Hiberniæ;* and yet all that he had in Ireland was conquered by his father king H. 2, which title of *dominus Hiberniæ* he assumed as annexed to the crowne, albeit his father, in the 28 yeare of his raigne had created him king of Ireland in his lifetime (1).

King H. 3, stiled himselfe as his father king John did, untill the 44 yeare of his raigne, and then he left out of his stile, *dux Normanniæ, et comes Andegaviæ,* and wrote only *rex Angliæ, dominus Hiberniæ, et dux Aquitaniæ.*

King E. 1, stiled himselfe in like manner as king H. 3, his father did, *rex Angliæ dominus Hiberniæ, et dux Aquitaniæ.* And so did king E. 2, during all his raigne. And king E. 3. used the selfe same stile until the 13 yeare of his raigne, and then he stiled himselfe in this forme, *Edwardus Dei gratiâ rex Angliæ et Franciæ, et dominus Hiberniæ,* leaving out of his stile *dux Aquitaniæ.* He was king of France as sonne and heire of Isabel wife of king E. 2, daughter and heire of Philip le Beau king of France. He first quartered the French armoires with the English in his great seale, *anno Domini* 1338, *et regni sui* 14.

King R. 2, and king H. 4, used the same stile that king E. 3, did. And king H. 5, until the 8 yeare of his raigne continued the same stile, and then wrote himself *rex Angliæ, hæres et regens Franciæ, et dominus Hiberniæ,* and so continued during his life.

King H. 6, wrote *Henricus Dei gratiâ rex Angliæ et Franciæ, et dominus Hiberniæ.* This king being crowned in Paris king of France used the said stile 39 yeares, till he was dispossessed of the crowne by king E. 4, who after he had raigned also about ten yeares, king H. 6, was restored to the crowne againe, and then wrote, *Henricus Dei gratiâ rex Angliæ et Franciæ, et dominus Hiberniæ, ab inchoatione regni sui* 49 *et receptionis regiæ potestatis primo.*

Vid. Rot. Parliam. anno 1 H. 6. nu. 15, he was stiled rex Franciæ et Angliæ, et dominus Hiberniæ.

King E. 4, R. 3, and H. 7, stiled themselves, *rex Angliæ et Franciæ, et dominus Hiberniæ.*

King H. 8, used the same stile till the tenth yeare of his raigne, and then he added this word (*octavus*) as *Henricus octavus Dei gratiâ, &c.* In the 13 yeare of his raigne he added to his stile *fidei defensor* (2). In the 22 yeare of his raigne, in the end of his stile he added, *supremum caput Ecclesiæ Anglicanæ* (3). And in the 28 yeare of his raigne he stiled himself thus, *Henricus octavus, Dei gratiâ Angliæ Franciæ et Hiberniæ rex, fidei defensor,*

(1) See further as to the deduction and change of the king's title in respect to Ireland, in Seld. Tit. Hon. b. 1. c. 4. s. 2.

(2) This title was given to Henry by Pope Leo X. in consequence of the king's publishing this book, in defence of the seven sacraments, against Martin Luther, and dedicating it to the pope. Coll. Eccl. Hist. v. 2. p. 11 to 17. However, it has been asserted, that Hen. 7 had same title. See Peck. Collection of Historical Pieces, p. 86.

(3) See Burn. Hist. Reform. v. 1. p. 136.

fensor, &c. et in terrâ ecclesiæ Anglicanæ et Hiberniæ supremum caput (4).

King E. 6, used the same stile, and so did queen Mary in the beginning of her raigne, and by that name summoned her first parliament, but soone after omitted *supremum caput*. And after her marriage with king Philip, the stile notwithstanding that omission was the longest that ever was, viz. *Philip and Mary, by the grace of God, king and queene of England and France, Naples, Jerusalem, and* (5) *Ireland, defenders of the faith, princes of Spaine and Cicilie, archdukes of Austria, dukes of Millaine, Burgundy and Brabant, countees of Hasburgh, Flanders and Tyroll.* And this stile continued till the fourth and fifth yeare of king Philip and queene Mary, and then Naples was put out, and in place thereof both the Cicilies put in, and so it continued all the life of queene Mary.

I need not mention the stile of queene Elizabeth, king James, nor of our sovereigne lord king Charles, because they are so well knowne; and I feare I have beene too long concerning this point, which certainly is not unnecessary to be knowne for many respects. But to shew the causes and reasons of these alterations would aske a treatise of itselfe (6), and doth not sort to the end that I have aimed at. And now let us returne to the learning of charters and deeds of feoffments and grants.

Very necessary it is that witnesses should be underwritten or indorsed, for the better strengthening of deeds, and their names (if they can write) written with their owne hands. For livery of seisin see hereafter, Sect. 59, and for deeds, Sect. 66, and of conditionall deeds see our author in his Chapter of Conditions. And now let us proceed to the other words of our author.

Livery of seisin incident to a feoffment. Vid. Sect. 59.

Mirr. cap. 2. sect. 15. Bract. lib. 2. fo. 62. b. Flet. lib. 6. cap. 1. & 54. & lib. 1. cap. 13. Glanvil. lib. 7. ca. 1. and ca. 12 and 13. (Post 237. b.)

"*To him and to his heires.*" *Hæres*, in the legall understanding of the common law, implyeth, that he is *ex justis nuptis procreætus*; for *hæres legitimus est quem nuptiæ demonstrant*, and is he to whom lands, tenements, or hereditaments, by the act of God and right of blood do descend of some estate of inheritance. For *solus Deus hæredem facere potest, non homo: dicuntur autem hæreditas et hæres ab hærendo, quòd est arctè insidendo, nam qui hæres est hæret; vel dicitur ab hærendo, quia hæreditas sibi hæret, licèt nonnulli hæredem dictum velint, quòd hæres fuit, hòc est, dominus terrarum, &c. quæ ad eum preveniunt.*

A monster, which hath not the shape of mankind, cannot be heire or inherit any land, albeit it be brought forth within marriage;[a] but although he hath deformity in any part of his body,

[a] Bract. lib. 5. fol. 437, 438. Brit. ca. 66. fol. 167. and ca. 83. Fleta, lib. 1. ca. 5. (Post. 29. b.)

yet

(4) See the 35 H. 8 c. 3, which ratifies the king's stile.

(5) Though Henry the 8th and Edward the 6th had both used the title of king of Ireland, yet pope Paul the 4th, dissembling notice of it, conferred the same title as a *new* one upon Philip and Mary, in order that the world might deem their use of the title merely the effect of his power. Heyl. Hist. Reform. 69, 70.

(6) See further concerning the stiles of the kings of England, and also of Great Britain, since the union of the two kingdoms, in Nichols. Eng. Histor. Libr. 2d ed. p. 248, and the several Treatises which have been published on the English Coins.

yet if he hath human shape he may be heire. *Hii qui contra formam humani generis converso more procreantur, ut si mulier monstrosum vel prodigiosum enixa, inter liberos non computentur. Partus tamen cui natura aliquantulem ampliaverit vel diminuerit, non tamen superabundanter (ut si sex digitos vel nisi quatuor habuerit) bene debet inter liberos connumerari.*

[8. a.] ☞ *Si inutilia natura reddidit, ut si membra tortuosa habuerit, non tamen is partus monstruus.* Another saith *ampliatio seu diminutio membrorum non nocet.* [*b*] A bastard cannot be heire, for (as hath beene said before) *qui ex damnato cuito nascuntur inter liberos non computentur.* Every heire is either a male or female. And an hermaphrodite, that is both male and female. And an hermaphrodite (which is also called *Androgynus*) shall be heire, either as male or female, according to that kind of the sexe with doth prevaile. *Hermaphrodita, tam masculo quàm fœminæ comparatur, secundum prævalescentiam sexûs incalescentis.* And accordingly it ought to be baptised. See more of this matter Sect. 35.

[*b*] Vid. Sect. 188. 309. Bract. lib. 2. fo. 92. Brit. fo. Fleta. lib. 1. ca. 5. and l. 6. c. 8. Fleta, ubi supra. 3 R. 2 entr. cong. 38. (1 Ro. Abr. 625.)

[*c*] A man seised of lands in fee hath issue an alien that is borne out of the king's ligeance; he cannot be heire, *propter defectum subjectionis* (1), albeit he be borne within lawfull marriage. If made denizen by the king's letters patent, yet cannot he inherit to his father or any other. But otherwise it is, if he be naturalized by act of parliament; for then he is not accounted in law *alienigena*, but *indigena*. But after one be made denizen, the issue that he hath afterwards shall be heir to him, but no issue that he had before. If an alien cometh into England and hath issue two sonnes, these two sonnes are *indigenæ* subjects borne, because they are borne within the realme. And yet if one of them purchase lands in fee, and dieth without issue, his brother shall not be his heire (2); for there was never any inheritable blood betweene

(*c*) Mirror, ca. 1. ca. 3. sect. ca. 5. sect. Bract. lib. 5. fo. 415. 427. Brit. fo. 29. Fleta, lib. 6. ca. 47. 13 E. 3. Br. 677. 25 E. 3 de natis ultra mare. 31 E. 3. Cousinage, 5. 42 E. 3. 2. 11 H. 4. 26. 14 H. 4. 19, 20. 3 H. 6. 55. 22 H. 6. 38. 9 H. 4. 7. 7 Co. 1, in Calvin's case. (Cro. Jam. 539. Gob. 275. 1 Sid. 195. 201. Noy, 158. T. Jo. 10. Vaugh. 274. 2 Sid. 23. Hardr. 224. 2 Ventr. 1.). 1 Ed. 3. 4. 6 Ed. 3. 55. 27 E. 3. 77. 3 E. 2. discent. Br. 64. 31 E. 1. discent. 17. 46 E. 3. Petition, 20. 26 Ass. p. 2. 49 Ass. pl. 4. 29 Ass. pl. 11. 9 H. 5. 9.

---

(1) If the *father* in this cause is to be supposed a *natural-born* subject at the birth of the issue, the child would now be also a *natural-born* subject by force of the 7 Ann. c. 5, and 4 Geo. 2. c. 21. But the children of persons attainted of, or liable to the penalties of treason, or in the service of a foreign state in enmity with Great Britain, are excepted from the benefit of this provision. See the 25 Ed. 3. st. 2, which declares, that at common law, the children of the king, wherever born may inherit. The same statute enables children born abroad to inherit, if at their birth *both* their parents are within the king's allegiance, and their mothers pass the sea with the licence of their husbands. Amongst the MSS. in Lincoln's-Inn library, there is a very learned dialogue between two serjeants on the 25 E. 3. See lib. no. 80. See also post. 128. b. 129, and Cro. Cha. 601.

(2) In the Case of Collingwood and Pace, the court denied this to be law; and held that the sons of aliens were inheritable to each other. See in 1 Sid. 193, and 1 Ventr. 413, the very elaborate speech by lord chief justice Hale, on giving the judgment of the court. And now by the 11 and 12 W. 3 c. 6, *natural-born* (*a*) subjects may derive a title by descent through their parents, though aliens; but the 25 Geo. 2. c. 39, confines the benefit of the former statute to such heirs as shall be living and capable of taking at the death of the

betweene the father and them; and where the sonnes by no possibility can be heire to the father, the one of them shall not be heire to the other. See more at large of this matter Sect. 198.

If a man be attainted of treason or felony, although he be borne within wedlocke, he can be heir to no man, nor any man heire to him, *propter delictum*, for that by his attainder his blood is corrupted. And this corruption of blood is so high, as it cannot absolutely be salved and restored but by act of parliament; for albeit the person attainted obtaine his charter of pardon, yet that doth not make any to be heire whose blood was corrupted at the time of the attainder, either downward or upward. [*d*] As if a man hath issue a sonne before his attainder, and obtaineth his pardon, and after the pardon hath issue another sonne, at the time of the attainder the blood of the eldest was corrupted, and therefore he cannot be heire. But if he die living his father, the younger sonne shall be heire; for he was not *in esse* at the time of the attainder, and the pardon restored the blood as to all issues begotten afterwards. But in that case if the eldest sonne had survived the father, the younger sonne cannot be heire; because he hath an elder brother which by possibilitie might have inherited; but if the elder brother had been an alien, the younger sonne should be heire, for that the alien never had any inheritable blood in him. (3) See more plentifully of this matter Sect. 746, 747.

[*d*] Stanf. Pl. Cor. 195, 196. Bract. lib. 3. fo. 132, 133. 276. and lib. 5. fo. 374. Britton, fo. 215. b. Fleta, l. 1. ca. 28. (Noy, 170. Finch, 8vo. ed. 207. Ante 2. b. Post. 129. Cro. Cha. 543. 1 Sid. 195. 202. 1 Ro. Abr. 625. Cro. Jam. 539.)

If a man hath issue two sonnes, and after is attainted of treason or felony, and one of the sonnes purchase land and dieth without issue, the other brother shall be his heire; for the attainder of the father corrupteth the lineall blood onely, and not the collaterall blood between the brethren, which was vested in them before the attainder, and each of them by possibility might have been heire to the father; and so hath it been adjudged (4). * But otherwise in the case of the alien-née, as hath been said. [*e*] But some have holden, that a man after he be attainted of treason or felony have issue two sons that the one of them cannot be heire to the other, because they could not be heire to the father for that they never had any inheritable blood in them (5).

* In the Exchequer, Mic. 40 & 41 Eliz. in le case de Hobby (A).

[*e*] Bract. lib. 3. fol. 130. Brit. fol. 15. Fleta, lib. 1. cap. 58. (1 Sid. 193. 1 Lev. 60. Vaugh. 274. 1 Ventr. 414.

One

---

the person last dying seised, unless such heirs happen to be daughters, and there is afterwards a son or another daughter, for which cases the statute makes a special provision.——(*a*) In Litt. R. 29, many of the judges are said to have held, that the stat. of Ed. 3. ought to be construed *distributive*; and that if either of the parents was a natural-born subject, it will be sufficient to make the child so. But see 1 Vent. 422. See also 21 H. 6. 28. 1 R. 3. 4, and Cro. Eliz. 3 & 4. T. R. 300. In which last case the son of an English mother and alien father born out of the king's allegiance, could not inherit his mother's land in England.

(3) Besides the authorities in the margin, see W. Jo. 34.

(4) See P. acc. Noy, 158. 4 Leon. 5.

(A) See as to Hobby's ca. Ld. Bridgman's Arg. Ex. Ch. in Collingwood *v.* Pace, vol. 3, fo. 71, of his MSS. Rep. Ld. Bridgman's MSS. Rep. are in the Mus. Brit.

(5) The principle on which it has been adjudged that the children of an alien may be heirs as between themselves, though not to their father, seems to reach

[*f*] One that is borne deafe and dumbe may be heire to another, albeit it was otherwise holden in ancient time. And so if borne deafe dumbe and blinde, for *in hoc casu vitio parcitur naturali.* But contract they cannot. Ideots, leapers, madmen, outlawes in debt, trespasses or the like, persons excommunicated, men attained in a *præmunire*, or convicted of heresie, may be heires.

18 E. 3. 53. 13 E. 3. Ley. 49.

[*f*] Bract. lib. 5. fo. 421. 430. 434. lib. 2. fo. 12. Fleta, lib. 6. ca. 39. 47. 14 H. 3. bre. 877. 32 E. 3. Age 8. 10 E. 3. 535 (1 Ro. Abr. 626.)

[*g*] If a man hath a wife, and dyeth, and within a very short time after the wife marrieth againe, and within 9 months (6) hath a childe, so as it may be the childe of the one or the other, some have said, that in this case the childe may choose (7) his father, *quia in hoc casu filiatio non potest probari*, and so is the booke to be intended; for avoiding of which question and other inconveniences, this was the law before the Conquest. *Sit omnis vidua sine marito duodecim mensibus, et si maritaverit perdat dotem* (8).

[*g*] 21 E. 3. 39. Panciroll. Nova. Rep. 485, &c. Opus eximium 46. b. Lambard de priscis Anglorum legibus, 120. 72. acc. (1 Ro. Abr. 357. Cro. Jam. 541. 3. S. C. Godb. 281.) (Post. 32. b.)

[*h*] A man by the common law cannot be heire to goods or chattels, for *hæres dicitur ab hæreditate.*[*i*] If a man buy divers fishes, as carps, breames, tenches, &c. and put them in his pond, and dyeth, in this case the heire shall have them, and not the executors, but they shall goe with the (9) inheritance; because they were at libertie, and could not be gotten without industrie, as by nets, and other engines. Otherwise it is, if they were in a trunke or the like. Likewise deere in a parke, conies in a warren, and doves in a dove-house, young and old, shall goe to the (10) heire. [*k*] But of ancient time the heire was permitted

Bench. Stanford, 25. b. 18 E. 4. 8. 22 Ass. 25. 18 H. 8. 2 det. 135. 139, 140. 47 E. 3. 23. 25 E. 3. fo. 48. 26 E. 3. fo. Vid. for an heirelome hæreditarium or principalius, Sect. 12.

[*h*] Bract. lib. 4. ca. 9. fo. 265. lib. 2. fo. 62. b. Fleta, lib. 6. ca. 1. 8. Co. 54 Sym's case.

[*i*] Mich. 36. and 37 El Rot. 25 inter Gray and Paulet in the King's [*k*] 13 E. 3

to

---

reach the case of children born after their father's attainder. See the cases cited in n. 2. supra. Note 7. 12 b. contr. 1 Lev. 60. 7 Vin. 571, in the notes to pl. 6.—[Note 38.]

(6) See post. 123. b. where this is said to be the utmost time the law supposes a woman to go with child, and the authorities which the reader will find there cited on the subject.

(7) Brooke questions this doctrine; from which it seems as if he thought it reasonable, that the circumstance of the case, instead of the choice of the issue, should determine who is the father. See Bro. Abr. Bastardy, pl. 18, and Palm. 10. Post 123. b.—[Note 39.]

(8) See 11 and 12 W. 3. c. 4, which disables persons educated in the popish religion, or professing it, from inheriting, but in respect of themselves only, if they do not confirm within six months after the age of 18; and provides that till they do conform, their protestant next of kin shall enjoy. By the same statute papists are disabled from taking lands by *purchase*, which should have been mentioned before. For cases on the construction of this statute, see 1 Stra. 267. 2 P. Wms. 3. 6. and 132. 3 P. Wms. 46. 1 Atk. 526. 528. 2 Atk. 210. 3 Atk. 155. 457. 2 Ves. 389. 1 Wils. part 1. p. 176. Rep. Cas. B. R. temp. Hardw. 149. Cas. B. R. temp. Hardw. 91; and Vin. Abr. *Devise*, l. 7. pl. 4, and 5.—[Note 40.]

(9) Acc. Cro. Eliz. 372.

(10) It is said, that though the party has only a term of years, still such things will go as accessary to the land. See Wentw. Off. Ex. ed. 1676. c. 5. p. 75. & 5 E. 3. 35.—[Note 41.]

to have an action of debt upon a bond made to his ancestor and his heires: but the law is not so holden at this day. *Vid.* Sect 12.

[*l*] Mirror, ca. 1. sect. 3.

[*l*] ☞ It is to be noted, that one cannot be heire till after the death of his auncestor. Before he is called *hæres apparens*, heir apparent. [8. b.]

In our old bookes and records there is mention made of another heire, *viz. hæres astrarius* so called of *astre*, that is, an harth of a house; because the auncestor by conveyance hath set his heir apparent, and his family, in a house and living in his life-time, of whom Practon saith thus, [*a*] *Item esto quòd hæres sit atrarius, vel quòd aliquis antecessor restituat hæredi in vitâ suâ hæreditatem, et se dimiserit, videtur, quòd nullo tempore jacebit hæreditas, et ideo quòd nec relevari possit, nec debeat, nec relevium dari.* [*b*] For the benefit and safety of right heires *contra partus suppositos*, the law hath provided remedie by the writ *de ventre inspiciendo*, whereof the rule in the Register is this: *Nota, si quis habens hæreditatem duxerit aliquam in uxorem, et postea moriatur ille sine hærede de corpore suo exeunte, per quod hæreditas illa fratri ipsius defuncti descendere debeat, et uxor dicit se esse prægnantem de ipso defuncto cùm non sit, habeat frater et hæres breve de ventre inspiciendo.* It seemeth by Bracton, and Fleta which followed him, that this writ doth lie, *ubi uxor alicujus in vitâ viri sui se prægnantem fecit cùm non sit, vel post mortem viri sui se prægnantem fecit cùm non sit, ad exhæredationem veri hæredis, &c. ad querelam veri hæredis per præceptum domini regis, &c.* which is to be understood according to the rule of the Register. When a man having lands in fee simple dieth, and his wife soone after marrieth againe, and faines herself with childe by her former husband, in this case though she be married, the writ *de ventre inspiciendo* doth lie (1) for the heire. But if a man seised of lands in fee (for example) hath issue a daughter, who is heire apparent, she in the life of her father cannot have this writ for divers causes. First, because she is not heire, but heire apparent; for, as hath been said, *nemo est hæres viventis;* and this writ is given to the heire to whom the land is descended. And both Bracton and Fleta say, that this writ lyeth *ad querelam veri hæredis*, which cannot be in the life of his auncestor; and herewith agreeth Britton and the Register. Secondly, the taking of a husband in the case aforesaid being her owne act, cannot barre the heire of his lawfull action once vested in him (2). Thirdly, the law doth not give the heire apparent any

[a] Bract. lib. 2, fo. 85. Heref. p. 8. E. 1. Ro. 80. de Banco. Mirror, cap. 2. sect. 18. Britton, 151. b.

[b] Registr. fo. 227. Bracton, lib. 2. fo. 69. Britton, fo. 165. Fleta, lib. 1. ca. 14. (Cro. Elis. 566. Cro. Jam. 685.)

Britton, fo. 165. b. Regist. ubi supra.

(1) But in such a case the manner of proceeding on the writ *de ventre inspiciende* is not the same as where the party remains a widow. In the case in Cro. Jam. 685, the wife was married to a second husband, when the writ *de ventre inspiciendo* was sued. Therefore, instead of ordering her into the sheriff's custody, and to be kept by him till delivered of the child, as the practice is if the party is a widow, the court permitted the wife to remain with her husband on his entering into a recognizance, that she should not remove from the house they then inhabited, and that some of the woman returned by the sheriff should see her every day, and that three or more of them should be present at her delivery.—[Note 42.]

(2) This is a reason why the *actual* heir should *have* his writ notwithstanding the wife's marrying a second husband, but is foreign to the *heir apparent's*

any writ, for it is not certaine whether he shall be heire, *solus Deus facit hæredes.* Fourthly, the inconvenience were too great, if heires apparent in the life of their auncestor should have such a writ to examine and trie a man's lawfull wife in such sort as the writ *de ventre inspiciendo* doth appoint: and if she should be found to be with childe, or suspect, then she must be removed to a castle, and there safely kept until her delivery, and so any man's wife might be taken from him against the laws of God and man.

The words of the writ *de ventre inspiciendo* makes this evident. *Rex vic. salutem. Monstravit nobis A. quòd cum R.* quæ fuit uxor *Clementis B. prægnans non sit, ipsa falsò dicit se esse prægnantem de eodem Clemente,* ad exhæredationem *ipsius A. desicut terra quæ fuit ejusdem C.* ad ipsum *A.* jure hæreditario descendere debeat *tanquam* ad fratrem et hæredem *ipsius se si prædict. R. prolem de eo non habuerit, &c.* But this rather belongs to the treatise of originall writs, and therefore much herein shall suffice (3).

Vide Bracton, Britton & Fleta ubi supra. Registr. ubi supra. Bracton and Fleta ubi supra have (ad exhæredationem.)

And it is to be observed, that every word of Littleton is worthy of observation. First (Heires) in the plurall number; for if a man give land to a man and to his heire in the singular number, he hath but an estate for life, for his heire cannot take a fee simple by descent, because he is but one, and therefore in that case his heire shall take (4) nothing. Also observable is this conjunctive (*et*). For if a man give lands to one, To have and to hold to him *or* his heires, he hath but an (5) estate for life, for the uncertaintie. (*His, suis*) If a man give land unto two, To have and to hold to them two *et hæredibus* [c], omitting

(c) 10 H. 6. 7. 22 H. 6. 15.

Pl. Com. 28. b. 22 E. 4. 16. 2 H. 4. 13. 20 E. 3. bre. 377.

suis

---

apparent's not having the writ; and therefore I presume has been placed here by mistake.—[Note 43.]

(3) See further on the writ *de ventre inspiciendo*, Aiscough's case, Mos. 391. & 2 P. Wms. 591, in which the lord cha. King, on a petition, granted the writ, though the persons applying were only tenant in tail; and note the special manner in which he ordered the writ to issue, and what he said as to the execution of it. In Mosely's report, a case of *personal* estate is cited, in which the then master of the Rolls, in conformity to the reason of the common law, directed that the master should appoint two matrons to inspect a woman. Some perhaps may think this a great stretch of power. I cannot conclude this note, without suggesting the necessity of an act of parliament to regulate the proceedings on the writ *de ventre inspiciendo.* If the writ was to be strictly executed, it would be an *intolerable grievance.* On the other hand, if our courts of justice should, without authority, from the legislature, change the established form for the sake of softening its rigour, it would be a *dangerous precedent*, and something very like the exercise of a dispensing power.—[Note 44.]

(4) According to many authorities, *heir* may be *nomen collectivum*, as well in a deed as a will, and operate in both in the same manner as *heirs* in the *plural* number. See 2 Ro. Abr. 253. See also 1 Ro. Abr. 832. K. pl. 1, 2. Godb. 155. T. Jo. 111. Cro. Eliz. 313. Robins. Gavelk. 95, 96. Burr. part 4. v. 1. p. 38, & Vin. Abr. *Devise*, U. a. pl. 13, & *Parols*, H.—[Note 45.]

(5) See 5 Co. 112, post. 214. & Plowd. 286. 289, in which last book it is particularly considered where the *disjunctive* shall be construed as the *conjunctive.*

suis (6), they have but an estate for life, for the uncertainty; whereof more hereafter in this Section. But is said, if land be given to one man *et hæredibus*, omitting *suis*, that notwithstanding a fee simple passeth; but it is safe to follow Littleton.

[d] 5 Co. 96, 97. Brit. fo. 28. H. 8. Dyer, Pl. Com. 287, 288. (Post. 22. a. 5 Co. 112.)

[d] "*And his assignes.*" Assignee cometh of the verb *assigno*. And note there be assignes in deed, and assignes in law: whereof see more in the Chapter of Warrantie, Sect. 733.

[e] Bract. lib. 2. cap. 39. fo. 92. b. Br. ca. 39. fo. 99. b. Fleta, lib. 6. ca. 1, 2. & lib. 3. cap. 2. 20 H. 6. 35, 36. 19 H. 6. 17. 22. 74. 22 E. 4. 16. b. 4 E. 6. Pl. Com. 26. [f] Vid. Sect. 413. [g] 7 E. 3. 25. Vid. Sect. 686. 25 E. 3. 35. Bract. lib. 2. fo. 62. b. Vid. Sect. 413. (5 Co. 112. 1 Leon. 2.) [h] Pl. Com. 242. Seignior Berkley's case. [i] Vid. Brit. fo. 86. 121. & 130. 17 E. 3. 25. b. 33 H. 6. 22. 10 H. 7. 13, 14. 9 H. 7. 11. 16 H. 7. 9. 15 E. 4. 13. 14 H. 6. 12. 35 H. 6. 34.

"*These words* (*his heires*) *which words onely make an estate* "*of inheritance in all feoffments and grants.*" [e] *Si autem facta esset donatio, ut si dicam, do tibi talem terram, ista donatio non extendit ad hæredes sed ad vitam donatoria, &c.* [f] Here Littleton treateth of purchases by naturall persons, and not of bodies politique or corporate; [g] for if lands be given to a sole body politique or corporate, (as to a bishop, parson, vicar, master of an hospital, &c.) there to give him an estate of inheritance in his politique or corporate capacite, he must have these words, To have and to hold to him and his successors; for without these words *successors*, in those cases there passeth no inheritance (7); for as the heire doth inherit to the ancestor, so the successor doth succeed to the predecessor, and the executor to the testator. [h] But it appeareth here by Littleton, that if a man at this day give lands to *I. S.* and his successors, this createth no fee simple in him; for Littleton speaking of naturall persons saith that these words (his heires) make an estate of inheritance in all feoffments and grants, where by he excludeth these words (his successors). [i] And yet if it be an ancient grant, it must be expounded as the law was taken at the time of the grant. [k] A chantry priest incorporate took a lease to him and his successors for a hundred yeares, and after tooke a release from the leasor to him and his successors; and it was adjudged, that by the release he had but an estate for life, for he had the lease in his naturall capacity, for it could not go in succession (1), and (his suc-

[9. a.]

24 Ass. 14. 40 Ass. 21. (Post. 94.) Tr. 5 E. 3. Rot. 4. in Scaccario. 3 E. 3. 32. 7 E. 3. 40. 11 H. 4. 84. 12 H. 4. 12. 18 E. 3. Conusans, 39. b. 5 E. 4. 121. 38 E. 3, 4. Co. 9. 28. in case de Abb. de Strata Marcella. [k] Hil. 21. Eliz. Dyer's Manuscript, inter Ansley and Johnsonin Com. Banco. (4 Co. 65.)

cessors)

(6) See 2 Ro. Abr. 833. M. & Vin. Abr. *Estate*, M.

(7) But a fee will pass to a corporation *aggregate* without the word *successors*, and sometimes to a corporation *sole*. See post 94. b. and Vin. Abr. *Estate*, L.—[Note 46.]

(1) The reason is, because a chantry priest was a corporation *sole*, which regularly could not take in succession chattels *real* or *personal*, in *possession* or *action*, though a corporation *aggregate* may.(*a*) Acc. post. 46. b. 4 Co. 65. Hob. 64. But by *custom*, some chattels will go in succession to a *sole* corporation, as in London, where the chamberlain is a special corporation for taking bonds, which has been frequently adjudged a good custom. Cro. Eliz. 464. 682. 4 Co. 64. b. Also in some instances, particularly of chattels in *action*, the law is the same *without* a custom. See 1 Rob. Abr. 515. pl. 3. 5, and Vin. Abr. *Corporation*, L. As to the king's taking the ancient jewels of the crown, which are a kind of *heir looms*, it is not to be considered as an instance of a *sole* corporation's

cessors) gave him no estate of inheritance for want of these words (his heires.) (*l*) If the king by his letters patent giveth lands *decano et capitulo, habendum sibi et hæredibus et successoribus suis;* in this case, albeit they be persons in their naturall capacity to them and their heires, yet because the grant is made to them in their politique capacity, it shall enure to them and their successors. And so if the king do grant lands to *I. S. habendum sibi et successoribus sive hæredibus suis*, this grant shall enure to him and his heires.

[*l*] 18 H. 6. 11. b. &c. adjudge.

[*m*] *B.* having divers sonnes and daughters, *A.* giveth lands to. *B. et liberis suis, et a lour heires*, the father and all his children do take a fee simple joyntly by force of these words (their heires); (2) but if he had no childe at the time of the feoffment, the childe borne afterwards shall not take (3).

[*m*] 15 E. 3. tit. Counterplea de Voucher, 43. 37 H. 6. 30. 11 E. 4. 2. (Cro. Jam. 374. 6 Co. 16. b. 1 Leon. 287.)

These words (his heires) doe not onely extend to his immediate heires, but to his heires remote and most remote, borne and to be borne, [*n*] *sub quibus vocabulis (hæredibus suis) omnes hæredes propinqui comprehenduntur, et remoti, nati, et nascituri.* And *hæredum appellatione veniunt hæredes hæredum in infinitum.* And the reason wherefore the law is so precise to prescribe certaine words to create an estate of inheritance, is for avoiding of uncertainty, the mother of contention and confusion.

[*n*] Fleta, lib. 3. cap. 8. Pl. Com. 163.

There be many words so appropriated, as that they cannot be legally expressed by any other word, or by any periphrasis or circumlocution. Some to estates of lands, &c. as here and in [*a*] other places of our author. In this place these words, *tantsolement*,

[*a*] Sect. 17. 62. 133.

---

corporation's taking *chattels* in succession, but rather as one of a personal chattel's descending like a thing of inheritance. See post. 18. b.—[Note 47.]

(*a*) See Kyd on Corporations, 76. 7. post. 90. a. 190 & 388.

(2) But in this case, the children must be understood to be parties to the grant; for it is said, that otherwise they can only take where the limitation is to them by way of remainder. Cro. Eliz. 10.—[Note 48.]

(3) Acc. Cro. Eliz. 121. 334. Ow. 152. Lord C. J. Hale adds, *that the father takes the whole fee simple.*—Hal. MSS. But if the limitation to the children be a remainder, then the children born *after* may take. See Wild's case, 6 Co. 18. b. where will be found several other distinctions on this subject. See further 1 Ro. Rep. 254. See also Vin. Abr. *Devise*, Y. a. I am the more frequent in my reference to Mr. Viner's Abridgment, because it tends to facilitate the use of that immense body of law and equity, which, notwithstanding all its defects and inaccuracies, must be allowed to be a necessary part of every lawyer's library. It is indeed a most useful compilation, and would have been infinitely more so, if the author had been less singular and more nice in his arrangement and method, and more studious in avoiding repetitions. These faults, in great measure, proceeded from the author's error of judgment, in attempting to engraft his own very extensive Abridgment on that of Mr. serjeant Rolle, whose work, though most excellent in its kind, and in point of method, succinctness, legal precision, and many other respects, fit to be proposed as an example for other abridgments of law, was by no means calculated for the excessive enlargement from 2 vols. to 23 vols. in folio. It is not to be wondered at, that an incorporation of works so widely different in *proportion* as well as *execution*, should produce much confusion and disorder in the *effect*. Mr. Viner's labours would probably have advanced his reputation as a compiler much higher, if he had not attempted an union so unnatural.—[Note 49.]

tantsolement (†), not *solement*, alone, but *tansolement*, all onely, i. e. *solummodo* or *duntaxat*, are to be observed. [*b*] Some to tenures; [*c*] some to persons; [*d*] some to offences; [*e*] some to forms of original writs, either for recovery of right, or removing, or redresse of wrong; [*f*] some to warrantie of land. These have I touched for examples. I leave others to the studious reader to observe, and add, holding this for an undoubted verity, that there is no knowledge, case, or point in law, seeme it of never so little account, but will stand our student in stead at one time or other, and therefore in reading, nothing to be pretermitted.

[*b*] Sect. 156. 161.
[*c*] Sect. 184. [*d*] Sect. 190. 194. 746.
[*e*] Sect. 9. 67. 194. 204. 234. 236. 241. 405. 485. 478. 651. 655. 646. 620. 614. 637. 674. 692.
[*f*] Sect. 733.

"*Make an estate.*" *Status dicitur à stando*, because it is fixed and permanent. The Isle of Man, which is no part of the kingdom, but a distinct territory of itselfe, hath beene granted by the great seale to divers subjects and their heires. [*g*] It was resolved by the lord chancellor, the two chiefe justices and chiefe baron, that the same is an estate descendible according to the course of the common law; for whatsoever state of inheritance passe under the great seale of England, it shall be descendible according to the rules and course of the common law of England (4).

[*g*] Tr. 40 Eliz. in le Count de Derby's case, by the Lo. Chancellor, les 2 chiefe Justices, & chiefe Baron.

"*In all feoffments and grants.*" Here it giveth the feoffment the first place, as the ancient and the most necessary conveyance, both for that it is solemne and publike, and therefore best remembered and proved, [*] and also for that it cleareth all disseisins, abatements, intrusions, and other wrongfull or defeasible estates, where the entry of the feoffor is lawfull, which neither fine, recovery, nor bargaine and sale by deede indented and inrolled doth. And here is implyed a division of fee, or inheritance, viz. [*h*] into corporeall, as lands and tenements which lie in livery, comprehended in this word feoffment, and may passe by livery by deed, or without deed, which of some is called *hæreditas corporata*, and incorporeall, (which lie in grant, and cannot passe by livery, but by deede, as advowsons, commons, &c. and of some is called *hæreditas incorporata*, and, by the delivery of the deede, the freehold, and inheritance of such inheritance, as doth lie in grant, doth passe) comprehended in this word Grant. And the deed of incorporeate inheritances doth equall the livery of corporeate. And therefore *Littleton* saith, in all feoffments and grants, *hæreditas, alia corporalis, alia incorporalis: corporalis est, quæ tangi potest et videri; incorporalis, quæ tangi non potest, nec videri.*

[*] Vide Sect. 59. and 66.

[*h*] Mirror, c. 2. sect. 15. & c. 5. sect. 1. Bract. lib. 2. fo. 53. 366. 368. Fleta, lib. 3. ca. 1, 2. 15. Britt. 84. 87. a. & fol. 63. 101, 102. 141, 142. agreeth herewith. Pl. Com. 171. Hill & Grange. Mirror, ca. 5. sect. 1. Britton. cap. 34. For the antiquity of Feoffments, see the Second Part of the Institutes, Marlbridge, ca. 9. 8 E. 3. 24. 18 H. 6. 14. 39 H. 6. 39.

Feoffment is derived of the word of art *feodum, quia est donatio feodi;* for the antient writers of the law called a feoffment *donatio,*

of

† *tansolement* (in the original) is translated *onely*, by lord Coke; see Sect. 1.

(4) S. C. 4 Inst. 284. and 2 And. 115. See further concerning the Isle of Mann in Pryn. on 4 Inst. 201. 384. Hale's Hist. Com. L. 183. Palm. 344. 1 P. Wms. 329. 1 Ves. 202. 2 Ves. 337. 1 Blackst. Comment. 5th ed. p. 104. and Camp. Polit. Surv. of Brit. v. 1. p. 524.

of the verb *do* or *dedi*, which is the aptest word of feoffment (5). And that word Ephron used*, when he enfeoffed Abraham, saying, I give thee the field of Machpelah over against Mamre, and the cave therein I give thee, and all the trees in the field and the borders round about; all which were made sure unto Abraham for a possession, in the presence of many witnesses.

* Genesis 23.

By a feoffment the corporeate fee is conveyed, and it properly betokeneth a conveiance in fee, as our author himselfe hereafter saith, † in his Chapter of Tenant for Life. And yet sometime improperly it is called a feoffment when an estate of freehold onely doth passe: *done est nosme generall plus que n'est feoffment, car done est generall a touts choses moebles et nient moebles, feoffment est riens forsque del soyle.* And note, there is a difference *inter cartam et factum;* for *carta* is ☞ intended a charter which doth touch inheritance, and so is not *factum*, unless it hath some other additions (1).

† Vide Sect. 57. Britton, cap. 34. 44 E. 3. 41. See more of Feoffments, Sect. 60. See of Factum, Sect. 259.

[9. b.]

Grant, concessio, is properly of things incorporeall, which, (as hath been said) cannot passe without deed. And here it is to be observed, (that I may speak once for all) that every period of our author in all his three books containes matter of excellent learning, necessarily to be collected by implication, or consequence. For example he saith here, that these words (*his heires*) make an estate of inheritance in all feoffments and grants. He expressing feoffments and grants, necessarily implyeth, that this rule extendeth not,

3 Co. 63. in Lincolne Colledge case. (1 Ro. Abr. 833. 6 Co. 16. b.)

First, to *last wills* and *testaments;* for thereby, [*i*] as he himselfe after saith, an estate of inheritance may passe without these words (his heires). [*k*] As if a man devise 20 acres to another, and that he shall pay to his executors for the same ten pound, hereby the devisee hath a fee simple by the intent of the devisor (2), albeit it be not to the value of the land. [*l*] So it is if a man devise lands to a man *in perpetuum* (A), or to give and to sell (B), or in *feodo simplici*, or to him and to his

[*i*] Litt. lib. 3. c. de Attorn. Sect. 5. 8. 6. 4 E. 6. Estates Br. 78. 29 H. 8. Testaments 18. 22 Eliz. Dier, 371. Temps H. 8. tit. Conscience, Br. 25. (3 Co. 21.) [*k*] 21 E. 3. 16. 34 H. 6. 7. 19 H. 8. 9. 3 Co. 21. In Boraston's case, 6 Co. 16. 17. 10 Co. 67. [*l*] Vide Sect. 585.

assigns

---

(5) See more as to the word *feoffment*, in Mad. Formul. Angl. Dissert. p. 3. 2 Inst. 110.

(1) See further as to the distinction between *charters* and *deeds*, and the various other names of writings before and since the Conquest, in Mad. Form. Angl. Dissert. p. 2, and Mad. Hist. Exch. Pief. Ep. p. 8.

(2) The reason is, because the devisee is to pay the money at all events, and he may die before he repays himself out of the estate; in which case, he would be a loser by the devise, if he was not to have a fee. But if the will directs the payment to be out of the profits of the land, then the devisee cannot lose by the will, and therefore only an estate for life passes. Cro. Cha. 157. Most of the cases relative to this point are abridged or referred to in Vin. Abr. *Devise*, S. a.—[Note 50.]

(A) Devise by one seised of a freehold messuage in fee, to *A.* for life, and after his decease testator gave all the term of years he had therein to *B.*, held this a good devise of the fee, as being tantamount to a devise for ever. And see 11 East, 518.

(B) 2 Atk. 103. 2 Wils. 6. Cowp. 352; Freely to be enjoyed passed a fee: contra 11 East, 220; might mean free from incumbrance, or dispunishable for waste. Estate sufficient to pass a fee; 2 P. W. 523; 2 Ves. 48; 1 T. R. 41; unless

assigns for ever. In these cases a fee simple doth passe by the intent of the devisor. But if the devise be to a man and his assigns without saying (for ever), the devisee hath but an estate for life. [m] If a man devise land to a man *et sanguino suo*, that is a fee simple; but if it be *semini suo*, it is an estate taile (3).

[m] Mich. 40 & 41 Eliz. in Error int. Downhall & Catesby adj. Brooke, tit. Taile' 21.

[n] 1 Co. 100. Shellye's case. 42 E. 3. 7. 19 H. 6. 17. b. 22. b. Pl. Com. 248.

[n] Secondly, that it extendeth not to a *fine sur conusans de droit come ceo que il ad de son done*, by which a fee also may passe without this word (heires) in respect of the height of that fine, and that thereby is implyed that there was a precedent gift in fee.

[o] Litt. lib. 2. ca. Tenant in Common. Sect. 304, 305. cap. Attorn. Sect. 374. Dier. 9 Eliz. 263. [p] Litt. lib. 3. c. Releases. Sect. 479. 480. 20 H. 6. 17. 19 H. 6. 17. 22. [q] Litt. cap. Releases, Sect. 467.

Thirdly, nor to *certain releases*, and that three manner of waies. [o] First, when an estate of inheritance passeth and continueth; as if there be three coparceners or joyntenants, and one of them release to the other two, or to one of them generally without this word (heirs), by *Littleton's* own opinion they have a fee simple, as appeareth hereafter. 2. By release [p], when an estate of inheritance passeth and continueth not, but is extinguished; as where the lord releaseth to the tenant, or the grantee of a rent, &c. release to the tenant of the land generally all his right, &c. hereby the seignory, rent, &c. are extinguished for ever, without these words (heires). 3. [q] When a bare right is released, as when the disseisee release to the disseisor all his right, he need not (saith our author in another place) speake of his heires. But of all these, and the like cases, more shall be treated in their proper places. 4. Nor to a *recovery*. *A.* seised of land suffereth *B.* to recover the land against him by a common recovery, where the judgment is *quòd prædictus B. recuperet versus præd. A. tenementa prædicta cum pertin'*; yet *B.* recovereth a fee simple without this word (heires); for regularly every recoveror recovereth a fee simple. 5. Nor to *a creation of nobilitie by writ*; for when a man is called to the upper house of parliament by writ, he is a baron, and hath inheritance (c) therein without the word (heires) (4). Yet may the king limit the generall state of inheritance created by the law and custome of the realme to the heires males, or generall, of his body by the writ; as he did to *Bromflete*, who in 27 H. 6, was called to parliament by the name of the lord *Vescye*, &c. with the limitation in the writ to him and the heires males of his bodie. But if he be created by patent, he must of necessitie have these words (his heires) or the heires males of his bodie, or the heires of his body, &c. otherwise he hath no inheritance. The first creation of a baron by patent that I find was of *John Beauchampe* of *Holte*,

(27 H. 6. Lo. Vescie's case, 7 Co. 33. b.)

---

unless restrained by other words. 6 T. R. 610. See also 8 Ves. 604. 7 East, 259. And this even though the preceding words describe locality (though contrary to former decisions). Per Gibbs, C. J. 6 Taunt. 416.

(3) As to the passing of an estate of inheritance in *last wills*, without the word *heirs*, see the title *Devise*, in the several Abridgments of Law and Equity, and Gilb. Law of Devises.

(c) But only lineal. Post. 16. b.

(4) See as to this, Mr. serj. Rolle's argument in Coll. Proc. on Claims of Baronies, 209. 221.

Holte, created baron by patent in 11 R. 2. (5), for barons before that time were called by writ. And it is to be observed, that of ancient times earles, &c. were created by girding them with a sword, and nominating him earle, &c. of such a countie or place; and this, with a calling him to parliament by writ by that name, was a sufficient creation of inheritance.

But out of this rule of our author the law doth make divers exceptions (*et exceptio probat regulam*); for sometime by a feoffment a fee simple shall passe without these words (his heires.) For example, first, [r] if the father infeoffe the sonne, to have and to hold to him and to his heires, and the sonne infeoffeth the father as fully as the father infeoffed him, by this the father hath a fee simple (6), *quia verba relata hoc maximè operantur per referentiam ut in esse videntur.* [s] Secondlie, in respect of the consideration, a fee simple had passed at the common law, without this word (heires), and at this day an estate of inheritance [in] tayle. As if a man had given land to a man with his daughter in frankmarriage generally, a fee simple had passed without this word (heires); for there is no consideration so much respected in law as the consideration of marriage, in respect of alliance and posteritie. [t] Thirdly, if a feoffment or grant be made by deed to a mayor and commonaltie, or any other corporation aggregate of manie persons capable, they have a fee simple without the word (successors; (7) because in judgment of the law they never dye. [u] Fourthly, in case of a sole corporation a fee simple shall sometime passe without this word (successors.) As if a feoffment in fee be made of land to a bishop, to have and to hold to him *in liberâ eleemosinâ*, a fee simple doth passe without this word (successors). [w] And so if a man give lands to the king by deede inrolled, a fee simple doth passe without these words (successors or heires); because in judgment of law the king never dieth.

[10. a.] Fifthly, in grants sometimes an inheritance shall passe without this word ☞ heires. [x] As if partition be made betweene coparceners of lands in fee simple, and for owelty of partition the one grant a rent to the other generally, the grantee shall have a fee simple without this word (heires) (1); because the grantor hath a fee simple, in consideration whereof he granted the rent: *Ipsæ etenim leges cupiunt ut jure regantur.* Sixthly, by the forrest law if an assart be granted by the king at a justice seat (which may be done without charter) to another, *habendum et tenendum sibi in perpetuum*, he hath a fee simple without this word (heires) [y]; for there is a speciall law of the forest, as there is a law marshall for wars, and a marine law for the seas [z].

[r] 39 Ass. 12. 41 E. 3. tit. Feoffments & Faits, 254. 14 H. 4. 13. 34 E. 3. Avowry, 258.
[s] Vide Sect. 17. 12 H. 4. 19. in Formedon.
[t] 8 E. 3. 27. 11 H. 7 12. 22 E. 4. 11 H. 4. 84. 2 H. 4. 13.
[u] 19 H. 6. 74. 20 H. 6. 36. (1 Ro. Abr. 43.)
[w] Pl. Com. Lo. Berkley's case.
[x] 29 Ass. 23. 15 H. 7. 14. 2 H. 7. 5. 11 H. 4. 3. 21 E. 3. 1. 21 Ass.
[y] 40 H. 7. 7. (4 Inst. 314.)
[z] 22 E. 3. 3. 45 E. 2. 20. 6 E. 3. 22. 4 Co. 1. Bustard's case, Vide Sect. 465. 469. 610. 19 H. 6. 17. 22. 19 E. 2. garr. 85.

And

(5) Acc. post. 16. b. Seld. Jan. Angl. b. 2. c. 15, and Seld. tit. Hon. 2d ed. p. 747, which latter book contains the form of the letters patent to lord Beauchamp.

(6) Adj. contra 39. lib. Ass. pl. 12; but Rolle abridges the case with a *quære*. See 1 Ro. Abr. 833. pl. 7.

(7) Acc. post. 94. b. But according to some authorities it is otherwise, if only the head of the corporation is capable, and the body is dead in law, as in the case of an abbot and convent. Post. 94. b. See, however, contra 1 Ro. Abr. 832. pl. 1.—[Note 51.]

(1) Acc. Plowd. 134. b.

And this rule of our author extendeth to the passing of estates of inheritances in exchanges, releases or confirmations that enure by way of enlargement of estates, warranties, bargaine and sales by deed indented and inrolled, and the like, in which this word (heires) is also necessary; for they do tantamount to a feoffment or grant, or stand upon the same reason that a feoffment or grant doth; for like reason doth make like law, *ubi eadem ratio, ibi idem jus* (2). And this is to be observed throughout all these three books, that where other cases fall within the same reason, our author doth put his case but for example; for so our author himselfe in another place* explaineth it, saying, *and memorandum, that in all other [such] like cases, although it be not here expressly moved or specified, if they be in like reason, they are in the like law.* And here our author is to be understood to speak of heires when they are inheritable by descent, for they are capable of land also by purchase, and then the course of descent is sometimes altered. As if lands of the nature of gavelkind be given to *B.* and his heires, having issue divers sons, all his sons after his decease shall inherit (3); but if a lease for life be made, the remainder to the right heires of *B.* and *B.* dieth, his eldest son only shall inherite, for he only to take by purchase is right heire by the common law (4). So note a diversity betweene a purchase and a descent. But

* Sect. 301.

(Post. 10. b. Dy. 133. b. Hob. 31. 1 Co. 101. 103.)

---

(2) For other instances in which a fee will pass by deed or grant without the word *heirs*, see Vin. Abr. *Estate*, K. 2. and L. To the cases in Viner, add 8 H. 4. 4. 16. b. 19 H. 6. 17. 20 H. 6. 36. 27 H. 8. 8. b. Dy. 169, which I do not see cited by him. See also Ash. Repertor. tit. *Estate*.

(3) Here *heirs* being a word of limitation, none can take under it but by *descent*; and the land being *gavelkind*, the descent is to all the sons, who are as much heirs to *such* land as the eldest son is heir to land descending according to the common law. The custom of *gavelkind* extends to estates tail; and so irresistible is the customary descent both of *gavelkind* and *borough-english* land, according to some authorities, that even in the case of estates tail (*a*), it cannot be changed by express words directing a descent *secundum cursum communis legis*. Dy. 179. b. pl. 45. See Robins. Gavelk. 94. Mr. Robinson's book on *Gavelkind* is a very excellent *law-treatise*, and *generally* comprehends every thing relative to his subject; but in this part of it he is rather short in his explanation; for though he takes notice of the custom's applying to estates tail, yet he neither mentions the case from Dyer, nor hints whether *express* words are as insufficient to exclude the custom from estates tail, as they certainly are to control the descent of estates in fee. Perhaps the author's silence might proceed from his doubts on the subject. See further the case of *tanistry*, Dav. 31. a. & 36. b. In that case it was resolved, that the customary descent was interrupted by the grant of an estate tail; but then the judges proceeded on a principle quite consistent with the *general* doctrine in Dyer. They held, first, that the custom of *tanistry* only applied to lands going with the *chiefry* or *seigniory*, from which the lands in question had been severed by the grant of the estate tail; and secondly, that the custom of *tanistry* was not *inherent in the land*, like the customs of *gavelkind* and *borough-english*, but merely *personal to the eldest and most worthy*, and therefore became extinguished for ever, when the land was conveyed to *another* person, that is, the heir at common law.—[Note 52.]===(*a*) Marsh. Rep. 54, pl. 82, a; Court held special custom may restrain the borough-english descent to estates in fee, and so exclude estates tail.

(4) Acc. Rob. Gavelk. 117, 118, and the authorities there cited. The reason seems to be, that though the *subject* of the gift is *customary* land, the heir

But where the remainder is limited to the right heires of *B.* it need not be said, and to their heires; for being plurally limited it includeth a fee simple, and yet it resteth but in one by purchase.

Out of that which hath beene said it is to be observed, that a man may purchase lands to him and his heires by ten manner of conveyances (for I speake not here of estoppells). First, by feoffment. Secondly, by grant (of which two our author here speaketh). Thirdly, by fine, which is a feoffment of record. Fourthly, by common recovery, which is a common conveyance, and is in nature of a feoffment of record. Fifthly, by exchange, which is in nature of a grant. Sixthly, by release to a particular tenant. Seventhly, by confirmation to a particular tenant, both which are in nature of grants. Eighthly, by grant of a reversion or remainder with attornment of the particular tenant, of all which our author speaketh hereafter. Ninthly, by bargaine and sale by deede indented and inrolled, ordained by statute since *Littleton* wrote. Tenthly, by devise by custome of some particular place, as he sheweth hereafter, and since he wrote, by will in writing, generally by authority of parliament.

27 H. 8. ca. 16.
32 H. 8. ca. 2.
34 H. 8. ca. 5.

What words are apt words for a feoffment or grant *vide* Sect. 531. Our author speaketh of feoffments and grants, whereby is implyed lawfull conveyances; and therefore this rule extendeth not to disseisins, abatements, or intrusions into lands or tenements, or to usurpations to advowsons, &c. in which cases estates in fee simple are gained by the act and wrong of the disseisors, abators, intruders, and usurpers (5); and if a disseisin, abatement, or intrusion be made to the use of another, if *cestui que use* agreeth thereunto in *pays*, by this bare agreement he gaineth a fee simple without any livery of seisin or other ceremony.

Sect. 531.
37 Ass. p. 8.
38 Ass. p. 9.
1 E. 4. 9, &c.

---

heir at *common law* is presumed to be meant, unless words are added to describe the *customary* heir. But if *such special* words are used, the presumption fails; and then it is said, that though the *subject* of the gift is *common-law land*, yet the *customary heir* shall be preferred. On this principle, lord ch. Cowper, in a case before him, declared, that if one, having *borough-english* land and also lands at *common law*, devises the latter to his heir by the custom of *borough-english*, this will be a sufficient description of the youngest son, though not heir at common law, and though the devise is not of the *customary*, but of the *common-law* land; and that a like devise to *gavelkind* heirs would entitle all the sons. 2 Vern. 732, and Prec. in Ch. 464. But see further on this latter subject, post. 24. b. where lord Coke writes, that to take by *purchase* under a limitation to the *heirs female*, the person claiming must be both *heir* and *female*. See also the note, in which it is attempted to justify lord Coke for that doctrine, and to explain the qualifications with which it ought to be understood.—[Note 53.]

(5) See ante 3. b. and post. 18. b.

Sect. 2.

AND if a man purchase land in fee simple and die without issue, he which is his next cousin collaterall of the whole blood, how farre so ever he be from him in degree, (de quel pluis long degree qu'il soit (6)), *may inherite and have the land as heire to him.*

(Plowd. 444.) *LITTLETON* showeth here who shall be heire to lands in fee simple; for he intendeth not this case of an estate taile, for that he speaketh of an heire of the whole blood, for that extendeth not to estates in taile, as shall be said hereafter in this Chapter, Section 6.

"Next cousin collaterall." Neither excludeth he brethren or sisters, because he hath a speciall case concerning them in this Chapter, Sect. 5, and in his Chapter of Parceners; but this is intended ☞ where a man purchaseth lands and dieth without issue, and having neither brother nor sister, then his next cousin collatterall shall inherite (1). [10. b.]

So as here is implyed a division of heires, viz. lineall (whoever shall first inherite) and collaterall (who are to inherite for default of lineall). For in descents it is a *maxime* in law, *quòd linea recta semper præfertur transversali.* Lineall descent is conveyed downward in a right line; as from the grandfather to the father, from the father to the sonne, &c. Collaterall descent is derived from the side of the lineall; as grandfather's brother, father's brother, &c. *Next cousin collaterall shall inherite* doth give a certain direction to the next cousin to the sonne, and therefore the father's brother and his posterity shall inherite before the grandfather's brother and his posterity. *Et sic de cæteris;* for *propinquior excludit propinquum, et propinquus remotum, et remotus remotiorem.*

Glanvill. lib. 7. ca. 3, 4. Bract. lib. 2. c. 30. fo. 65. Britton, c. 119. Fleta, lib. 6. cap. 1 & 2. (Plowd. 444.) Bract. lib. 2. cap. 30. fo. 64. Fleta, lib. 5. cap. 5. & lib. 6. cap. 1 & 2. Britton, c. 119. Mirror, 11. cap. 1. sect. 3. 30 Ass. p. 47. (3 Co. 40. 42.)

Upon

---

(6) de lui, *L. and M. Rob. Red.*

(1) In the preceding page, lord Coke begins his comment on that part of Littleton which describes the course of *descent* by the common law of England; and this seems to be a proper place for referring the student to some valuable writings published since lord Coke's time on the same subject. See Hal. Hist. C. L. c. 11. Wright's Ten. 174. Gilb. Ten. 2. Dalrymp. Feud. Prop. 4th ed. c. 5. p. 159, and Blackst. Law of Descents. To the first and last of these books it is that we principally call the attention of the student; though it must be confessed, that in all of them, the history of the law is so learnedly and critically traced, and the feudal principles, on which it chiefly depends, are so clearly unfolded, that a subject in itself dry and abstruse, becomes not only plain and intelligible, but even agreeable and interesting. Mr. R. Robinson's *Discourse concerning the Law of Inheritances in Fee simple* is another treatise on the same subject, which should not be passed over without notice. Many parts of it are ingeniously written; but unfortunately the author has chiefly exerted his talents in inventing a *new* kalendar of consanguinity, the explanation of which employs a very considerable part of the work; and by always referring to this, and by introducing a number of arbitrary terms, which are only intelligible as he explains them, he involves his subject, before too much embarrassed with difficulties, in still greater perplexity.—[Note 54.]

Upon this word (*next*) I put this case. One hath issue two sonnes, *A.* and *B.* and dieth; *B.* hath two sonnes, *C.* and *D.* and dieth. *C.* the eldest son hath issue and dieth. *A.* purchaseth lands in fee simple, and dieth without issue. *D.* is the next cousin, and yet shall not inherite, but the issue of *C.*; for he that is inheritable is accounted in law next of blood. And therefore here is understood a division of *next*, viz. next *jure repræsentationis*, and next *jure propinquitatis*; that is, by right of representation and by right of propinquity. And *Littleton* meaneth of the right of representation, for legally in course of descent he is next of blood inheritable. And the issue of *C.* doth represent the person of *C.*; and if *C.* had lived, he had been legally the next of blood, And whensoever the father, if he had lived, should have inherited his lineall heire by right of representation shall inherite before any other, though another be *jure propinquitatis*, neerer of blood. And therefore *Littleton* intendeth his case of next cousin of blood immediately inheritable. So as this produceth another division of next blood, viz. immediately inheritable, as the issue of *C.*; and mediately inheritable, as *D.* if the issue of *C.* die without issue; for the issue of *C.* and all that line, be they never so remote, shall inherite before *D.* or his line; and therefore *Littleton* saith well, *how farre so ever he be from him in degree.* And here ariseth a diversity in law between next of blood inheritable by descent, and next of blood capable by purchase. And therefore in the case before mentioned, if a lease for life were made to *A.* the remainder to his next of blood in fee; in this case, as hath been said, *D.* shall take the remainder, because he is next of blood and capable by purchase, though he be not legally next to take as heire by descent (2).

19 R. 2. tit. Garr. 100.

(2 Inst. 7.)

30 Ass. p. 47.

Sect. 3.

BUT if there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and

---

(2) *Harpur having a son and* 4 *daughters, viz. A, B, C, and D, devises to the son in tail, remainder to B. and C. for life, remainder* proximo consanguinitatis et sanguinis *of the devisor; and Easter* 17 *Jam. by two justices against one, the remainder vests in all the daughters when the son dies without issue. But afterwards Mich* 10 *Jam.* per totam curiam, *it vests in the eldest daughter only, and not in all the daughters;* 1, *because* proximo; 2, *because an express estate is limited to two of the daughters.—Periman and Pierce.*—Hall. MSS. See S. C. in Palm. 11, and 303. 2 Ro. Rep. 256. Bridgm. 14. O. Bendl. 102. 106. See Fitz. Abr. Devise. pl. 9.—Lord chief justice Hale also gives a note on the words *proximus de sanguine vel consanguinitate;* in which, after citing from Ratcliffe's case, 8 Co. 40, that on the stat. 21 H. 8, the father or mother shall be preferred in administration to the son, as next of blood before the brother, he adds, *Nota, ruled that in administration, the sister of the half blood should be preferred in administration before the son of the sister of the whole blood; but when they are* in æquali gradu, *the sister if the whole blood shall be preferred before the sister of the half blood.* M. 23. *Cha. and M.* 1650. *B. R. Brown's case.* Hal. MSS. See further as to *proximus de sanguine* in Dy. 333. b.—[Note 55.]

and not the father, yet the father is neerer of blood; because it is a maxime in law, that inheritance may lineally descend, but not (3) *ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heire to the sonne (as by law he ought) and after the uncle dieth without issue, living the father, the father shall have the land as heire to the uncle, and not as heir to his sonne, for that he commeth to the land by collateral discent and not by lineall ascent.*

5 E. 6. tit. Ad. ministr. Br. 47. Ratcliffe's case ubi sup. See after in the Chapter of Socage.

(Hob. 33.)

(3 Co. 40.)

"YET *the father is neerer of blood.*" And therefore some do hold upon these words of *Littleton*, that if a lease for life were made to the sonne, the remainder to his next of blood, that the father should take the remainder by purchase, and not the uncle, for that *Littleton* saith the father is next of blood, and yet the uncle is heire. As if a man hath issue two sons, and the eldest sonne hath issue a sonne and die, a remainder is limited to the next of his blood, the younger sonne shall take it, yet the other is his heire.

[p] Pl. Com. 293. b. Osborne's case, (Post. 67.)

"[p] *It is a maxime in law, that inheritance may lineally descend, but not ascend,*"

[q] Pl. Com. 27. b. (3 Co. 40.)

Maxime, i. e. a sure foundation or ground of art, and a ☞ conclusion of reason, so called [q] *quia maxima est ejus dignitas et certissima authoritas, atque quod maxime omnibus probetur*, so sure and uncontrollable as that they ought not to be questioned. [r] And that which our author here and in other places calleth a maxime, hereafter he calleth a principle; and it is all one with a *rule*, a *common ground postulatum*, or an *axiome*, and it were too much curiositie to make nice distinction betweene them. And it is well said in our bookes, [s] *n'est my a disputer l'ancient principles del ley*. I never read any opinion in any booke, old or new, against this maxime, but only in *Lib. Rub.* where it is said [t], *si quis sine liberis decesserit, pater aut mater ejus in hæreditatem succedat, vel frater et soror si pater et mater desint; si nec hos habeat, soror patris vel matris, et deinceps qui propinquiores in parentelâ fuerint hæreditariò succedant; et dum virilis sexus extiterit, et hæreditas abinde sit, fœmina non hæriditat.* But all our ancient authors and the constant opinion ever since do affirme the maxime.

[11. a.]

[r] Sect. 90. 648.

[s] 12 H. 4. Glanvill. lib. 7. cap. 1. Bract. lib. 2. cap. 29.

[t] Lib. Rub. cap. 76.

By this maxime in the conclusion of his case, onely lineall ascention in the right line is prohibited, and not in the collaterall.

[u] Brit. cap. 119. Fleta, lib. 6, ca. 1. Numb. ca. 21. Ratcliffe's case, ubi supra. (3 Co. 40.)

[u] *Quælibet hæreditas naturaliter quidem ad hæredes hæreditabiliter descendit, nunquam quidem naturaliter ascendit. Descendit itaque jus quasi ponderosum, quod cadens deorsum rectâ lineâ vel transversali, et numquam reascendit eâ viâ quâ descendit post mortem antecessorum, à latere tamen ascendit alicui propter defectum hæredum inferius provenientium;* so as the lineall ascent is prohibited by law, and not the collaterall (1). And in prohibiting the lineall

(3) *lineally*—P. and Red.

(1) In Ratcliffe's case, 3 Co. 40, the reasons given for excluding lineal ascent, are, *first*, that fathers and mothers are not of the blood of their children; *secondly*, that the exclusion is agreeable to the Jewish law, as prescribed to Moses by God himself; and *thirdly*, that it tends to avoid that confusion and diversity of opinions in the case of descents, of which the allowance of lineal ascension by the *civil* law is said to be the occasion. Lord Coke

lineall ascent, the common law is assisted with the law of the 12 tables (2).

Here our author for the confirmation of his opinion draweth a reason and a proofe (as you have perceived) from one of the maximes of the common law. Now that I may here observe it once for all, his proofes and arguments, in these his three books, may be generally divided into two parts, viz. from the common law and from statutes, of both which, and of their several branches, I shall give the studious reader some few examples, and leave the rest to his diligent observation.

For the common law his proofes and arguments are drawn from 20 several fountaines or places.

[a] First from the maximes, principles, rules, intendment and

[a] Sect. 5. 8. 90. 96. 52, 53. 57. 59. 65. 99. 130. 146. 156. 169. 178. 231. 298. 302. 352. 360. 376, 377. 396. 410. 440, 441. 346, 347. 462. 43.

Coke himself controverts the *first* of these reasons, by the words of Littleton in the Section here commented upon, and by the case of administration, in which the father or mother is preferred as *nearest of blood* to their children, and also by the case of a remainder to the son's *nearest of blood*, under which description the father is entitled to take by purchase. But as to the two other reasons, Lord Coke rather appears to adopt them. However, neither of them seems satisfactory. The inference from God's precept to Moses is unwarranted, unless it can be shown that it was promulgated as a law for mankind in *general*, instead of being, like many other parts of the Mosaical law, a rule for the direction of the Jewish nation *only*. Besides, by the Jewish law, the father did succeed to the son in exclusion of his brothers, unless one of them married the widow of the deceased, and raised up seed to him. See Blackst. Law Tracts, v. 1. p. 182. 8vo. ed. and Seld. de Succes. Ebræor. c. 12. there cited. The argument from the supposed confusion and uncertainty, which might arise, if lineal ascent should be permitted, is not less liable to objection; because lineal *ascent* might be governed by the same rules as lineal *descent;* and what is the difference between the two, that should create more confusion and uncertainty in the one case than in the other? Our modern writers account for our law's disallowance of lineal ascent in a very different way; and according to them, it in a great measure originated from the nature of ancient feudal grants, which, like estates tail, being confined to the first feudatory and his descendants, necessarily excluded his father and mother, and all paramount them, and also his collateral relations. How this rule in *practice* became extended so as to exclude lineal ascent *universally*, without confining it to the cases to which the feudal reason for the rule is applicable, and yet at the same time is so construed, as to let in all collateral relations, and even the father himself collaterally, and by the medium of others, is not now very easy to explain, though this has been attempted. See Wright's Ten. 180, and Blackst. Law Tracts, v. 1. p. 183. 8vo. ed. See also a learned note on the subject in *Littleton avec Observat. par M. Houard.* This edition of Littleton is in 2 vol. 4to. and was published at Rouen in 1766.—[Note 56.]

(2) See *Tab.* 5. 1. *de successione ab intestato;* but neither in this, nor in any other part of the 12 Tables, do I see any thing to exclude lineal ascent; and as I have not met with any book on the Roman law in which such an exclusion is mentioned, I conclude, that lord Coke is mistaken in his idea of our laws conforming to the law of the 12 Tables. The mother was indeed excluded; but it was not because the law of the 12 Tables did not permit lineal *ascent*, but on account of her sex, that law preferring the *agnati*, or those related through males, and excluding the *cognati*, or those related through females. See Inst. 3. 3. Princ.—[Note 57.]

and reason of the common law, which indeed is the rule of the law, as here and in other places our author doth use.

[b] Secondly, from the bookes, records, and other authorities of law cited by him *ab authoritate, et pronunciatis.*

[c] Thirdly, from originall writs in the Register, *à rescriptis valet argumentum.*

[d] Fourthly, from the forme of good pleading.

[e] Fifthly, from the right entrie of judgements.

[f] Sixthly, *à præcedentibus approbatis et usu*, from approved precedents and use.

[g] Seventhly, *à non usu*, from not use.

[h] Eighthly, *ab artificialibus argumentis consequentibus et conclusionibus*, artificiall arguments, consequents and conclusions.

Ninthly, [i] *à communi opinione jurisprudentum*, from the common opinion of the sages of the law.

Tenthly, [k] *ab inconvenienti*, from that which is inconvenient.

Eleventhly, [l] *à divisione*, from a division, *vel ab enumeratione partium*, from the enumeration of the parts.

Twelfely, [m] *à majore ad minus*, from the greater to the lesser, or [n] from the lesser to the greater [o] *à simili* [p] *à pari.*

13. † *Ab impossibili*, from that which is impossible.

14. [q] *A fine*, from the end.

15. [*] *Ab utili vel inutili*, from that which is profitable or unprofitable.

16. [r] *Ex absurdo* for that thereupon shall follow an absurditie, *quasi à surdo prolatum*, because it is repugnant to understanding and reason.

17. [s] *A naturâ et ordine naturæ*, from nature, or the course of nature.

☞ 18. [t] *Ab ordine religionis*, from the order of religion. [11. b.]

19. [u] *A communi præsumptione*, from a common presumption.

20. [w] *A lectionibus jurisprudentium*, from the readings of learned men of law.

From statutes his arguments and proofes are drawn,

1. [x] From the rehearsall or preamble of the statute.

2. By the bodie of the law diversely interpreted.

Sometime by other parts of the same statute, which is *bene dicta expositio, et ex visceribus causæ.*

[y] Sometime by the reason of the common law. But ever the generall words are to be intended of a lawfull act, [z] and such interpretation must ever be made of all statutes, that the innocent or he in whom there is no default may not be damnified (1).

"In law." There be divers lawes within the realme of England. As first, [a] *Lex coronæ*, the law of the crowne.

[b] Sect. 20. where a number of others are quoted.
[c] Sect. 67. 132. 170. 234. 241. 263. 613, 614. (Plowd. 228.)
[d] Sect. 58. 170. 183. 369.
[e] Sect. 248, 249.
[f] Sect. 88. 74. 76. 145. 332. 371, 372. 445.
[g] 108. 733.
[h] Sect. 170. 264. 283. 302. 429. 464. 629. 633. 686. 340. 418. 613. 686. 739.
[i] Sect. 697. 59. 104. 288. 332. 478.
[k] Sect. 87. where many others are quoted.
[l] Sect. 13. where many more are quoted; but see chiefly Sect. 381.
[m] Sect. 438, 439. 441.
[n] Sect. 18.
[o] 301, &c.
[p] 291. 298. 409, &c.
[†] 129. 440.
[q] Sect. 46. 194.
[*] Sect. 360.
[r] Sect. 722.
[s] Sect. 114. 223. 129. 211. 107, 108.
[t] Sect. 202.
[u] Sect. 440.
[w] Sect. 481.
[x] Sect. 13, &c. Sect. 731. 692. 635. 633. 441. 103. 193. 154. 140. 2. (Plowd. 57. b. 49. b.)
[y] Sect. 464. (Cro. Ja. 474.)
[z] Sect. 731. 685. (Plowd. 105.) Regist. inter Jura regia, 61, &c.
[a] 17 E. 3. Rot. Parl. nu. 19. (Post. 116. a.) 25 E. 3. cap. 1. (Post. 360.)

2. [b] *Lex*

---

(1) As to the construction of statutes, see lord ch. Hatt. Treat. on Stat.—Ash. Expos. Stat. by Eq.—Vin. Ab. *Statutes*, E. 6.—Com. Dig. *Parliament.* R. 10.

2. [b] *Lex et consuetudo parliamenti. Ista lex est ab omnibus quærenda, à multis ignorata, à paucis cognita* (A).

3. [c] *Lex naturæ*, the law of nature.

4. [d] *Communis Lex Angliæ*, the common law of England, sometime called *lex terræ*, intended by our author in this and the like places.

5. [e] Statute law. Lawes established by authority of parliament.

6. [f] *Consuetudines*, Customes reasonable.

7. [g] *Jus belli*, the law of armes, war, and chivalrie, *in republicâ maximè conservanda sunt jura belli.*

8. [h] Ecclesiastical or canon law in courts in certaine cases.

9. [i] Civil law in certaine cases not onely in courts ecclesiastical,* but in the courts of the constable and marshall, and of the admiraltie, in which court of the admiralty is observed *la ley Olyron, anno* 5 of Richard the first, so called, because it was published in the isle of Olyron.

10. [k] *Lex forestæ*, forest law.

11. [l] The law of marque or reprisal (2).

12. [m] *Lex mercatoria*, merchant, &c.

13. [n] The lawes and customes of the isles of Jersey, Guernsey, and Man.

14. [o] The law and privilege of the Stannaries.

15. [p] The lawes of the east, west, and middle Marches, which are now abrogated.

But hereof this little taste for our student, that he may be capable of that which he shall reade concerning these and others in records, and in our books, and orderly observe them, shall suffice.

[b] Commonly spoken of in Parliament Rolls. (4 Inst. 49, 50. Post. 15. b.)

[c] 13 E. 4. 9. 7 Co. Calvin's case. Pl. Com. Sharington's case. (Dr. and Stud. Dial. 1. c. 2.)

[d] This law appeareth in our bookes and judiciall records.

[e] These are of record in Rolls of Parliament.

[f] Whereof you shall read in our author, and in our bookes.

[g] Rot. Parl. 2 R. 2. nu. 3. 13 R. 2. ca. 2. (Post. 249.)

[h] 7 Co. Caudrie's case, articul. super cartas, &c.

[i] 37 H. 6. 21. Fortesc. ca. 32. 13 H. 4. 4. 28 H. 8. ca. 15.

[k] Carta de Foresta, &c. the eires of the Forests. [l] 27 E. 3. ca. 17. Wi. ca. 23. 4 H. 5. ca. 7. [m] Mirror des Just. c. 1. Bract. 334. 444. Fleta, lib. 2. ca. 51, 52, &c. 5 E. 3. 11. 38 E. 3. 7. 27 E. 3. cap. 8. Fortescue, 32. F. N. B. 117. 13 E. 4. 9. Rot. Parl. 6 H. 4. nu. 43. 10 H. 7. 16. 47 E. 3. 22. 30 E. 1. Account, 127. Carta Mercatoria. 31 E. 1. Rot. Patent. (4 Inst. 237.) [n] Mich. 41. E. 3. caram rege in Thesaur. 12 E. 3. 5. b. 12 H. 8. fol. 5. Rot. Pat. an. 20 E. 1. 7 Co. Calvin's case, fol. 21. Regist. fol. 22. [o] 50 E. 3. Rot. Parl. 50 E. 3. Rot. Patent, &c. [p] 31 H. 6. ca. 3. 4 Ja. c. 1.

"*And his uncle enter into the land.*" For if the uncle in this case doth not enter into the land, then cannot the father inherite the land; for there is another maxime in law herein implied,[q] that a man, that claimeth as heire in fee simple to anie man by descent, must make himself heire to him that was last seised of the actuall freehold and inheritance(3). And if the uncle in this

[q] 11 H. 4. 11. 10 Ass. 27. 34 Ass. p. 20. 19 E. 2. Quar. imped. 177. 45 E. 3. 13. 40 Ass. p. 6.

* *For an elementary introduction to the Civil and Canon Law, see Mr. Butler's Horæ Juridicæ Subsecivæ, oct.* 1804, and 1807.

case

(A) See Vindication of Rights of Commons, by Mackworth, 19. 31. Power of Parl. by Atkins, 50. 54. Proceedings as to the Ailesbury men, 44. 49. Vindication of the Rights of the Lords, in answer to Mackworth, 14. Proceedings in Sir J. Fenwick's attainder on bill against Bishop Atterbury. Lord Holt's words in Skin. R. 526, in Lord Banbury's case. See also 8 Wils. 192.

(2) Besides the books more generally known, see Lee's Capt. in War, which is a Treatise on this subject.

(3) *Grandfather, father, and son; grandfather dies; father is bound in an obligation or warranty, and dies before entry. Held, that the son is not liable, becaus*

case doth not enter, then had he but a freehold in law, and no actuall freehold, but the last that was seised of the actuall freehold was the sonne to whom the father cannot make himselfe heire; and therefore *Littleton* saith, *and his uncle enter into the land* (*as by law he ought*) to make the father to inherite, as heire to the uncle. [*r*] Note, that true it is that the uncle in this case is heire, but not absolutely heire; for if after the descent to him the father hath issue a sonne or daughter, that issue shall enter upon the uncle (4). [*s*] And so it is if a man hath issue a sonne and a daughter, the sonne purchaseth land in fee and dyeth without issue, the daughter shall inherite the land; but if the father hath afterward issue a sonne, this sonne shall enter into the land as heire to his brother, and if he hath issue a daughter and no sonne, she shall be coparcener with her sister.

[r] 11 Ass. p. 6. Doct. and Stud. 12. b. 32 H. 6. 35.

[s] 19 H. 6. 61.

"*As by law he ought.*" These words as a key doe open the secrets of the law; for hereupon is concluded, that where the uncle cannot get an actuall possession by entrie or otherwise, there the father in this case cannot inherit. And therefore if an advowson be granted to the sonne and his heires, and the sonne die without issue, and this descend to the uncle, and he die before he doth or can present to the church, the father shall not inherit, because he should make himselfe heire to the sonne, which he cannot doe. And so of a rent and the like. But if the uncle had presented to the church, or had seisin of the rent, there the father should have inherited. For *Littleton* putteth his case of an entry into land but for an example. If the sonne make a lease for life, and die without issue, and the reversion descend to the uncle, and he die, the reversion shall not descend to the father, because in that case he must make himself heire to the sonne. *A.* infeoffes the son with warrantie to him and his heires, the sonne dies, the uncle enters into the land and dies, the father if he be impleaded shall not take the advantage of

---

because he shall make himself heir to the grandfather. 24 E. 3. Hal. MSS.—[Note 58.] See Kellow *v.* Kowden, 1 Show. 244. Smith *v.* Parker, 2 Bl. Rep. 1230. Post. 14. b. n. 9. 1 Br. Ch. Cases, 252.

(4) Here lord Coke is silent as to the right to the intermediate profits from the death of the father. In the case of *Basset* and *Basset*, lord ch. Hardwicke held, that a posthumous son, claiming under a remainder in a settlement, was, by construction of the 10 and 11 W. 3. c. 16, which preserves remainders for posthumous children, where no estate is limited to trustees, for that purpose, entitled to the mean profits. See 3 Atk. 203. But in the same case, lord Hardwicke seems to have taken it for granted, that on a *descent* the mean profits belong to the uncle; for he directed, that the profits of the *estate descended* should be accounted for by the uncle, only from the birth of the posthumous son. See post. 55. b. where lord Coke puts the case of a daughter's being entitled against a posthumous brother to corn sowed before his birth; which seems to shew, that lord Coke did not consider the posthumous child as entitled to any mean profits on a descent. See also Wils. Rep. vol. 3. p. 526, where lord Ch. J. De Grey, in delivering the opinion of the court of C. P. on a question whether a *posthumous* son was *actually seised*, denies that the posthumous son in the case of a descent, can be entitled to any profits received before his birth, and cites 9 H. 6. 25. as an authority in point.—[Note 59.] See further, Hopkins *v.* Hopkins, in Forrest R. 2 Ves. 521. 1 Ves 485.

[12. a.] of this ☞ warrantie, for then he must vouch *A.* as heire to his sonne, which he cannot doe (1); for albeit the warrantie descended to the uncle, yet the uncle leaveth it as he found it, and then the father by *Littleton's* (*ought*) cannot take advantage of it. For *Littleton*, Sect. 603, saith that warranties shall descend to him that is heire by the common law; and Sect. 718, he saith that everie warrantie which descends, doth descend to him that is heire to him which made the warrrantie by the common law; which proveth that the father shall not be bound by the warrantie made by the sonne, for that the father cannot be heire to the sonne, that made the warrantie. And a warrantie shall not goe with tenements, whereunto it is annexed, to any especiall heire, but alwaies to the heire at the common law (2). And therefore if the uncle be seised of certain lands, and is disseised, the sonne release to the disseisor, with warrantie, and die without issue, this shall bind the uncle; but if the uncle die without issue, the father may enter, for the warrantie cannot descend upon him. So if the sonne concludeth himselfe, by pleading concerning the tenure and services of certaine lands, this shall bind the uncle; but if the uncle die without issue, this shall not bind the father, because he cannot be heire to the sonne, and consequently not to the estoppell in that case; but if it be such an estoppell as runneth with the land, then it is otherwise (3).

Vid. Sect. 603. 718. (Post. 329.

Vid. Sect. 735, 736, 737.

35 H. 6. 33. John Crook's case. (5 Co. 79.

Sect. 4.

AND in case where the sonne purchaseth land in fee simple, and dies without issue, they of his blood on the father's side shall inherite as heires to him, before any of the blood on the mother's side: but if he hath no heire on the part of his father, then the land shall descend to the heires on the part of the mother (4). *But if a man marrieth an inheritrix*

---

(1) Quære *of this case of warranty; for though the lien of warranty descends from him who makes the warranty, to the heir at common law, and it cannot descend to the special heir, because it is a thing in gross, yet the benefit of a warranty being once annexed to land, shall go in divers cases as incident to the land to the special heir or assignee. Thus a gift of* borough-english, *with a warranty, shall go to the youngest son with the land.* Hal. MSS.—See acc. 2 Ro. Abr. 743, where it is said, that the father may vouch on such a warranty to the uncle. In Gilb. Ten. 18, there is a reference to lord ch. j. Hale's note on this part of lord Coke, from which it appears that lord ch. bar. Gilbert had seen lord Hale's MS. notes.—[Note 60.]

(2) See acc. both as to estoppels and warranties, Hob. 31. 8 Co. 54. But observe what is said by lord Hale in the preceding note.

(3) *The son makes lease for life, and dies; the uncle releases to the lessee for life in tail on condition, and dies.* Quære, *who shall enter for the condition broken, as the reversion in fee doth not descend to the father?* Hal. MSS.—[Note 61.]

(4) *And this was the opinion of all the justices, M.* 12. *E.* 4. *But it was there held, if land descend to a man on the part of his father, who dies without issue, that his next heir, on the part of his father, shall inherit to him, that is to wit, the next who is of the blood of the father on the part of his grandfather: and for*

heritrix (Mes si home prent (5) enheretrix) *of lands in fee simple who have issue a sonne, and die, and the sonne enter into the tenements, as sonne and heire to his mother, and after dies without issue, the heires of the part of the mother ought to inherit, and not the heires of the part of the father. And if he hath no heire on the part of the mother, then the lord, of whom the land is holden, shall have the land by escheate.* (1) † *In the same manner it is, if lands descend to the sonne of the part of the father, and he entreth, and afterwards dies without issue, this land shall descend to the heires on the part of the father and not to the heires on the part of the mother. And if there be no heire of the part of the father, the lord of whom the land is holden shall have the land by escheate. And so see the diversity, where the sonne purchaseth lands or tenements in fee simple, and where he cometh to them by descent on the part of his mother, or on the part of his father.*

Vid. Sect. 354. and excellent point.

BY this it appeareth, that our author divideth heires into heires of the part of the father, and into heires of the part of the mother. [a] And note, it is an old and true maxime in law, that none shall inherit any lands as heire, but only the blood of the first purchaser, for **refert à quo fiat perquisitum.* As for example, *Robert Coke* taketh the daughter of *Knightley* to wife, and purchaseth lands to him and to his heires, and by *Knightley* hath issue *Edward*, none of the blood of the *Knightleys*, though they be of the blood of *Edward*, shall inherite, albeit he had no kindred but them, because they were not of the blood of the first purchaser, viz. of *Robert Coke* (6).

[a] Pl. Com. Sir Edward Clere's case, 447.

[*] Fleta, lib. 6. ca. 1, 2, &c. Bracton, lib. 2. fol. 65, 67, 68, 69, &c. Britton, ca. 119. 24 E. 3. 50. 39 E. 3. 29, 30. 38. 49 E. 3. 12. 49 Ass. p. 4. 12 E. 4. 14. Pl. Com. 445. & 450. 7 E. 6 Dyer, 6. 24 E. 3. 24. 37 Ass. 4. 40 E. 3. 9. 42 E. 3. 10. 45 E. 3. Releases, 28. 7 H. 5. 3, 4. 8 Ass. 6. 35 Ass. 2. 5 E. 4. 7. 3 H. 5. 21 H. 7. 33. 40 Ass. 6. Ratcliff's case, 3 Co. 42. (Post. 220, b.

[b] Bracton ubi supra. Fleta ubi supra. Britton, c. 118. 119. Pl. Com. 444. Clere's case. Tr. 19 E. 1. Banco. Rot. 25. Lincoln Will. Seel's case.

[b] "*They of his blood on the father's side.*" Here it is to be understood, that the father hath two immediate bloods in him, viz. the blood of his father, and the blood of his mother (7). Both these

---

for default of such heir, those who are of the blood of the father on the part of the mother of the father, viz. the grandmother, shall inherit. And if there is no such heir on the part of the father, then the lord shall have the land by escheat. Red. But this passage is not in any edition prior to Redman's, and seems an addition to Littleton by another hand, and to be an opinion extracted from 12 E. 4. 14 pl. 12, which is indeed cited in the margin of Redman.

(5) feme *L. & M.—Roh. P.—Red.*

(1) † All between *In the same*, and *so see*, omitted in Red.

(6) *And therefore if the heir of the part of the father be attainted, the land shall escheat.* 49 *Ass. p.* 4. Hal. MSS. See 3 Bridg. MSS. 73, 74. 2 Bridg. MSS. 101. (in Mus. Brit.)

(7) But sometimes a man can only have immediate inheritable blood from one parent, as where his father or mother is an alien, or person attainted; and this it seems suffices to enable children to inherit from the parent, who confers the inheritable blood, and also to inherit to each other. See acc. ante 8. a. n. 2, and the following note by lord Hale on lord Coke's next passage, where he mentions, that according to ancient authors the issue of an attainted father cannot inherit to the mother. *This seems not to be law. A female heretrix takes*

these bloods are of the part of the father. [c] And this made ancient authors say, that if a man be seised of lands in the right of his wife, and is attainted of felony, and after hath issue, this issue should not inherit his mother, for that he could derive no blood inheritable from the father. And both these bloods of the part of the father must be spent ☞ before the heire of the blood of the part of the mother shall inherit, wherein ever the line of the male of the part of the father, (that is) the posteritie of such male, be they male or female, (who ever in descents are preferred) must faile before the line of the mother shall inherite. [d] And the reason of all this is, for that the blood of the part of the father is more worthie, and more neere in judgment of law, than the blood of the part of the mother.

[12. b.]

[c] Britton, fol. 15. Fleta, lib. 1, c. 18. Pl. Com. 445. 446, &c. Clere's case. (1 Sid. 200.) (Plowd. 444.)

[d] 19 R. 2. Gar. 100.

"Before any of the blood on the mother's side." And it is to be observed, that the mother hath also two immediate bloods in her, (viz.) her father's blood and her mother's blood. Now to illustrate all this by example, *Robert Fairefield* son of *John Fairefield* and *Jane Sandie*, takes to wife *Ann Boyes*, daughter of *John Boyes* and *Jane Bewpree*, and hath issue *William Fairefield*, who purchaseth lands in fee. Here *William Fairefield* hath foure immediate bloods in him, two of the part of his father, viz. the blood of the *Fairefields*, and the blood of the *Sandyes*, and two of the part of his mother, viz. the blood of the *Boyses* and the blood of the *Bewprees*, and so in both cases upward *in infinitum*. Now admit that *William Fairefield* die without issue, first the blood of the part of his father, viz. of the *Fairefields*, and for want thereof the blood of the *Sandyes* (for both these are of the part of the father) if both these faile, then the heires of the part of the mother of *William Fairefield* shall inherit, viz. first the blood of the *Boyses*, and for default thereof the blood of the *Bewprees*.

Britton, cap. 118, 119. Fleta, lib. 6. cap. 2.

It is necessary to be knowne in what cases the heire of the part of the mother shall inherite, and where not. If a man be seised

---

takes an alien to husband, and they have issue: the issue shall inherit to the mother. Post. Sect. 114. *and fol.* 33. *a. for a dower of wife being alien or attainted.* Hal. MSS. To the same purpose is what follows, being a note on fol. 8. a. ante, where lord Coke asserts that the children of an alien cannot inherit to each other, though he allows that the children of one attainted, if born before the attainder, may. Quære *of this; for it seems the blood of the mother suffices to make them inheritable one to the other, and this was the principal reason in Hobby's case.* Hal. MSS. Also lord Hale, in another note in fol. 8. a. ante, abridges the case of *Bacon* and *Bacon* from Cro. Cha. and cites *Stephens's* case in the *duchy* as another case of the same kind, and then there is the note following. *Yet note that he cannot be heir to his mother, because she is an alien. Husband denizen takes wife an alien, or wife takes husband an alien, and they have issue. It seems the issue shall inherit to the father in the first case, to the mother in the second.* Ergo videtur, *that if alien hath issue by denizen two sons, one son shall inherit to the other, because the mother is a denizen; and so in the case of a person attainted, having issue after attainder; and this was one of the reasons of Hobby's case.* Hal. MSS. This doctrine is agreeable to lord Hale's argument when he gave judgment in *Collingwood* and *Pace*, cited ante, fo. 8. a. n. 2. and also confirms the observation hazarded in n. 5. fol. 8. a.—[Note 62.] See 4 T. R. 300.

seised of lands as heire of the part of his mother, and maketh a feoffment in fee, and taketh backe an estate to him and to his heires, this is a new purchase, and if he dyeth without issue, the heires of the part of the father shall first inherite (2). If a man so seised maketh a feoffment in fee upon condition, and dye, the heire of the part of the father, which is the heire at the common law, shall enter for the condition broken, but the heire of the part of the mother shall enter upon him, and enjoy the land. [m] A man so seised maketh a feoffment in fee reserving a rent to him and to his heires, this rent shall go to the heires of the part of the father; but [n] if he had made a gift in taile, or a lease for life reserving a rent, the heir of the part of the mother shall have the reversion, and the rent also as incident thereunto shall passe with it; but the heire of the part of the mother shall not take the advantage of a condition annexed to the same, because it is not incident to the reversion nor can passe therewith. [o] If a man had been seised of a mannor as heire on the part of his mother, and before the statute of *Quia emptores terrarum*, had made a feoffment in fee of parcell to hold of him by rent and service, albeit they be newly created,

9 H. 7. 24. (Plowd 57. Post. 202.)

[m] 7 H. 6. 4. 1 Co. 100. Shelley's case.

[n] 5 E. 2. tit. Avowry, 207. (Hob. 31.)

[o] 5 E. 3. Avowry, 207. (3 Co. 54. 3 Co. 32. b.

---

(2) But here lord Coke must be understood to speak of two distinct conveyances in fee; the *first* passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the land; and the *second* regranting the estate to him (*a*). For if in the first feoffment, the use had been expresly limited to the feoffor and his heirs, or if there was no declaration of uses, and the feoffment was not on such a consideration as to raise an use in the feoffee, and consequently the use resulted to the feoffor, in either case he is in of his *ancient use*, and not by purchase. Adj. acc. 3 Lev 406, and 2 Salk. 59; and see acc. post. 18. a. and 22. b. What shall be a *purchase*, and break the *descent*, so as to entitle the *paternal* heir to a preference over the *maternal* heir, particularly in the case of a devise to the heir, the student may inform himself by the authorities cited in Vin. Abr. *Heir*, W. 1, 2, to which add Battey and Trevillian, Mo. 278. Hinde and Lyon, 3 Leon. 64. 70, and Dy. 124. Hainsworth and Pretty, Cro. Eliz. 833. 919. Brown and Taylor, Cro. Cha. 38. Clark and Smith, 1 Salk. 241, and 1 Lutw. 793. Smith and Trig, 8 Mod. 23, and 1 Stra. 487. Ratcliffe's case, 1 Stra. 267. Martin and Strachan, 1 Wils. part 1. p. 66, and Hurst and the earl of Winchelsea, Bur. pt. 4. v. 2. p. 879. In this last case, a feme covert by force of a power appointed by *will* to her heir in fee, but charged the land with debts and legacies; and it was adjudged in B. R. that the heir took by *descent*, and that the appointment had no other operation than making the estate subject to the debts and legacies. One leading principle, which this and the other authorities seem clearly to establish, is, that whenever a *devise* gives to the heir the same estate in *quality* as he would by *descent*, he shall take by the *latter*, which is the title most favoured by the law; and that merely charging the estate with debts or legacies will not break the descent. This is only one of the many useful propositions, which might be extracted on the subject as the result of the long list of cases before cited, if this was the proper place for a discussion so nice and difficult.—[Note 63.] See Amb. 383. Scott *v.* Scott, and 1 Black. R. 22, the case of Allen *v.* Heber. And see the case of Goodright *v.* Wells, Doug. 3 ed. 769. Watkins' Des. 154. ═══ (*a*) See Ld. ch. j. Eyre's reference to this note in 3 Ves. 665. But qu. was not it intended to Mr. Butler's note, 271. b. And see acc. in the note in 1 Bos. & Pull. 597.

created, yet for that they are parcell of the mannor, they shall with the rest of the mannor descend to the heire of the part of the mother, *quia multa transeunt cum universitate quæ per se non transeunt.* If a man hath a rent secke of the part of his mother, and the tenant of the land ☞ granteth a distresse to him and to his heires, and the grantee dieth, the distresse shall go with the rent to the heire of the part of the mother, as incident or appurtenant to the rent, for now is the rent secke become a rent charge (1).

[13. a.]

[p] A man so seised as heire on the part of his mother maketh a feoffment in fee to the use of him and his heires, the use being a thing in trust and confidence shall ensue the nature of the land (2), and shall descend to the heire on the part of the mother. [q] A man hath a seigniory as heire on the part of his mother, and the tenancy doth escheat, it shall go to the heire of the part of the mother. If the heire of the part of the mother of land whereunto a warranty is annexed is impleaded and vouche, and judgment is given against him, and for him to recover in value, and he dieth before execution [r], the heire of the part of the mother shall sue execution to have in value against the vouchee, for the effect ought to pursue the cause, and the recompence shall ensue the losse.

If a man giveth lands to a man, to have and to hold to him and his heires on the part of his mother, yet the heires of the part of the father shall inherit, *for no man can institute a new* (A) *kind of inheritance not allowed by the law,* and the words (of the part of his mother) (B) are voide, as in the case that *Littleton* putteth in this Chapter. If a man giveth lands to a man to him and his heires male, the law rejecteth this word

[p] 5 E. 4. 4. 1 Co. 100. Shelley's case, 27 H. 8. Dyer. Buckenham's case. 32 H. 8. Gard. Brooke, 93. 13 H. 7. 6. (2 Ro. Abr. 780 Post. 23. a. 271. b. 1 Co. 127. Hob. 31. 2 Co. 58.)

[q] 16 E. 3. Age, 46.

[r] Pl. Com. 292 and 515. See more of this in the Chapter of Warranties.

(Post. 27. a.)

---

(1) Acc. 8 Co. 54. a.

(2) The better reason seems to be, that the use being the same as it was before the feoffment, it is the old use which continues. As to an use's ensuing the nature of the land, see 1 Co. 127. 2 Co. 58, and Bac. Read. on Stat. Uses, 8vo. ed. 308, in which latter book the author controverts the *generality* of the doctrine, which certainly ought to be understood with many restrictions, and considers at large the differences between *uses* and the *land* itself, or rather, as he expresses himself, between uses and cases of possession. Lord Bacon's Reading on the Statute of Uses is a very profound treatise on the subject so far as it goes, and shews that he had the clearest conception of one of the most abstruse parts of our law. What might we not have expected from the hands of such a master, if his vast mind had not so embraced within its compass the whole field of science, as very much to detach him from professional studies? It may be proper to observe, that all the editions of lord Bacon's Reading on Uses are printed with such extreme incorrectness, that many passages are rendered almost unintelligible, even to the most attentive reader. A work so excellent deserves a better edition.—[Note 64.]

(A) See Prince's case, 8 Co. 16, and 1 Ch. Ca. 2. 14.

(B) In Sergison's case, 4 Ves. 147, there was a devise to one and his heirs on the part of his mother. This was properly admitted by counsel to be an ineffectual attempt to exclude heirs *ex parte paterna*, but was argued as a ground for not extending the devise to an estate of which the testator was only mortgagee. But by words of purchase an estate may be carried to the heirs *ex parte materna;* as where one devises to his maternal heirs. See 2 P. W. 186.

word males, because there is no such kind of inheritance, whereof you shall read more in his proper place.

A man hath issue a sonne, and dieth, and the wife dieth also, lands are letten for life, the remainder to the heires of the wife, the sonne dieth without issue, the heires of the part of the father shall inherite, and not the heires of the part of the mother, because it vested in the sonne as a purchaser. And the rule of *Littleton* holdeth as well in other kind of inheritances, as in lands and tenements. [s] And therefore if there be lord, *feme mesne*, and tenant, and the mesne bind herselfe and her heires by her deed to the acquittall of the tenant, the mesne takes husband, the tenant by his deed granted to the husband and his heires, that he or his heires shall not be bound to acquittall, the husband and wife have issue, and die, this issue, being bound as heire to his mother, shall not take benefit of the said grant of discharge, for that extends to the heires of the part of the father, and not to the heires of the part of the mother, and therefore the heire of the part of the mother was bound to the acquittall (3). And thus much for the better understanding of *Littleton's* cases concerning the heire of the part of the mother shall suffice (4).

[s] 38 E. 3. 12.

"But if a man marrieth an inheretrix, &c." Here there is another maxime [t] that whensoever lands do descend from the part of the mother, the heires of the part of the father shall never inherit. And likewise when lands descend from the part of the father, the heires of the part of the mother shall never inherit (5). *Et sic paterna paternis, et è converso, materna maternis.* For more manifestation hereof, and of that which hereafter shall be said touching descents, see a Table in the end of this Chapter.

[t] 39 E. 3. 29. 49 E. 3. 12.

"Shall have the land by escheate." [u] *Escheate* (6), *eschaeta*, is a word of art, and derived from the French word *escheat* (*id est*) *cadere*, *excidere* or *accidere*, and signifyeth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated. And therefore, of some, *escheats* are called *axcadentiæ* or *terræ excadentiales* [w]. *Dominus verò capitalis loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis sui tenentis. Loco hæredis et haberi poterit cui per modum donationis fit reversio cujusque tenementi.* And Ockam (who wrote in the raigne of Henry the second) treating of tenures of the king, saith, *porro eschaetæ vulgò dicuntur, quæ*

[u] Vide Sect. 130. Glanvill. lib. 7. cap. 17. Bract. lib. 3. fol. 118. Fleta, lib. 5. cap. 5. & lib. 3. cap. 10. Britton, cap. 37. and cap. 119. F. N. B. 100. Tr. 19 E. 1. in Banco Rot. 25. (3 Inst. 21. 4 Inst. 225. F. N. B. 144. b.)

[w] Fleta, lib. 6. cap. 1. Ockam, cap. quod non absolvitur, &c.

decedentibus

---

(3) *Nota, it was grant and release; but* ratio libri *is, because the husband was not charged, except during the coverture, and by reason of that the discharge doth not extend farther.* Hal. MSS.—[Note 65.]

(4) 7 *H.* 6. 3. *by Cottesmore. If lord takes tenant to wife, and dies having issué, which dies without issue, the seigniory is revived, and the tenancy shall go to the heir of the part of the mother.* Hal. MSS.—[Note 66.]

(5) *But if the eldest son purchases land, and it descends to the youngest son, and he dies without heir of the part of the father, it shall descend to the heir on the part of the mother; because they have one and the same mother.* Hal. MSS.

(6) See Wright's Ten. 115. Blackst. Law Tracts, 8vo. ed. v. 1. p. 236, and 2 Blackst. Comm. 5th ed. 241.—[Note 67.]

decedentibus hiis qui de rege tenent, &c. cùm non existit ratione sanguinis hæres, ad fiscum relabunter. [x] So as an escheat doth happen two manner of wayes, *aut per defectum sanguinis*, i. e. for default of heire, *aut per delictum tenentis*, i. e. for felonie, and that is by judgment three manner of waies, *aut quia suspensus per collum, aut quia abjuravit regnum, aut quia utlegatus est.* And therefore, they which are hanged by martiall law *in furore belli* forfeit no lands: and so in like cases escheats by the civilians are called *caduca.*

[x] Pl. Com. Dame Hale's case. (Post. 92. b.)

[y] The father is seised of lands in fee holden of *I. S.* the son is attainted of high treason, the father dieth, the land shall escheat to *I. S. propter defectum sanguinis*, for that the father dyed without heire. And the king cannot have the land, because the sonne never had anything to forfeit. But the king shall have the escheat of all the lands whereof the person attainted of high treason was seised, of whomsoever they were holden (7).

[y] Pl. Com. in Nicholl's case.

[z] In an appeale of death or other felony, &c. processe is awarded against the defendant, and hanging the process the defendant conveyeth away the land, and after is outlawed, the conveyance is good (8) and shall defeat the lord of his escheat; but if a man be indicted of felony, and hanging the processe against him, he conveyeth away the land, and after is outlawed, the conveyance shall not in that case prevent the lord of his escheat. And the reason of this diversity is manifest: for in the case of the appeale, the writ containeth no time [13. b.] when ☞ the felony was done, and therefore the escheate can relate but to the outlawry pronounced. But the indictment containeth the time when the felony was committed, and therefore the escheate upon the outlawry shall relate to that time (1). Which cases I have added, to

[z] 38 E. 3. f. 37. 30 H. 6. 5. Bract. l. 2 tit. de Forf. Staunf. Pl. Cor. 192; and according to this diversity was it resolved in 5 E. 6 as it appeareth by my lord Dier's Manuscript. (Post. 390. b.) (W. Jo. 217. Cro. Cha. 172.

---

(7) *A. infeoffs B. attainted of treason, to the use of C., the king shall have the land discharged of the use.* Hal. MSS. and Pimb's case, M. 27 Eliz. is cited from Moore. See Mo. 196. But note, that according to Moore, *B.* at the time of the conveyance to him, had only *committed* treason, and was not attainted till *after;* and it was by *relation* to the time of committing the offence, that the case was construed to be the same as if the conveyance had been to a person actually attainted. The doctrine in Pimb's case sounds peculiarly harsh; for first the legal estate in the land was given to the queen by a *constructive relation*, and then she was deemed to hold the land discharged of the use, because the king cannot be a trustee. However, it is but justice to mention, that the case being represented to queen Elizabeth, she, much to her honour, granted the land to *cestui que use* by patent. As to the king's holding land discharged of all uses and trusts where the legal estate vests in him, and the sense in which that doctrine is to be understood, see Vin. Abr. *Uses*, C. where most of the authorities on the subject are stated or referred to.—[Note 68.]

(8) *But if the party appears on an appeal, and the plaintiff counts, and the defendant is convicted by verdict or confession, it is all one.* Hal. MSS.—[Note 69.

(1) *Nota, if one be attainted by outlawry or confession of a felony, which is precedent to the feoffment of the party attainted, the feoffee may falsify the attainder by traverse to the felony or to the time of the felony. But if he be attainted by verdict, it seems that he cannot falsify by traverse to the felony; but he may traverse the time of the felony, for that is not material; for if he be guilty*

on

to the end the student may conceive, that the observation of writs, indictments, processe, judgments, and other entries, doth conduce much to the understanding of the right reason of the law.

Of this word (*eschaeta*) here used by our author, commeth [a] *eschaetor*, an ancient officer so called, because his office is properly to look to escheats, wardships, and other casualties belonging to the crowne. In ancient time there were but two escheators in *England*, the one on this side of *Trent*, and the other beyond *Trent*, at which time they had subescheators. But in the raigne of *Edward* the second, the offices were divided, and several escheators made in every county for life, &c. and so continued until the raigne of Edward 3. And afterwards by the statute of 14 E. 3, it is enacted by authority of Parliament, that there should be as many escheators assigned, as when king *Edward* 3. came to the crown, and that was one in every county, and that no eschaetor should tarry in his office above a yeere, and by another statute to be in office but once in three yeares. The lord treasurer nameth him.

[a] Mirror, ca. 1. sect 5. 51 H. 3. statutum de Scac. Britton, fo. 33, 34. Flet. lib. 1. cap. 36. & lib. 2. cap. 34, 35. Regist. 301. his Oath, 18 E. 1. Ro. Parl. 21 E. 1. Rot. Parl. 1. 29 E. 1. stat. de Eschaetoribus. 14 E. 3. c. 8. 28 E. 1. ca. 18. F. N. B. 100. c. Staunf. Prær. 81. 1 H. 8. ca. 8. 3 H. 8. ca. 2. Capitula Eschaetriæ in Vet. Magna Carta, fo. 160, 161, &c.

And hereof also commeth *eschaetria*, which signifieth the eschaetorship, or the office of the escheator. But now let us heare what our author will further say unto us.

"*And so see, &c.*" This kind of speech is often used by our author, and doth ever import matter of excellent observation, which you may find in the Sections noted in the margin *.

* Sect 147. 149. 248. 289. 417. 667. &c. (2 Ro. Abr. 816.)

And it is to be well observed that our author saith, *if he hath no heire, &c. the land shall escheate.* In which words is implyed a diversity (as to the escheate) between fee simple absolute, which a natural body hath, and fee simple absolute, which a body politique or incorporate hath. [b] For if land holden of *I. S.* be given to an abbot and his successors, in this case if the abbot and all the convent die, so that the body politique is dissolved, the donor shall have againe this land, and not the lord by escheat (2). And so if land be given in fee simple to a deane and chapter, or to a major and commonalty, and to their successors, and after such body politique or incorporate is dissolved, the donor shall have again the land, and not the lord by escheate. And the reason and the cause of this diversity (A) is, for that in the case of a body politique or incorporate the fee simple is vested in

[b] 7 E. 4. 11, 12. Fits. N. B. 33. 9 E. 3. 26. 17 E. 2. stat. de. Templariis.

---

on another day, the jury ought to find him guilty. Hal. MSS. which cites 3 Inst. 230.—[Note 70.]

(2) *Vid. tamen Mich.* 20 *Jac. C. B. Johnson and Morris, that it shall escheat.* Hal. MSS. which also cites 21 E. 4. 1, and 21 H. 7. 9. See further on this subject, Godb. 211, and Mo. 283, which are with lord Coke. But the case of *Johnson* and *Norway*, in Win. 37, which seems to be the same as that cited by lord Hale, is against the donor, though it is not mentioned in Winch, that the judges *finally* decided the point. See also contra lord Coke, the case of Southwell and Wade, in 1 Ro. Abr. 816. A. pl. 1, and S. C. in Poph. 91.—Note 71.]

(A) See a long and curious note by Ld. Nottingham, as I suppose, relative to this diversity, in Mr. Hargrave's Co. Litt. with Ld. Nottingham's and other notes (in the Mus. Brit.)

in their politique or incorporate capacity created by the policy of man, and therefore the law doth annex the condition in law to every such gift and grant, that if such body politique or incorporate be dissolved, that the donor or grantor shall re-enter, for that the cause of the gift or grant faileth; but no such condition is annexed to the estate in fee simple vested in any man in his naturall capacity, but in case where the donor or feoffor reserveth to him a tenure, and then the law doth imply a condition in law by way of escheat. Also (as hath beene said) no writ of escheat lyeth but in the three cases aforesaid, and not where a body politique or incorporate is dissolved.

Sect. 5.

ALSO, if there be three brethren, and the middle brother purchaseth lands in fee simple, and die without issue, the elder brother shall have the land by descent, and not the younger (3), *&c. And also if there be three brethren, and the youngest purchase lands in fee simple, and die without issue, the eldest brother shall have the land by descent, and not the middle, for that the eldest is most worthy of blood.*

NOW commeth our author to the descent between brethren, which he purposely omitted before. *Discent, descensus*, commeth of the Latine word *descendo;* and, in the legall sense, it signifyeth, when lands do by right of blood fall unto any after the death of his ancestors: or a descent is a meanes whereby one doth derive him title to certain lands, as heire to some of his ancestors. And of this, and of that which hath been spoken doth arise another division of estates in fee simple, viz. every man, that hath a lawful estate in fee simple, hath it either by descent, or by purchase. (Post. 237.)

[14. a.] ☞ "*The eldest is most worthy of blood.*" It is a maxime in law, that the next of the worthiest blood shall ever inherit, as the male and all descendants from him before the female, and the female of the part of the father before the male or female of the part of the mother, &c., because the female of the part of the father is of the worthiest blood. [c] And therefore among the males the eldest brother and his posterity shall inherit lands in fee simple as heire before any younger brother, or any descending from him, because (as *Littleton* saith) he is *most worthy of blood. Quod prius est dignius est*, and *qui prior est tempore potior est jure. Si quis plures filios habuerit, jus proprietatis primo descendit an primogenitum, eò quòd inventus est primò in rerum naturâ.* In king *Alfred's* time knights fees (1) descended to the eldest sonne, for that by division

[c] Britton, cap. 119. Bract. lib. 2. cap. 30. 277. 279. 3 E. 3. 26. 3 Eliz. Dyer, 138. Stanford Prær. 52. 58. 3 E. 1. tit. Avowry, 235. 32 E. 3. Discent, 80. Bra. lib. 4. 211. Fleta, lib. 6. ca. 2. Glanvill. lib. 7. ca. 1. Mirror, cap. 1. sect. 3.

---

(3) *But if the land purchased by the middle brother was holden of the elder brother, who accepts homage of him, the land shall desend to the younger brother by* 3 *E.* 1. *Avowry*, 235. Hal. MSS.—[Note 72.]

(1) Here lord Coke writes, as taking it for granted, that feudal tenures subsisted in England before the Conquest. But this is a controverted point amongst our best writers. See post. 64. a, where a note is given on this subject.

sion of them between males the defence of the realme might be weakened; but in those days socage fee was divided between the heires males, and therewith agreed *Glanvill.* * *Cùm quis hæreditatem habens moriatur, &c. si plures reliquerit filios, tunc distinguitur utrùm ille fuerit miles, sive per feodum militare tenens, aut liber sockmannus, quia si miles fuerit aut per militiam tenens, tunc secundum jus regni Angliæ primogenitus filius patri succedit in toto, &c. si verò fuerit liber sockmannus, tunc quidem dividetur hæreditas inter omnes filios, &c.* (2). But hereof more shall be said hereafter in his proper place.

* Glanvill, lib. 7. cap. 3. & ca. 1. Vid. Pl. Com. 229. b.

Sect. 6.

ALSO, it is to be understood, that none shall have land of fee simple by discent as heire to any man, unlesse he be his heire of the whole blood. For if a man hath issue two sonnes by divers venters, and the elder purchase lands in fee simple, and dye without issue, the younger brother shall not have the land, but the uncle of the elder brother, or some other his next cosin, shall have the same, because the younger brother is but halfe blood to the elder (5).

NO man can be heire to a fee simple by the common law, [d] but he that hath *sanguinem duplicatum*, the whole blood, that is, both of the father and of the mother, so as the halfe blood is no blood inheritable by descent (3); because that he that is but of the halfe blood cannot be a compleat heire, for that he hath not the whole and compleate blood(4), and the law

[d] Bract. lib. 4. Idem. lib. 2. fo. 65. Britton, ca. 119. Fleta, lib. 6. ca. 1. 1 E. 3. 19. John Gifford's case, 31 E. 3. Conterpl. de Voucher, 88. 40 Ass. 6. 4 E. 2. Formd. 49. Vid. Ratcliff's case, 3 Co. 40. 41. (1 Ro. Abr. 629.)

in

(2) See in Robins. Gavelk. an elaborate dissertation on the origin, antiquity, and universality of partible descents. The author pursues his subject amongst the Jews, Greeks, and Romans, and afterwards amongst most of the modern nations in Europe, and then proceeds to inquire into the state of our own law of descents before the Conquest. See page 20. See also lord Hale's learned researches into the history of the law of descents in his Hist. of the C. L. c. 11. p. 206.—[Note 73.]

(3) The exclusion of the half blood by our law is variously accounted for. Sir Martin Wright considers it as a consequence of the rules established for restricting the succession to the descendants of the first feudatory, in conformity to the strict notion of feuds. See Wright's Ten. 184, where the exclusion of lineal ascent is excused on the same principle. See also Blackst. Law Tracts, v. 1. p. 213. 8vo. ed. where the feudal reason is explained more at large, though the author admits that the practice goes much further than the principle will warrant. Others there are, who insist, that the true reason why the brothers of different *venters* cannot inherit to each other, is the aversion our Saxon ancestors had to second marriages, which they are said to have deemed at best but a permitted fornication. But this unfavourable idea of the *vota iterata* was not peculiar to the Saxons, or any other descendants of the ancient Germans. See Tayl. Elem. Civ. L. 294.—[Note 74.]

(4) See what is observed on lord Coke's explanation of the meaning of the term *whole blood*, in 1 Sid. 200. See too 1 Vent. 424, and 2 P. Wms. 667.

(5) But daughters by different femes, though they cannot inherit to each other, may inherit together to their father, because the descent is *immediate* from the father. See R. Robins. Disc. on Inher. 2d ed. p. 37, and Bro. Abr. Descent, pl. 20, and 1 Ro. Abr. 627.—[Note 75.]

in descents in fee simple doth respect that which is compleat and perfect. And this maxime doth not onely hold where lands (whereof *Littleton* here speaketh) are claymed or demanded as heire, [e] but also in case of appeale of death; for if one brother be slaine, the other brother of the halfe blood shall never have an appeale (albeit he shall recover nothing therein either in the realitie or personaltie) because in the eye of the law he is not heire to him. Also this rule extends to a warranty, as our author himselfe elsewhere holdeth (6).

[e] 7 E. 4. 15. Sect. 737.

Sect. 7.

AND if a man hath issue a sonne and a daughter by one venter, and a son by another venter, and the son of the first venter purchase lands in fee and die without issue, the sister shall have the land by descent, as heire to her brother (1), *and not the younger brother, for that the sister is of the whole blood of her elder brother.*

[14. b.] THIS is put for an example to illustrate that which hath been ☞ said, and needeth no explanation. And herewith agreeth *Britton*.

Britton, cap. 119.

Sect. 8.

AND also, where a man is seised of lands in fee simple, and hath issue a sonne and daughter by one venter, and a sonne by another venter, and die, and the eldest son enter, and die without issue, the daughter shall have the land, and not the younger son, yet the younger son is heir to the father, but not to his brother. But if the elder son doth not enter into the land after the death of his father, but die before any entry made by him, then the

---

(6) *So brother of half blood shall not have error on fine levied by the elder brother, though, if there had not been such fine, the land would descend to him.* Hal. MSS.—[Nota,] *if A. purchases a reversion expectant on an estate for life, and dies without issue, regularly his brother of the half blood shall not be heir to him; because though when there is a mesne seisin, he ought to make himself heir to him who is last actually seised; yet when there is not such a mesne seisin, he ought to make himself heir to him in whom it first vests by purchase.* See Fearne Rem. 499. 3d. edit. Woodd. 256. 2 Vest. 177. See also Mr. Christian's note in 2 B. Com. 227. See further Doe *v.* Hutton, 3 Bos. & P. 648. *Yet see M.* 1 *Car. C. B. Cro. no.* 16. *Hodgekinson and Wood. A. having issue B. a son by one venter, and C. by another, devises to B. and the heirs male of his body, remainder to the heires male of the body of the devisor, and to the heirs male of their bodies, remainder to the devisor's right heirs, and dies. B. dies without issue. Ruled, that C. shall take as heir male of the devisor, because it is* quasi *an entail according to Littleton, sect.* 30. *But it seems, that the fee shall descend to him, since it is a void devise of the fee simple, and doth not vest by purchase in the eldest son but by descent.* Hal. MSS.—[Note 76.]

(1) *To her brother,* omitted in L. & M. and Roh.

the younger brother may enter, and shall have the land as heir to his father. But where the elder son in the case aforesaid enters after the death of his father, and hath possession, there the sister shall have the land, because possessio fratris de feodo simplici facit sororem esse hæredem. *But if there be two brothers by divers venters, and the elder is seised of land in fee, and die without issue,* [*and his uncle enter as next heire to him, who also dies without issue* (1)†,] *now the younger brother may have the land as heire to the uncle, for that he is of the whole blood to him, albeit he be but of the halfe blood to his elder brother.*

"SEISED *of lands in fee simple.*" These words exclude a seisin in fee taile, albeit he hath a fee simple expectant.

[*f*] 24 E. 3. 24. 30. 31 E. 3. Count. de Vouch. 88. 32 E. 3 tit. Voucher. 37 Ass. p. 4. 40 E. 3. 9. 42 E. 3. 10. 39 E. 3. fol. 13. 7 H. 5. 3. (1 Ro. Abr. 627.) (Cro. Cha. 411. Post. 281.) (3 Co. 40, 41.)

[*f*] (2) And therefore if lands be given to a man and his wife, and to the heires of their two bodies, the remainder to the heires of the husband, and they have issue a sonne, and the wife dyeth, and he taketh another wife, and hath issue a sonne, the father dieth, and the eldest entreth, and dieth without issue, the second brother of the halfe blood shall inherit; because the eldest sonne by his entry was not actually seised of the fee simple, being expectant but onely for the estate taile (3). And the rule is, that *possessio fratris de feodo simplici facit sororem esse hæredem*, and here the eldest son is not possessed of the fee simple but of the estate taile (4). And where *Littleton* speaketh onely of lands, [*g*] yet there shall be *possessio fratris* of an use (5), of a seigniory, a rent, an advowson (6) and of other hereditaments.

[*g*] 5 E. 4. fo. 7. Pl. Com. fo. 58. in Wimbishe's case.

[*h*] 10 Ass. 27. 34 Ass. 10. 31 E. 3. Count de Vouch. 88. 32 E. 3. tit. Vouch. 94.

"*And the eldest son enter.*" [*h*] These words are materially added when the father died seised of lands in fee simple, for if the eldest sonne doth not in that case enter, then without question the youngest ☞ sonne shall be heir, because as it has beene said before regularly he must make himselfe heire to him that was last actually seised (or to the purchasor) and that was to the father where the eldest sonne did not enter. And therefore *Littleton* addeth, that the sonne is heir to the father. [*i*] But when the eldest sonne in this case doth enter, then cannot the youngest sonne being of the halfe blood be heir to the eldest, but the land shall descend to the sister of the whole blood. Yet in many cases, albeit the sonne doth not enter into lands descended in fee simple, the sister of the whole blood shall inherit, and in some cases where the eldest sonne

[15. a.]

[*i*] 11 H. 4. 11. 40 E. 3. 30. 45 E. 3 13. 40 Ass. p. 6. Ratcliffe's case, 3 Co. 41.

---

(1) † All between the brackets omitted in Roh. edit.

(2) 7 *H.* 4. 16. *Vid.* 38. *Ass.* 8. Hal. MSS.

(3) Acc. Bro. Abr. *Discent*, pl. 13, 14, and 30. *Scire Facias*, pl. 126, and Execution, 67. 1 Ro. Abr. 628, and see 1 Show. 245, and 3 Mod. 257.

(4) *Yet the remainder was in the elder brother to give or forfeit.* 24 *E.* 3. 30. Hal. MSS.—[Note 77.]

(5) See Dy. 10. b. 11. a. Finch, 8vo. ed. 21. and 2 And. 146. Note, that lord Coke must be understood to mean uses before the statute for transferring uses into possession, or uses not executed by the statute; for uses within the statute are legal estates.—[Note 78.]

(6) *So of a copyhold before admittance*, 4 *Co.* 22. b. Hal. MSS. See acc. Dy. 291. b. Finch 8vo. ed. 21.—[Note 79.]

sonne doth enter, yet the younger brother of the halfe blood shall be heire.

[k] If the father maketh a lease for yeares, and the lessee entreth and *dieth, the eldest sonne dieth during the tearme before entry or receipt of rent, the younger sonne of the halfe blood shall not inherite, but the sister (2); because the possession of the lessee for yeares is the possession of the eldest sonne, so as he is actually seised of the fee simple, and consequently the sister of the whole blood is to be heire (3). The same law it is if the lands be holden by knights service, and the eldest sonne is within age, and the gardian entreth into the lands. And so it is if the gardian in socage enter (4).

[k] 5 E. 4. 7. b. 3 H. 7. 5. 8 Ass. p. 6. 45 E. 3. tit. Releases, 28. (Post. 243. Mo. 125. 3 Co. 40, 41.)

But in the case aforesaid, if the father make a lease for life, or a gift in taile, and dyeth, and the eldest sonne dyeth in the life of tenant for life or tenant in taile, the younger brother of the halfe blood shall inherit; because the tenant for life or tenant in taile is seised of the freehold, and the eldest sonne had nothing but a reversion expectant upon that freehold or estate taile, and therefore the youngest sonne shall inherit the land as heire to his father, who was last seised of the actual freehold. And albeit a rent had beene reserved upon the lease for life, and the eldest sonne had received the rent and dyed, yet it is holden by some* that the younger brother shall inherite, because the seisin of the rent is no actuall seisin of the freehold of the land. But 35 *Ass. pl.* 2, seemeth to the contrary, because the rent issueth out of the land, and is in lieu thereof (5), wherein the onely question is, whether such a seisin of the rent be such an actual seisin of the land in the eldest son as the sister may in a writ of right make herselfe heire of this land to her brother. But it is cleere, that [l] if there be bastard *eigne*, and *mulier puisne*, and the father maketh a lease for life or a gift in taile reserving a rent and die, and the bastard receive the rent and dye, this shall barre the *mulier*, for the reason of that standeth upon another maxime as shall manifestly appeare in his apt place, Sect. 399.

(Post. 191.)

* 7 H. 5. 34. per Halls & Logdington. 35 Ass. p. 2.

[l] 14 E. 2. Bastard, 26. Vid. Sect. 399.

(Post. 244. a.)

* *The words,* the father, *seem wanting in this place; see* Mr. Ritso's Introduction, *p.* 117.

"*Seised*

---

(2) Adj. acc. Mo. 125. But it is said to be otherwise, if the lease is of a copyhold, unless made by *surrender.* 3 Leon. 69, and 4 Leon. 38.—[Note 80.]

(3) *Yet in pleading, it shall not be said* seisin in demesne. *Defendant avows, because I. S. was seised in his* demesne *of fee and granted rent; plaintiff replies that a long time before the said I. S. leased to him for years. It is not a plea without traversing the* seisin in demesne. *T.* 9 *Car. B. R. Weedon's case.* Hal. MSS.—[Note 81.]

(4) *See accordingly, though the lord seize the land in socage as guardian in chivalry.* 11 *Ass.* 6. 34 *Ass.* 10. *See* 12 *Eliz. Dy.* 292. *so as to copyholder or tenant at will. Quære of tenant by sufferance.* Hal. MSS.—In Jenk. 242, it is said, that the entry of a devisee for years will make a *possessio fratis.* See Vin. Abr. *Descent,* K. pl. 34. See further on this subject in the case of Newman and Newman, Wils. vol. 2. p. 516.—[Note 82.]

(5) Nota, *M.* 24 *Car. B. R. between Ames and Cooke, ruled that in such case seisin of rent doth not make* possessio fratris. Hal. MSS.—See S. C. acc. All. 88.—S. P. adjudged acc. Trin. Term, 1657, between Piper and Masters, MS. Rep. by Glyn, J.—[Note 83.]

[m] 7 H. 5. 2, 3, 4.

"*Seised of lands.*" [m] (6) But in this case, if the eldest sonne doth enter and get an actuall possession of the fee simple, yet if the wife of the father be indowed of the third part, and the eldest sonne dyeth, the younger brother shall have the reversion of this third part notwithstanding the elder brother's entry; because that his actuall seisin which he got thereby was by the endowment defeated (7). But if the eldest sonne had made a lease for life, and the lessee had endowed the wife of the father, and tenant in dower had died, the daughter should have had the reversion, because the reversion was changed and altered by the lease for life, and the reversion is now expectant on a new estate for life.

(8 Co. 35. b. Post. 191. b. 4 Co. 58. b.)

"*Enter.*" Hereupon the question groweth, whether if the father be seised of divers severall parcels of land in one county, and after the death of the father the sonne entreth into one parcell generally, and before any actuall entry into the other dyeth, this generall entry into part shall vest in him an actual seisin in the whole, so as the sister shall inherit the whole. And this is a *quære* in 21 H. 7. 33. a. (8).

21 H. 7. 33. a.

☞And some doe take a diversitie when an entry shall vest, or devest an estate, that there must be severall entries into the several parcels, but where the possession is in no man, but the freehold in law is in the heire that entreth, there the generall entry into one part reduceth all into his actual possession. And therefore if the lord entreth into a parcel generally for a mortmain, or the feoffor for a condition broken, or the disseisee into a parcell generally, the entry shall not vest nor devest in these or like cases, but for that parcell. But when a man dies seised of divers parcels in possession, and the freehold in law is by the law cast upon the heire, and the possession in no man, there the entry into parcel generally seemeth to vest the actuall possession in him in the whole. But if his entry in that case be speciall, viz. that he enter only into that parcell, and into no more, there it reduced that parcell only into actuall possession.

(Post. 252. b.) (Leon. 265.) [15. b.]

"*A man seised of lands.*" What then is the law of a rent, advowson, or such things that lie in grant? [g] If a rent, or an advowson, do descend to the eldest sonne, and he dyeth before he hath seisin of the rent, or present to the church, the rent or advowson (1), shall descend to the youngest sonne, for that he must

[g] 19 E. 2. Quare imped. 177. 3 H. 7. 5.

(6.) See post 31. a.

(7) *So it is, if father makes lease for life, and afterwards recovers against him by default, and dies, and the eldest son enters, against whom the lessee recovers* per quod ei deforceat. 8 *Ass.* 6. *If wife recovers dower by erroneous judgment against the elder brother and dies, the sister shall have error; and if she reverses the judgment, she shall hold against the brother.* 7 *H.* 5. 4. *Son barred by false verdict in mort d'auncestor: the sister shall have attaint and reverse the judgment; but afterwards the brother shall enter. Kelw.* 119. *b.* 4 Hal. MSS.—[Note 84.]

(8) *Adjudged accordingly in the point P.* 4. *Eliz. B. R.* Hal. MSS.

(1) *If it was an advowson in* gross. *But seisin of a manor is good seisin of advowson, common, &c.* appendant *or* appurtenant. 18 *H.* 6. 24. Hal. MSS. —[Note 85.]

must make himselfe heire to his father, as hath been oftentime said before. The like law is of offices, courts, liberties, franchises, commons of inheritance, and such like. [h] And this case differeth from the case of the tenant by the courtesie, for there if the wife dieth before the rent day, or that the church become voyd, because there was no laches or default in him, nor possibility to get seisin, the law in respect of the issue begotten by him will give him an estate by the courtesie of *England*. But the case of the descent to the youngest sonne standeth upon another reason, viz. to make himselfe heir to him that was last actually seised, as hath beene said.

[h] 7 E. 3. 66. tit. Bar. 293. 3 H. 7. 5. (Post 29. a.)

"*In fee simple.*" [i] For halfe blood is not respected in estates in taile, because that the issues doe claime in by descent, *per forman doni*, and the issue in taile is ever of the whole blood to the donee (2).

[i] 8 E. 3. 11. 49 E. 3. 12. Ratcliffe's case, 3 Co. 41.

"[k] *Possessio fratris de feodo simplici facit sororem esse hæredem.*" Hereupon foure things are to be observed, every word almost being operative and materiall. First, that the brother must be in actuall possession (A); for *possessio est quasi pedis positio*. Secondly, *de feodo simplici* exclude estates in taile. Thirdly, *facit sororem esse hæredem*. So as [l] *soror est hæres facta*, and therefore some act must be done to make her heire, and the younger sonne is *hæres natus* [m] if no act be done to the contrary. And albeit the words be *facit sororem esse hæredem*, yet this doth extend to the issue of the sister, &c. who shall inherit before the younger brother. Fourthly, Of *dignities*, whereof no other possession can be had but such as descend (as to be a duke, marquesse, earle, viscount, or baron) to a man and his heires, there can be no possession of the brother to make the sister inherit (3), but the younger brother, being heire (as *Littleton* saith) to the father, shall inherite the dignitie inherent to the blood, as heire to him that was first created noble.

[k] Bracton, lib. 2. fo. 65. & lib. 4. fo. 279. Britton, cap. 119. Flet. l. 6. c. 1. 24 E. 3. 30.
[l] Ratcliffe's case, 3 Co. 42.
[m] Britton, cap. 119.

(Cro. Cha. 601.)

And you shall understand that concerning descents there is a law, parcell of the lawes of *England*, called *jus coronæ*, and differeth

---

(2) 8 *E.* 3. 11. 12 *E.* 4. 19. 49 *E.* 3. 12. 4 *E.* 2. *Formedon*, 49. Hal. MSS.

(A) What is tantamount to an actual possession, see Mo. 125, 126. Hob. 120. 3 Co. 41. b. 3 Wils. 516.

(3) *Accordingly adjudged in parliament, H.* 16 *Car. Cro. n.* 4. *Lord Gray's case, which was a barony by writ; and there agreed, that where lord Gray being baron by writ is created earl of Kent to him and his heires male of his body, and he has issue two sons by several venters, and the eldest has issue a daughter, the barony shall go to the daughter, and the earldom to the younger brother, and doth not draw the barony to it. But if it was a feudal title of honour, as of the earldom of Arundel or barony of Berclay* (a), *there* possessio fratris *should hold well; because the title is annexed to the land.—So of an office of dignity, and* eâ ratione *the office of high chamberlain of England descended to the earl of Minsey of the whole blood, and departed from the line male of the earl of Oxford; and adjudged accordingly in parliament.* Hal. MSS.—See lord Gray's case at large in Coll. Proc. on claims of Bar. 195, and the case about the office of lord chamberlain, in same book, 178, and W. Jo. 96.—[Note 86.]——(a) So as to Abergavenny, see lord Hardwicke's words, in 2 Ves. 352. But lord Hardwicke there intimates, that as to Barclay or Berkley castle, lord Hale's statement of its being a feudal barony was against the general opinion.

differeth in many things from the generall law concerning the subject. As for example, the king in any suit for any thing that pertaines to the crown shall not shew in certaine his cosinage as a subject shall do, or as he himselfe shall do for things touching his dutchie. [n] And in the case of the king, if he hath issue a sonne and a daughter by one venter, and a sonne by another venter, and purchaseth lands and dieth, and the eldest son enter and dieth without issue, the daughter shall not inherit these lands, nor any other fee simple lands of the crowne, but the younger brother shall have them. Wherein note that neither *possessio fratris* doth hold of lands of the possessions of the crowne, nor halfe blood is no impediment to the descent of the lands of the crowne, as it fell out in experience after the decease of king *Edward* the sixth to the queene *Mary*, and from queene *Mary* to queene *Elizabeth*, both which were of the half blood, and yet inherited not only the lands which king *Edward* or queen *Mary* purchased, but the ancient lands parcell of the crowne also.

6 H. 4. 1.

[n] 34 H. 6. fol. 34. Pl. Com. fo. 245, 25 E. 3. ca. de natis ultra mare. (4 Inst. 206.)

A man that is king by descent of the part of his mother, purchases lands to him and his heires, and dies without issue, this land shall descend to the heire of the part of the mother; but in the case of a subject, the heire of the part of the father shall have them.

Pl. Com. ubi supra.

So king *Henry* the eighth purchased lands to him and his heires, and died having issue two daughters, the lady *Mary*, and the lady *Elizabeth*; after the decease of king *Edward*, the eldest daughter queen *Mary* did inherit only all his lands in fee simple. For the eldest daughter or sister of a king shall inherit all his fee simple lands. So it is if the king purchaseth lands of the custome of gavelkind, and die having issue divers sonnes, the eldest sonne shall only inherit these lands (4). And the reason of all these cases is, for that the qualitie of the person doth in these and many other like cases alter the descent, so as all the lands

(7 Co. 12. b. Calvin's case.)

---

(4) Nota, *by the common law, the king is a corporation, and purchases made by him after assumption of the crown vest in a politic capacity. Hence, if an usurper purchases lands, and the right heir resumes the crown, he shall have the purchases*, et è converso, *an usurper shall have the purchases made by a rightful king so long as he has the crown. So it happened in the cases of H.* 4. *H.* 5. *H.* 6. *E.* 4. *R.* 3. *H.* 7. But nota, *purchases made before accession of the crown, or descents from collateral ancestors after accession of the crown, vest in a natural capacity; and therefore in the re-ademption of the crown by Edward* 4, *there was a special act to give the king all the possessions of Hen.* 6. *But such lands are qualified and affected differently from those of other persons. They will pass by letters patent only, and without livery; and the grants of them shall not be avoided by nonage*, et similiter. *As to acquisitions by conquest by the king of England, they are annexed to his crowne as his purchases are, as Ireland, Man, Berwick, Calais, and the New Plantations, the ancient territories of Normandy, Acquittaine, Anjou. And also many other lands, which descended in England from collateral ancestors, though in their original vested in a natural capacity, yet partly by attainder, partly by long continuance united to the crown, partly by occupation in some manner annexed to the crown, and will go with it. Yet see* Rot. Parl. 13 R. 2. n. 32, dux Lancastriæ creatus dux Aquitaniæ cum mero et misto imperio tenend. de rege ut rege Franciæ.—Hal. MSS. —[Note 87.]

lands and possessions whereof the king is seised *in jure coronæ*, shall *secundùm jus coronæ* attend upon and follow the crowne, and therefore to whomsoever the crowne descend, those lands and possessions descend also, for the crowne and the lands whereof the king is seised *in jure coronæ*, are ☞ *comitantia*. If the right heire of the crowne be attainted of treason, yet shall the crowne descend to him, and *eo instante* (without any other reversall) the attainder is utterly avoided, as it fell out in the case of *Henry* the seventh (1). [o] And if the king purchase lands to him and his heires, he is seised thereof *in jure coronæ: à fortiori*, when he purchases land to him his heires and successors (2).

Pl. Com. fo. 247. (1 Sid. 138.) Pl. Com. 238. 1 H. 7. fol. 4. (Plowd. 105. 244, 245.)

[16. a.]

[o] 43 E. 3. fol. 20.

But hereof this little taste shall suffice.

Sect. 9.

AND it is to wit, that this word (inheritance) *is not onely intended where a man hath lands or tenements by descent of inheritage, but also every fee simple or taile* (3) *which a man hath by his purchase may be said an inheritance, because his heires may inherit him. For in a writ of right which a man bringeth of land that was his owne purchase, the writ shall say*, quam clamat esse jus et hæreditatem suam. *And so shall it be said in divers other writs which a man or woman bringeth of his owne purchase, as appeares by the Register.*

"*AND it is to wit.*" This kinde of speech is used twice in this Chapter, and oftentimes by our authour in all his three bookes, and ever teacheth us some rule of law, or generall or sure leading point, as you shall perceive by reading, and observing of the same, which for the ease of the studious reader I have observed.

Sect. 45, 46. 57. 59. 80. 100. 146. 164. 170. 184. 229. 243. 259. 274. 280. 293. 300. 305. 419, 420, 421. 489. 632. 697. 749.

"*Quam clamat esse jus et hæreditatem suam.*" [a] Here our authour declareth the right signification of this word (*inheritance*). And true it is that in the writ of right patent, &c. *quando dominus remittit curiam suam*, the words of the writ be, *quam clamat esse jus et hæreditatem suam.* And in the *præcipe in capite*, in a *cui in vitâ*, [b] when the defendant claimeth by purchase, the writ is, *quam clamat esse jus et hæreditatem suam.* And with *Littleton* agreeth the Register, fol. 4, & 232, and the

[a] Sect. 732. Bract. lib. 2. fo. 62. b. Fleta, lib. 6. cap. 1. (Post. 383. b.)

[b] Regist. fol. 1, 2. (F. N. Br. 193.) Regist. fo. 4. 232. 49 E. 3. 22. 7 H. 4. 5. 10 H. 6. 9. 39 H. 6. 38. 6 E. 3. 30. Pl. Com. Wimbeshe's case, 47. & 58. b.

booke

---

(1) *So it is, though he be an alien, as happened in the case of King James. The reason is, because the king is a corporation.* Hal. MSS.—[Note 88.]

(2) See this subject very fully and learnedly considered in the case of the *dutchy of Lancaster*, Plowd. 212, in which it was held that a lease of dutchy land was not avoidable by reason of the nonage of Edw. 6, and in the case of Willion and Berkley, Plowd. 223, in which a remainder to the king and the heirs male of his body was held to be an estate tail within the statute *de donis*, in the same manner as if the limitation had been to a subject, and not to be a fee simple conditional. See further, 7 Mod. 78.—[Note 89.]

(3) *or taile*, not in L. and M.

booke in 49 E. 3. 22, against sodaine opinions, 7 H. 4. 5. 10 H. 6. 9. 39 H. 6. 38. Pl. Com. *Wimbeshe's* case, 47. And yet in 7 H. 4. 5, which is the booke of the greatest weight, sir *William Thirning*, chiefe justice of the common bench (as it seemeth doubting of it) went into the chancery to enquire of the chancery men of the forme of the writ in that case; and they said that the forme was bothe the one way and the other, so as thereby the opinion of *Littleton* is confirmed, and the booke in
6 E. 3. 30. 6 E. 3. fo. 30, is notable; for there in an action of waste the plaintife supposed, that the defendant did hold *de hæreditate sua*, and it is ruled, that albeit the plaintife purchased the reversion, yet the writ should serve. And there it is said, it hath beene seene, that in a *cui in vita*, the writ was, *which the demandant claimed as her right and inheritance*, when it was her purchase. And so this point wherein there might seem some contrariety in bookes is manifestly cleared. But in the statute
W. 2. ca. 5. 1 E. 2. tit. Quare imp. 43. 35 H. 6. 54. F. N. B. 34. b. of W. 2. cap. 5, *de hæreditate uxorum* by construction of the whole statute is taken onely for the wives inheritance by descent and not by purchase, as appeareth in 1 E. 2. tit. *Quare imped.* 43. 35 H. 6. 54. F. N. B. 34. b.

[c] 6 Co. 52, 53. Countes de Rutland's case. 8 Co. 16, 17. the Prince's ca. (4 Inst. 126.) There be some that have an inheritance [c], and have it neither by descent, nor properly by purchase, but by creation; as when the king doth create any man a duke, a marquesse, earle, viscount, or baron to him and his heires, or to the heires males of his bodie, &c. he hath an inheritance therein by creation. A man may have an inheritance in title of nobilitie and dignitie three manner of wayes, that is to say, by creation, by descent, and by ☞ prescription (1). By creation two manner of ordinary wayes (for I will not speak of a creation by parliament) by writ, and by letters patent. Creation by writ is the ancienter way; and here it is to be observed, that a man shall gain an inheritance by writ (2). King *Richard* the second created *John Beauchampe de Holte* baron of *Kedermister* by his letters patents, bearing date the 10th *October*, *anno regni sui* 11, before whom there was never any baron created by letters patent, but by writ. And it is to be observed, that if he be generally called by writ to the parliament, he hath a fee simple in the baronie without any words of inheritance. But if he be created by letters patent, the state of inheritance must be limited by apt words, or else the grant is void. If a man be called by writ to the parliament, and the writ is delivered unto him, and he dieth before he cometh and sits in parliament, whether he was a baron or no? And it is to be answered that he was no baron, for the direc-

[16. b.]

(12 Co. 69. Ante, 9. b.)

tion

---

(1) See 1 Bulstr. 196, where the earldom of Arundel is mentioned as an instance of an earldom by prescription. In this case many curious particulars concerning the *honour of Petworth* are mentioned.

(2) *Baron by writ takes grant of the same barony by patent. This determines his barony by writ. Otherwise it is, if the barony by writ was suspended.* 11 *Co. Lord Delaware's case.* Hal. MSS.—But the doctrine of extinguishing a barony by writ by acceptancé of a patent-barony seems questionable; for it supposes a right to surrender the barony by writ. See in Show. Parliam. Cas. 1, Lord Purbeck's case, in which the house of lords adjudged, that the dignity of a viscount could not be surrendered by a fine.—[Note 90.]

tion and deliverie of the writ to him maketh not him noble: for the better understanding whereof it is to be knowne that the words of the writ in that case are, *Rex, &c. E. B. de D. Chivalier salutem. Quia de advisamento et assensu concilii nostri, pro quibusdam arduis et urgentibus negotiis statum et defensionem regni nostri Anglise, &c. concernentibus, quoddam parliamentum nostrum apud civitatem Westm. d* 21 *Octob. proxim. futuro teneri ordinavimus, et ibid. vobiscum, et cum prælatis, magnatibus et proceribus dicti regni nostri colloquium habere et tractatum, vobis in fide et ligeancià quibus nobis tenemini firmiter injungendo mandamus, quòd consideratis dictorum negotiorum arduitate et periculis imminentibus, cesante excusatione quâcunque, dictis die et loco personaliter intersitis nobiscum et cum prælatis, magnatibus, et proceribus supradictis, super dictis negotiis tractatur' vestrumque consilium impensur', &c.* And this writ hath no operation or effect (A) until he sit in parliament, and thereby his blood is ennobled to him and his heires lineall; and thereupon a baron is called a peer of parliament. [*d*] And if issue be joined in any action, whether he be a baron, &c. or no, it shall not be tryed by jury, but by the record of parliament, which could not appeare unless he were of the parliament (3). Therefore a duke, earle, &c. of another kingdome, are not to be sued by those names here, for that they are not peeres of our parliament (4). And albeit the creation by writ is the ancienter, yet the creation by letters patent is the surer, for he may be sufficiently created by letters patent, and made noble, albeit he never sit in parliament.

6 Co. 52, 53. Countesse of Rutland's case. 8 H. 6. 10. 48 E. 3. 30. 35 H. 6. 46. Pl. Com. 223. (Ante, 9. b.)

[*d*] 35 H. 6. 46. 48 E. 3. 30. b. 48 Ass. p. 6. 22 Ass. p. 24. Regist. 287. 11 E. 3. Breve, 472. 20 E. 4. 6. (6 Co 52. Countess of Rutland's case.)

[*e*] And it is to be observed, that nobilitie may be granted for term of life by act in law without any actuall creation; as if a duke take a wife, by the intermarriage she is a duchess in law, and so of a marquesse, an earl, and the rest, and in some other cases. And there is a diversitie between a woman that is noble by descent, and a woman that is noble by marriage. [*f*] For if a woman that is noble by descent, marrie one that is under the degree of nobilitie, yet she remaineth noble still (5); but if she gaine it by marriage, she loseth it if she

[*e*] 6 Co. 52, 53. Countes de Rutland's case. 2 H. 6. 11. 22 Ass. 24. 12 E. 3. Breve, 254. 8 H. 4. 19. 11 H. 4. 15. Vid. Fleta, lib. 6. ca. 10.

[*f*] 4 Co. 118, Acton's case, tempore Mariæ Reginæ. Brooke, nosme de dignity, 69. 14 H. 6. 18. 2 H. 6. 11.

marry

(A) How far repeated writs of summons are evidence of a sitting in ancient times, see lord Fretchville's case, 30 Ch. 2d. Nott. MSS. No. 808.

(3) This doctrine is certainly true with respect to baronies by *writ;* because, as lord Coke observes, the blood of the person summoned is not ennobled till he takes his seat in parliament. But the case of nobility by *letters patent* is different, for by them the creation is perfect, and the blood is ennobled without sitting; and therefore, in lord Banbury's case, the court of king's bench held that a peerage claimed under letters patent is not triable by the record of parliament, but must be questioned by pleading *non concessit.* See the King and Knollys, 1 L. Raym. 10.—[Note 91.]

(4) Nota, *as to precedence of foreign dukes, earles, &c. it differs not, though they have not voice in parliament. But a Scotch or Irish earl summoned to parliament here is as an English earl, as the earl of Angus. See the case of the dutchess of Suffolk.* Hal. MSS.—See further as to the precedency in general, 4 Inst. 361, and Prynn on 4 Inst. 323; and as to the precedency of Irish peers, see a tract by the late earl of Egmont.—[Note 92.]

(5) See 14 H. 8. 42. Dy. 79.

marry under the degree of nobilitie, and so is the rule to be understood, *Si mulier nobilis nupserit ignobili desinit esse nobilis.*

[g] 22 H. 6. 52. [g] But if a duchesse by marriage marrieth a baron of the realme, she remaineth a duchesse and loseth not her name, because her husband is noble (6), *et sic de cæteris.*

And as an estate for life may be gained by marriage, so may

[h] 9 Co. 97, 98, Sir George Reynel's case. the king create either man or woman *noble* for (7) *life* (A) [h] but not for yeares, because then it might goe to executors or administrators (8). The true division of persons is, that everie

---

(6) But in some books it is said, that if a woman noble by birth marries one of inferior nobility, she shall be styled by the dignity of her second husband. Dutchess of Suffolk's case, Ow. 82. See S. C. O. Bendl. 37.—[Note 93.]

(7) It has been supposed that a man may be noble during the life of another. 2 H. 6. 29. by Danby.—[Note 94.] The words of the book suppose a man made count or earl for the life of another.

(A) Note, that notwithstanding lord Coke's position here of the king's power to make a man or woman noble for life, and his stating in his 9 Rep. 97, 98, the king's power of making an earl for life, and notwithstanding the precedents I have cited above of creation for life, I doubt whether the legality of such creations can be supported; I am rather impressed that the quality of being hereditary is of the essence of our peerage, and that attributing to the king a prerogative of creating peers for life only, is to invest the crown with a power of gradually destroying the peerage in its subsisting state; which I believe is *de facto* such, as not to furnish an instance of a peer sitting as a lord of parliament under a life interest. The point seems to me one of great importance. I am not aware that it ever was judicially determined. It was adverted to in the Purbeck case (see Nott. MSS. and Collins's Claims, 299), in the reign of Ch. 2. Sir W. Jones, then attorney-general, for the validity of surrenders of peerages argued in some degree from the king's power of instances of peerages granted for life. Margaret, countess of Norfolk, created duchess of Norfolk, 21 R. 2. Ro. Par. v. 5, p. 355. (This creation of the countess was by the king sitting in parliament.) The mother of Villiers, first duke of Buckingham, who, 16 Ja. 1. was countess of Buckingham. See 2 Dug. Bar. 432, lady Stafford, created by Ja. 2. countess of Stafford for life in the same patent as made her eldest son an earl. See also as to Alice, countess of Dudley, 2d & 3d Dug. Bar. 226; Barbara, duchess of Cleveland, with remainder to another, ib. 484; Louisa, duchess of Portsmouth, 486; and Susan, baroness Bellasyse of Osgoodry, ib. same passage. As to creating a peer for life, lord Shaftesbury, who, in the Purbeck case, took the lead against the validity of such surrenders, and so prevailed that the doctrine became judicially settled, objected pointedly to pressing such a point upon the house of lords, it not being before them, and signified his considering it as one of still greater consequence than the point of surrender. I observe also that lord chancellor Nottingham, in his MSS. of the Purbeck case, and of his own speech as a peer, though zealous to establish the doctrine of surrender, and a supporter of Sir W. Jones's argument in other respects, is silent as to the king's power of making a peer for life, and thence I conjecture that he saw cause for questioning such a power. *Qu.* as to precedents of creation for life, remainder to another in tail, and whether the present viscount Lowther did not come in upon such a remainder.

(8) *As to the degree of baronet, it is parcel of the name; and therefore capias against I. S. or I. S. knight, where he is baronet, cannot take I. S. baronet. Noy, n.* 382, *Sir Richard Lucye's case. Tr.* 10 *Car. B. R. Cro. n.* 6, *Sir Henry Ferrer's*

everie man is either of nobilitie, that is, a lord of parliament of the upper house, or under the degree of nobilitie, amongst the commons, as knights, esquires, citizens and burgesses of the lower house of parliament, commonly called the house of commons; and he that is not of the nobilitie is by intendment of law among the commons (9).

"*As appears by the Register.*" Which booke in the statute of W. 2. ca. 24, is called *Registrum de cancellariâ*, because it containeth the formes of writs at the common law that issue out of the chancerie, *tanquam ex officinâ justitiæ*. There is a register of originall writs, and a register of judicial writs; but when it is spoken generally of the register, it is meant of the register originall. For the antiquitie and excellencie of this book, see in my preface to the eighth part of my Commentaries. This excellent booke our author voucheth divers times in these bookes, and so doth he divers other authorities in law of several kinds, but with this observation, that he citeth no authoritie but when the case is rare, or may seeme doubtfull, which appeareth in this, that he putteth no case in all his three bookes but hath warrant of good authoritie in law. For he knew well the rule, that *perspicua vera non sunt probanda*. And the like observation is made of justice *Fitzherbert* in his booke of *natura brevium*, that he never citeth authoritie, but when the case is rare or was doubtfull to him. The authorities which our author hath cited in his three bookes I have collected.

Vide Sect. 88. 94. 96. 101. 157. 231. 318. 383. 412. 420. 433. 514. 643. 644. 657. 660. 692. 702. 729.

[17. a.] ☞ Sect. 10.

AND of such things, whereof a man may have a manuell occupation, possession or receipt, as of lands, tenements, rents and such like, there a man shall say in his count countant and plea pleadant, that such a one was seised in his demesne as of fee. But of such things, which do not lie in such manuall occupation, &c. as of an advowson of a church and such alike, there he shall say, that he was seised as of fee, and not in his demesne as of fee. And in Latine it is in one case, quòd talis seisitus fuit in dominico suo ut de feodo, *and in the other case,* quòd talis seisitus fuit, &c. ut de feodo.

"*IN his count countant.*" Count, i. e. *narratio*, cometh of the French word *conte*, which in *Latyne* is *narratio*, and is vulgarly called a declaration (1). The original writ is according to its name (Doct. Pla. 83.)

Ferrer's case. The king cannot create a dignity with a mesne between baron and baronets. 9 *Jac.* 12 *Co. n.* 51. Hal. MSS.—See Noy, 87. Cro. Cha. 371, and 12 *Co.* 81.—[Note 95.]

(9) See 2 Inst. 29. 50.

(1) As to the form of a *count* or *declaration*, and all other particulars concerning it, see Com. Dig. *Pleader*, C. The whole of lord chief baron Comyns' work is equally remarkable for its great variety of matter, its compendious and accurate expression, and the excellence of its methodical distribution; but the title *Pleader* seems to have been the author's favourite one, and that in which he principally exerted himself.—[Note 96.]

name *breve*, briefe and short; but the count which the plaintife or demandant makes, is more narrative and spacious and certaine both in matter and circumstances of time and place, to the end the defendant may be compelled to make a more direct answer; so as the writ may be compared to *logicke*, and the count to *rhetoricke:* and it is that which the civilians call a *libell.* And in that ancient booke of the Mirror of Justices, lib. 2. cap. desloiers, *contors* are *serjeants* skilfull in law, so named of the count as of the principal part, and in *W.* 2. ca. 29, he is called *serjeant counter* (2).

Mirror des Justices.

W. 2. cap. 29.

(Post. 303.) "*In his plea pleadant.*" *Placitum.* Here *Littleton* teacheth good pleading in this point, of which in his Third Booke and Chapter of Confirmation, Sect. 534, he thus saith, *And know, my son, that it is one of the most honorable, laudable, and profitable things in our law, to have the science of well pleading in actions reals and personals; and therefore I counsaile thee especially to imploy thy courage and care to learne this.* And for this cause this word *placitum* is derived *à placendo, quia bene placitare super omnia;* and it is not, as some have said, so called *per antiphrasin, quia non placet.*

Bract. lib. 4. fol. 263. Idem, lib. 5. fol. 372. Britton, fol. 205, 206. Flet. lib. 5. c. 5. Staunf. Prær. 8.

"*Seised;*" *Seisitus,* commeth of the *French* word *seisin,* i. e. *possessio,* saving that in the common law, *seised* or *seisin* is properly applyed to freehold, and *possessed* or *possession* properly to goods and chattels; although sometime the one is used instead of the other.

Pl. Com. fo. 191; Wrotesley's case.

"*In his demesne as of fee,* in dominico suo ut in feodo." *Dominicum* is not onely that inheritance wherein a man hath proper dominion or ownership, as it is distinguished from the lands which another doth hold of him in service, but that which is manually occupied, manured, and possessed, for the necessary sustentation, maintenance, and supportation of the lord and his household, and savoureth *de domo,* of the house, either *ad mensam,* for his or their board or sustentation, or is manually received, (as rents) for bearing and defraying of necessary charges publike or private. Of these, saith our author, he should plead that he is seised *in dominico suo ut de feodo,* i. e. *de feodo dominicali, secu terrâ dominicali seu redditu dominicali;* which is as much as to say demeyne or demaine, of the hand, i. e. manured by the hand, or received by

(2) See further on the antiquity and dignity of serjeants at law, Blackst. Com. 5th ed. v. 1. p. 24, and v. 3, p. 26, and the books there cited, particularly Fortesc. De Laud. Leg. Ang. c. 50. Spelm. Gloss. 335. Pref. to 10 Co. 2 Inst. 214. Dugd. Orig. Jurid. and a tract by the late Mr. serjeant Wynn, which was printed in 1765. To these add Waterh. Comment. on Fortesc. 136, 137, and 547 to 563, where the author is so full and explanatory on the same subject, that what he has collected may very well be deemed a treatise upon it. Mr. Waterhouse, though a very prolix as well as extravagant writer, one who too frequently exhausts himself, and disgusts his readers, by tedious, useless, and ill-timed digressions, appears to have been a man of considerable learning; and his collections, relative to the antiquities of our law, may sometimes be resorted to with great advantage, and may very much facilitate the labours of some judicious and able inquirers.—[Note 97.]

by the hand; and therefore he calleth it manuall occupation, possession or receipt (3). And in *Domesday* demeane land is called inland; as for example, 4 *bovatas terræ de inland, et* 10 *bovatas in servitio.* Domesday.

[17. b.] *"In such manuall occupation, &c."* There is nothing in our author but is worthy ☞ of observation. Here is the first (*&c.*) and there is no (*&c.*) in all his three bookes (there being as you shall perceive very many), but it is for two purposes. First, it doth imply some other necessary matter. Secondly, that the student may, together with that which our author hath said, inquire what authorities there be in law that treat of that matter, which will worke three notable effects; first, it will make him understand our author the better: secondly, it will exceedingly adde to the reader's invention: and lastly, it will fasten the matter more surely in his memory; for which purpose I have for his ease in the beginning set downe, in these Institutes, the effect of some of the principal authorities in law, as I conceive them concerning the same. In this place the (*&c.*) implyeth possession or receipt, and such other matter as appeareth by my notes in this Section. As for the authorities of law, you shall find the effect of them in this Section, and the like of the rest of the (*&c.*) which you shall find in the Sections hereafter mentioned, omitting those (for avoyding of tediousnesse) that either are apparent, or which are explained in some other places, viz. Sect. 20. 48. 102. 108. 120. 125. 136, 137. 146. 149. 154. 164. 166, 167, 168. 177. 179. 183, 184. 194. 200. 202. 210, 211. 217. 220. 226. 233. 240. 242. 244, 245. 248. 262. 264. 269, 270, 271. 279. 320. 322, 323. 325, 326, 327. 329, 330. 335, 336. 341. 347, 348, 349, 350. 352. 355, 356. 359. 364, 365. 374, 375. 377. 381. 384. 389. 393. 395. 397. 399. 401, 402. 410. 417, 428. 433. 447. 449. 464. 470, 471. 477. 488. 489. 500, 501. 522. 532. 652, 653. 656. 658. 662. 678. 691, 692, 693, 694. 603. 613. 624, 625, 630. 632. 634. 637, 638. 648. 659, 660, 661. 669. 687, 693. 700. 718. 745. 748. 749. All which I have observed and quoted here once for all, for the ease of the studious reader (1).

"Ut de feodo." Where (*ut*) is not by way of similitude, but to be understood positively that he is seised in fee. And so it is where one pleads a descent to one *ut filio et hæredi*, that is, to *Io. S.* that is sonne and heyre, *et sic de cæteris*, where (*ut*) *denotat ipsam veritatem.* Brit. 205, 206. optime Fleta, lib. 6. cap. 5. Idem. lib. 3. cap. 15.

"As of an advowson." Of an advowson [i] wherein a man hath as absolute ownership and propertie as he hath in lands or rents, [i] 7 E. 3. 63. 24 E. 3. 74. 34 H. 6. 34. 19 E. 3. Quar. im. 154. Mirror, cap. 2. sect. 17. yet

(3) Vide *the diversity between count and plea in some cases. In debt for rent the plaintiff shall count, that he leased without showing seisin or seisin in demesne.* 21 *H.* 7. 26. *So in Formedon*, quod I. S. dedit. 3 *E.* 3. 35. 5 *E.* 3. 16. 3 *E.* 3. 59. 15 *E.* 4. 17. *But in counting descent in writ of entry, he ought to plead seisin, and in pleading a gift in tail, he ought to allege seisin in demesne.* 18 *H.* 6. 24. 15 *E.* 4. 17. Hal. MSS. See further on pleading seisin in demesne, post. 17. b.—[Note 98.]

(1) See in fol. 22. a. the note in respect to lord Coke's observation on Littleton's use of *nota, &c.* and like expressions.

yet he shall not pleade that he is seised *in dominico suo ut de feodo* (2), because that inheritance, savouring not *de domo*, cannot either serve for the sustentation of him and his household, nor any thing can be received for the same for defraying of charges. And therefore he cannot say, that he is seised thereof in *dominico suo ut de feodo*, whereby it appeareth how the common law doth detest simony and all corrupt bargaines for presentations to any benefice, but that [*k*] *idonea persona* for the discharge of the cure should be presented freely without expectation of any thing: nay, so cautious is the common law in this point, that the pl. in a *quare impedit* should recover no damages for the losse of his presentation untill the statute of *W.* 2. cap. 5 (3). And that is the reason that gardian in socage [*l*] shall not present to an advowson, because he can take nothing for it, and by consequent he cannot account for it. And by the law he can meddle with nothing that he cannot account for. [*m*] And in a writ of right of advowson, the patron shall not alledge the explees or taking of the profits in himselfe but in his incumbent. And hereby the old bookes shall be the better understood, viz. *Bracton*, lib. 4. tract. 3. cap. nu. 5. *Est autem dominicum, quod quis habet ad mensam, et propriè, sicut sunt* Boordlands, *Anglicè*. And *Fleta*, lib. 5. ca. 5. *Est autem dominicum propriè terra ad mensam assignata. Dominicum etiam dicitur ad differentiam ejus quod tenetur in servitio.* But of an advowson and such like he shall plead, that he is seised *de advocatione ut de feodo et jure* (4).

(Doctr. Plac. 287. Post. 89. 388.)

[*k*] 6 Co. 51, Boswel's case.

[*l*] 8 E. 2. Presentment al Eglise, 10. 7 E. 3. 39. 27 E. 3. 89. 29 E. 3. 5. 31 E. 3. Estopel, 240. (Post. 89. 344. b.)

[*m*] 7 E. 3. 63. Bracton, 263. 372. Fleta. lib. 5. cap. 5.

"*Advowson,*"

---

(2) And yet in 34 H. 6. 37. one pleads, that the king was seised in his demesne as of fee of an advowson in gross.—See also 26 E. 3. 64. b. where in a writ of right of advowson by an abbot against the countess of Ormond, the plaintiff counts, that one *R.* was seised in his demesne as of fee and right, and it was held good. If a church be impropriate, the impropiator may plead seisin in his demesne as of fee. Plowd. 503.—[Note 99.]

(3) *Advowson assets. Recovery in value for advowson shall be* 12*d. for every mark* [the church is worth by the year]. 8 *E.* 2. *Recovery in value*, 11. Hal. MSS. The words between the brackets are added from Fitzh. Abr. As to an advowson's being assets and valuable, see post. 374. b. and the note there given on the subject.—[Note 100.]

(4) *Office* de ballivâ parci vel hundredi *not demesne, yet the* esplees *shall be laid.* 7 *E.* 3. 63. 8 *E.* 3. 55. *Corody not demesne.* 17 *E.* 2. *Nuper obiit* 12. *Tithes whether demesne, Dy.* 85. *One grants a rent charge, the grantee brings annuity, and declares of a grant* virtute cujus fuit seisitus in dominico suo ut de feodo. *By some this is electing to have it as a rent charge,* 3 *E.* 6. *Dy.* 65. *But ruled* contra, *and the pleading good in substance. M.* 43, 44 *Eliz. B. R. Case of dean of Rochester. Noy, n.* 162. *M.* 11 *Car. B. R. Cro. n.* 24. *Sprint and Hickes,* 2 *Bulst.* 148. Hal. MSS. The dean of Rochester's case is in Noy, 37. 2 And. 106, & Ow. 73.—A man entitled to a *road* pleads seisin of it *in dominico suo ut de feodo et in jure.* 3 H. 6. 7. In *nativo habendo* esplees alleged, and yet the count for the villein only *de feodo et jure.* 39 H. 6. 32.—Where a *reversion* depends on an estate for years, there pleading either seisin in demesne as of fee, or seisin as of fee, will be good; but if the reversion be on an estate of freehold, only seisin in demesne can be pleaded. Plowd. 191. a. See accord. Dy. 101, in Culpepper's case. It is said, that a reversion or remainder belonging to the king's tenant *in capite* formerly entitled the king to wardship, though the statute 17 E. 2. *de prerogativâ regis*, cap. 1. speaks of lands of which the tenant dies seised *in dominico*

suo

"*Advowson*," *Advocatio*, signifying an advowing or taking into protection, is as much as *jus patronatûs*. Sir *William Herle* in 7 E. 3. fol. 4. saith, that it is not long past, that a man did know what an advowson was; but when a man would grant an advowson, he granted *ecclesiam* the church, and thereby the advowson passed. *Vide* 45 *E.* 3. 5. But surely the word is of greater antiquity; for in the Register there is an originall writ *de recto advocationis*, and in the originall writ of assise *de darreine presentment* the patron is called *advocatus*. [*n*] *Vide W.* 2. ca. 5. And so doth [*o*] *Bracton* call him. *Advocatus autem dici poterit ille, ad quem pertinet jus advocationis alicujus, ut ad ecclesiam præsentet nomine proprio et non alieno.* And [*p*] *Fleta*, lib. 5. cap. 14. agreeth herewith almost *totidem verbis: Advocatus est ad quem pertinet jus advocationis alterius ecclesiæ, ut ad ecclesiam nomine proprio non alieno possit præsentare.* And [*q*] *Britton*, cap. 92, the patron is called *avow*, and the patrons are called *advocati*, for that they be either founders or maintainers or benefactors of the church, either by building, dotation or increasing of it, in which respect they were also called *patroni*, and the advowson *jus patronatûs*.

7 E. 3, 4.

45 E. c. 5.

[*n*] W. 2. ca. 5.

[*o*] Bract. lib. 4. fo. 240.

[*p*] Fleta, lib. 5. cap. 14.

[*q*] Britton, cap. 92.

And it is to be understood that there is a great [*r*] diversity *inter advocationem medietatis ecclesiæ, &c. et medietatem advocationis ecclesiæ* (5), and of their severall remedies for the same. For the advowson of the moity is, when there be severall patrons and two severall incumbents in one church, the one of the one moiety thereof, and the other of the other moity, and one part as well of the church as of the towne allotted to the one, and the other part thereof to the other; and in that case each patron if he be disturbed shall have a *quare impedit, quòd permittat ipsum præsentare idoneam personam ad medietatem ecclesiæ* (1).

[*r*] 33 H. 6. 11. b. per Prisot. 14 H. 6. 15. per Newton. 31 E. 1. Droit, 68, 69. F. N. B. 31. b. 10 Co. 135, 136, R. Smithe's case. 45 E. 3. Fines 41. 45 E. 3. 12. 17 E. 3. 78. 17 E. 2. Dower, 163.

[18. a.]

(4 Co. 75. 5 Co. 102. 2 Inst. 375.)

But if there be two coparceners, and they do agree to present by turne, each of them in truth hath but a moity of the church; but for that there is but one incumbent, if either of them be disturbed,

(10 Co. 135. F. N. B. 33.)

---

suo ut de feodo. Staunf. Prærog. 8. a. Plowd. 11. See further as to pleading seisin in demesne, ante, 17. a. n. 3. Staunf. Prærog. 8. a. 14. a. Doctrin. Plac. 287, & Com. Dig. *Pleader*, C. 35.—[Note 101.]

(5) But note that this diversity doth not hold in the case of a rectory; for in Holland's case, 4 Co. 75, the pleading was *ad medietatem rectoriæ*, whereas it should have been *ad rectoriam medietatis*, and yet it was taken by the court to be the same in effect.—[Note 102.]

(1) Accordingly in Smith's case, 10 Co. 135. b. it was agreed, that *quare impedit præsentare ad medietatem ecclesiæ*, shall only be when there are two several patrons and two several incumbents of distinct parts of the same church; but in that case the court implied as much, because the count alleged a seisin *de advocatione medietatis*. In Windsor's case, Cro. Eliz. 686, where the count was of the *advowson of two parts*, the court held the declaration to be bad; but then it was, because by other parts of the declaration it appeared that the church was entire, and that there was but one incumbent, and consequently that the plaintiff's title was to *two parts of the advowson*, and not to *an advowson of two parts*.—[Note 103.]

turbed, she shall have a *quare impedit, &c. præsentare idoeneam personam ad ecclesiam*, for that there is but one church and one incumbent, and so of the like (2). But in [s] the said case of two coparceners, one of them shall have a writ of right of advowson *de medietate advocationis;* for in truth she hath but a right to a moity; but in the other case, where there be two patrons and two incumbents in one church, each of them shall have a writ of right of advowson *de advocatione medietatis.*

[s] Britton, fo. 235. 31 E. 1. Droit, 68, 69. F. N. B. 31. b. and 33 a. 5 H. 7. 8. 17 E. 3. 38. 75, 76. 7 E. 3. 327. 8 E. 3. 425. 22 Ass. p. 33. 14 H. 4. 10. 33 E. 3. Quar. imp. 196.

And as there may (as hath been said) be two severall persons in one church, so there may be two that may make but one parson in a church. [t] *Britton* saith, *si ascun eglise soit done a divers persons per un sole avowe, nul ne se pura pleadre per assise de juris utrum ne nul estre implede sans l'autre, &c.* And therewith agreeth *Fleta*. [u] *Item licèt aliqua ecclesia divisa fuerit inter duos, sive bona sua habeant communia sive separata, dum tamen unicum habeant advocatum, nullus eorum sine alio agere poterit vel implacitari.* And *Fitzh.* saith, that two prebendaries may be one parson of a church, who shall joyne in a *juris utrum*, so as one rectory may be annexed to two severall prebends, and both of them make but one parson. But where one is parson of the one moity of a church, and another of the other moity, as hath been said, there one of them shall have a *juris utrum* against the other, and in the writ shall name him *persona medietatis ecclesiæ, &c.* But for avoyding of suspicion of curiositie if we should proceed any further herein, we will attend what *Littleton* will further teach us.

[t] Britton, fo. 235.

[u] Fleta, lib. 5. ca. 19.

F. N. B. 49. O.

F. N. B. 49. P.

Sect. 11.

AND note, that a man cannot have a more large or greater estate of inheritance than fee simple.

THIS doth extend as well to fee simples conditionall and qualified, as to fee simples pure and absolute. For our author speaketh here of the amplenesse and greatnesse of the estate, and not of the perdurablenesse of the same. And he, that hath a fee simple conditionall or qualified, hath as ample and great an estate, as he that hath a fee simple absolute; so as the diversity appeareth betweene the quantity and quality of the estate.

From this state in fee simple, estates in taile and all other particular estates are derived; and therefore worthily our author beginneth his First Booke with tenant in fee simple, for *à principalioribus seu dignioribus est inchoandum.*

"*Cannot*

(2) See further on this subject Doder. Advows. 21. 2 Leon. 36. Dy. 78. b. & 299. W. Jo. 446, & Wils. vol. 2. p. 225, & 231.

" Cannot have a more large or greater estate, &c." For this cause two [a] fee simples absolute cannot be of one and the selfe-same land. If the king make a gift in taile, and the donee is attainted of treason, in this case the king hath not two fee simples in him, viz. the ancient reversion in fee, and a fee simple determinable upon the dying without issue of tenant in taile, but both of them are consolidated and conjoined together (4). And so it is, if such a tenant in taile doth convey the land to the king, his heires and successors, the king hath but one estate in fee simple united in him, and the king's grant of one estate is good, and so was it adjudged in the court of common pleas. And yet in several persons by act in law, a reversion may be in fee simple in one, and a fee simple determinable in another by matter *ex post facto;* as if a gift in taile be made to a villeine, and the lord enter, the lord hath a fee simple qualified, and the donor a reversion in fee (5). But if the lord infeoffe the donor, now both fee simples are united, and he hath but one fee simple in him. But one fee simple cannot depend upon another by the grant of the partie; as if lands be given to *A.* (6), so long as *B.* hath heires of his body, the remainder over in fee, the remainder is voyde (7).

[a] Pl. Com. 349. and 248. 19 H. 8. Dier, 4. 29 H. 8. Dier, 33. 16 Eliz. Dier, 330. 2 Marie, Dier, 107, Austen's case. Pa. 38 Eliz. rot. 108. in Quar. Imp. betweene the Queene, Pl. and the Bishop of Lincolne, Hussey and others, Deff. 15 E. 4. 6. 8.

(Plowd. 559. Dy. 4. & 12. Cro. Jam. 590. Finch, 8vo. ed. 113. 1 Ro. Abr. 827. Dy. 156. b.)

---

(4) See acc. Cro. Eliz. 519. Hob. 323, and W. Jo. 6.—*The king shall be said to be in, in point of reverter, and shall avoid leases by tenant in tail. Plowd.* 552. *Tr.* 2 *Car. Rot.* 730, *and adjudged H.* 3. *Car. Hutt. n. and Crook. n.* 4. *sir Thomas Holt's case. A. tenant for life, remainder to B. his son and heir apparent in tail, remainder to A.'s right heirs. A. grants rent charge to C. and his heirs, A. and B. levy fine to the use of A. and his heirs, A. infeoffs D. and dies having issue B.; and ruled, that D. shall hold charged, for by the fine he has a fee consolidated in him; which* quære. *For M.* 10 *Jac. B. R. Bulstr. n.* 35. *in Errington's case. A. and B. his wife, tenants in tail special, remainder to the right heirs of A. have issue a son and a daughter; the son by indenture makes lease for* 40 *years, to commence after the mother's death, the father being dead; the son dies without issue; the daughter levies a fine to I. S.; the mother dies; and although this lease is partly derived out of the fee simple, and by the fine I. S. had a consolidated fee, yet, because the daughter was not liable to the lease, consequently the conusee shall not be liable to the lease so long as the tail continues. Vid. M.* 6 *Jac. B. R. n.* 22. *Nedham's case. Tenant in tail, remainder to the king, is attainted of treason. The king shall not be in, in point of remainder, but as long as the tail continues shall be in under tenant in tail, and subject to his charges, and so it differs from Walsingham's case, where the king had the reversion. Paradine's case.* Hal. MSS.—See sir Thomas Holt's case in Hutt. 96, and Cro. Cha. 103, and Errington's case in 2 Bulstr. 42. As to Nedham's case and Paradine's case, I take them to be the same, and the reader will find it reported by the name of Poole and Nedham, Yelv. 149.—[Note 104.]

(5) See acc. post. 117. a.

(6) The words *and his heirs* seem wanting here.

(7) Acc. 10 Co. 97. b. See an observation on this doctrine by lord ch. justice Vaughan, who seems to question it. Vaugh. 269, 270. [See also Prest. Est. 148.]

Sect. 12.

ALSO, purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he commeth not by title of descent from any of his ancestors, or of his cousins, but by his owne deed.

Bracton, lib. 2. fol. 65.

PURCHASE in Latin is either *acquisitum*, of the verbe *acquiro*, for so I finde it in the original Register, 234. *In terris vel tenementis, quæ* ☞ *viri et mulieres conjunctim acquisiverunt, &c.* *Bracton* calleth it *perquisitum;* and by [*b*] *Glanvill* it is called *quæstus* or *perquisitum.* [18. b.]

[*b*] Glanvill, lib. 7. cap. 1. Brit. c. 33. fo. 84. and 121. (1 Ro. Abr. 827.)

A purchase is always intended by title, and most properly by some kind of conveyance either for money or some other consideration, or freely of gift; for that is in law also a purchase (1). But a descent, because it commeth merely by act of law, is not said to be a purchase; and accordingly the makers of the act of parliament in 1 H. 5. ca. 5. speake of them that have lands or tenements by purchase or descent of inheritance. And so it is of an escheate or the like, because the inheritance is cast upon, or a title vested in the lord by act in law, and not by his own deed or agreement, as our author here saith (2). Like law of the

Pl. Com. Wimblishe's ca. 47. b. 1 H. 5. cap. 5.

---

(1) In Plowd. 11. Saunders *arguendo* says, that one may have land by purchase three ways, by bargain or gift for money, by gift without any recompense, and by way of remainder.—[Note 105.]

(2) *The abbot of Fountains of the order of Cistercians before the council of Lateran makes a feoffment, and the land escheats to him after the council of Lateran. It seems, that he shall not be charged with tithes, because it is not a purchase.* Quære, *M.* 7 *Jac. B. R. Dickson and Waller.* Hal. MSS. It was decreed by the general council of Lateran in 1215, that the privilege of exemption from tithes, enjoyed by the Cistercians and other religious orders, should not extend to lands *purchased after* that council. *Ne occasione privilegiorum suorum ecclesiæ ulterius prægraventur, decernimus, ut de alienis terris, et* a modo acquirendis, *&c. decimas persolvant, &c.* Gibs. Cod. 1st ed. v. 2. p. 700, 701. This explains the case cited by lord Hale.—An escheat in appearance participates of the nature both of a *purchase* and a *descent;* of the *former*, because some act by the lord is requisite to perfect his title, and the actual possession of the land cannot be gained till he enters or brings his writ of escheat; of the *latter*, because it follows the nature of the seignory, and is inheritable by the same persons. But *strictly* speaking, an escheat is a title neither by purchase nor descent. It should be considered, that though the lord must do some act to put himself into the *actual possession*, yet his *title* to take possession commences immediately on the want of a tenant, and this title is vested in him without waiting for his own deed or agreement, and as much by *mere act of law* as the title of an heir is in the case of a descent; and therefore both titles are equally excluded from being purchases. On the other hand, escheat is not a title by *descent;* for the lord takes in his capacity of *lord* of the seignory of which the land escheated was holden, and not as *heir*, or by right of blood. Nor is it any objection to this way of considering the title by escheat, that the land escheated will be inheritable in the lord as land

the state of tenant by the curtesie, tenant in dower, or the like. But such as attaine to lands by meere injury or wrong, as by disseisin, intrusion, abatement, usurpation, &c. cannot be said to come in by purchase, no more than robbery, burglarie, pyracy, or the like, can justly be termed purchase(3).

If a nobleman, knight, esquire, &c. be buried in a church, and have his coat armor and pennons with his armes, and such other ensignes of honour as belong to his degree or order, set up in the church, or if a gravestone or tombe be laid or made, &c. for a monument of him,[c] in this case albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson or any take them or deface them, but he is subject to an action to the heire and his heires in the honour and memory of whose ancestor they were set up(4). And so it was holden *Mich.* 10 *Ja.* and herewith agree the lawes[d] in other countries. Note this kind of inheritance. And some hold that the wife or executors that first set them up, may have an action in that case against those that deface them in their time(5). And note, that in some places chattels as heir-loomes (as the best bed, table, pot, pan, cart, and other dead chattels moveable) may go to the heire(6), and the heire in that case may have an action for them at the common law, and shall not sue for them in the ecclesiastical court; but the heire-loome is due by custome and not by the common law(7).

(Cro. Jam. 366. Post. 27. a. 3 Inst. 202.)

[c] 9 H. 4. 24. Mich. 10 Ja. obiter in Com. Banc. in Pym's case.

[d] B. Cassanæus, fol. 13. Conc. 29. 30 E. 3. 2 & 3. 39 E. 3. 6. 9. 10. 1 H. 5. tit. Executors, 108. tit. Descent, Br. 43. 9 E. 4. 15. Madam Wiche's case.

Ann

land by purchase, where he has the seignory by purchase, and as land by descent where he has the seignory by descent; for the reason of this is, not that the escheat is either a purchase or descent, but because the escheat follows the seignory, from which the right to it is derived, as an accessory to its principal. According to this view of the subject, instead of distributing all the several titles to land under *purchase* and *descent*, it would be more accurate to say, that the title to land is either by *purchase*, to which the act or agreement of the party is essential, or by *mere act of law*, and under the latter to consider first *descent*, and then escheat, and such other titles not being by descent, as yet like them accrue by mere act of law. See on this subject Blackst. Comment. ed. 5. v. 2. p. 241, and 201.—[Note 106.]

(3) See acc. ante 3. b.

(4) See Cro. Jam. 367. 2 Bulstr. 151. See too the several books cited in Vin. Abr. *Descent*, E. 3 Inst. 202. also Mo. 878. S. C. See further in Andrews' Rep. 69. 2 Str. 1080. the case of Cart *v.* Marsh.

(5) See acc. 12 Co. 104, where it is said that afterwards the heir of the person, in honour of whom the tomb is erected, shall have the action.—[Note 107.]

(6) Heir-looms by custom cannot be alienated by *devise*. See post 185. b. and 1 Vern. 273.—[Note 108.]

(7) However, personal property may be devised or limited in strict settlement to one for life, with remainder to sons and daughters in tail, so as to be transmissible like heir-looms; but the goods will be the absolute property of the first tenant in tail, and be conformable to all the other rules concerning executory devises, and cannot render the property unalienable longer than lives in being, and 21 years after. For cases of heir-looms by devise and settlement, see Gower and Grosvenor, Barnard. Ch. Rep. 54. Wyth and Blackman, 1 Ves. 196. Duke of Bridgewater and Egerton, 2 Ves. 121. Boon and Cornrfoth, 2 Ves. 277. and Trafford and Trafford, 3 Atk. 347.—See further on the subject of heir-looms, Blackst. Com. 5th ed. v. 2. p. 427, and Vin. Abr. *Heir-loom*.—[Note 109.]

[e] Vide 28 H. 8. 24. (B.) (12 Co. 104.)

And the [e] ancient jewels of the crowne are heire-loomes, and shall descend to the next successor, and are not devisable by testament (A). An heire-loome is called *principalium* or *hæreditarium*.

Int. adjudicata coram Rege Tr. 41 E. 3. lib. 2. fo. 104. in Thesaur. Sect. 241, 242, &c.

Consuetudo hundredi de Stretford in Com' Oxon' est, quòd hæredes tenementorum infra hundredum prædictum existentium post mortem antecessorum suorum habebunt, &c. principalium, Anglicè, an heire-loom, viz. *de quodam genere catallorum, utensilium, &c. optimum piaustrum, optimam carucam, optimum ciphum, &c.*

Our author hath not spoken of parceners in this Chapter, for that he hath particular Chapters of the same.

Gradus Parentelæ, &c.

CHAP. 2. Of Fee taile. Sect. 13.

***TENANT** in fee taile is by force of the statute of* W. 2. cap. 1, *for before the said statute, all inheritances were fee simple; for all the gifts which be specified in that statute were fee simple conditional at the common law, as appeareth by the rehearsall of the same statute. And now by this statute, tenant in taile is in two manners, that is to say, tenant in taile generall, and tenant in taile speciall.*

(2 Inst. 331.) Mirror, cap. 2. sect. 15. & c. 1. sect. 5. (Post. 22. a.

"***TENANT** in fee tail.*" *Tallium*, or *feodum talliatum*, is derived of the French word *tailler, scindere;* for so *Littleton* himselfe in this Chapter, Sect. 18, saith.

"*The statute of W. 2.*" This statute was made in 13 *E.* 1, and is called *West.* 2, because the parliament was holden at *Westminster*, and ☞ hath the name of the second, because another parliament was formerly [19. a.] holden at *Westminster* in the third year of the same king's raigne, which was called *Westminster* the first. And albeit manie parliaments were after holden at *Westminster* besides these, yet were they two onely, *propter excellentiam*, called the statutes of *Westminster*. And the act intended by *Littleton* is *W.* 2. ca. 1. upon which statute our author in the *Inner Temple* did learnedly read, whose reading I have. Of king *Ed.* 1, and of this statute, sir *William Herle*, chiefe justice of the court of common pleas, in 5 *E.* 3. 14. saith, that king *E.* 1. was the wisest king that ever was; and the cause of the making this statute was to preserve the inheritance in the blood of them to whom the gift was made. And in 9 E. 3. 22. he saith, that they were sage men that made this statute (1). See more of this in the Chapter of Warranties, Sect. 746.

(2 Inst. 331.)

5 E. 3. 14.

9 E. 3. 22.

Of

(A) As to the king's will, see 1 H. 6. ch. 5. 4 Inst. 335. and Ro. Parl. 16 R. 2. Ro. 10. there cited.

(B) No printed Year Book after 27 H. 8.

(1) However lord Coke in other places finds great fault with the statute *de donis*. See post. 19. b.

Of this estate taile it is said, [a] *Modus legem dat donationi, et tenenda est etiam conventio, quia modus et conventio vincunt legem; ut si alicui cum uxore fiat donatio habendum et tenendum sibi et hæredibus quos inter eos legitimè procreabunt, ecce quòd donator vult tales hæredes in hæreditate paterna et materna succedant, aliis heredibus eorum remotioribus penitùs exclusis: et quòd voluntas donatoris observari debet, manifestè apparet per hæc statuta. Quia autem dudum regi durum videbatur, &c.*

[a] Fleta lib. 3. cap. 9. Bract. lib. 2. cap. 5, &c. Brit. ca. 24. & 36.

"*Before the said statute* [b] *all inheritances were fee simple.*" Here fee simple is taken in his large sense, including as well conditionall or qualified, as absolute, to distinguish them from estates in taile since the said statute. Before which statute of *donis conditionalibus*, if land had beene given to a man, and to the heires males of his body, the having of an issue female had beene no performance of the condition; but if he had issue male, and dyed, and the issue male had inherited, yet he had not had a fee simple absolute; [c] for if he had died without issue male, the donor should have entred as in his reverter. By having of issue, the condition was performed for three purposes: First, to alien: Secondly, to forfeit: Thirdly, to charge with rent, common, or the like. But the course of descent was not altered by having issue (2); for if the donee had issue and died, and the land had descended to his issue, [d] yet if that issue had dyed (without any alienation made) without issue, his collatterall heir should not have inherited, because he was not within the forme of the gift, viz. heire of the body of the donee. [f] Lands were given before the statute in franke-marriage, and the donees had issue and died, and after the issue died without issue; it

[b] Vid. Sect. 18 Brit. ca. 36. fol. 93. Pl. Com. 235. 5§2. Shelley's case, 1 Co. 103. (2 Inst. 333. 7 Co. 38.)

[c] 44 E. 3. 3. 30. E. 1. Formedon, 66. 7 E. 3. 6, 7. 7 H. 4. 31. 12 H. 4. 2.

[d] 18 E. 3. 46. 18 Ass. p. 5. 12 E. 4. 3.

[f] 4 H. 3. Formedon, 34. 18 Ass. 5. 12 E. 4. 3. Pl. Com. 247. b. 18 E. 2. tit. Formedon, 58, 59.

was

(2) Where the gift was special to one of the heirs of his or her body by a particular person, the course of descent was in *some* degree changed by the having issue; for after issue had, by construction of law the land became descendable to all the heirs of the donee's body, whether they were the donee's issue by the person named in the gift, or by any other person, and also liable to the curtesy or dower of a *second* husband or wife. See acc. Pain's case, 8 Co. 35. b. and Berkley's case, Plowd. 247, and the next note. Lord Coke infers, that this was the common law from that part of the statute *de donis*, or of Westminster the second, which enacts, that *from thenceforth* neither the *second* husband nor the issue of a second marriage shall have any thing in the case of such a conditional gift. *Nec habeat de cætero secundus vir hujusmodi mulieris aliquid in tenemento sic dato per conditionem post mortem uxoris suæ per legem Angliæ, nec exitus de secundo viro et muliere successionem hæreditariam.* That at common law the having of issue thus enlarged the course of descent, where the gift was of an *express* conditional fee to a man and woman and the heirs of their two bodies, all the authorities agree; but it is said that the issue of a second marriage could not inherit where the gift was in *frank-marriage*, which was an *implied* conditional fee to the donees and the issue between them: and yet at the same time we are told, that in this latter case the *second* husband might have curtesy. See 2 Inst. 356. It will be difficult to give a reason, why a gift to a husband and wife and the issue between them should be so distinguished from a gift in frank-marriage, or why the husband should have curtesy, where the issue by him should not inherit. See the next note, where lord Hale seems to doubt this doctrine.—[Note 110.]

was adjudged, that his collaterall issue shall not inherite, but the donor shall re-enter. So note, that the heire in taile had no fee simple absolute at the common law, though there were divers descents (3).

If lands had beene given to a man and to his heires males of his bodie, and he had issue two sonnes, and the eldest had issue a daughter, the daughter was not inheritable to the fee simple, but the younger sonne *per formam doni*. And so if land had beene given at the common law to a man and the heires females of his body, and he had issue a sonne and a daughter, and died, the daughter should have inherited this fee simple at the common law (4); for the statute of *donis conditionalibus* createth no estate taile, but of such an estate as was fee simple at the common law, and it is descendable in such forme as it was at the common law. If the donee in taile had issue before the statute, and the issue had died without issue, the alienation of the donee at the common law, having no issue at that time, had not barred the donor.

(1 Ro. Abr. 840.)

[g] 30 E. 1. Formedon, 5. Temps E. 1. ibidem. 62. 19 E. 2. Formedon, 61. Pl. Com. 246. [h] 4 E. 2. Formedon, 50.

[g] If donee in taile at the common law had aliened before any issue had, and after had issue, this alienation had barred the issue because he claimed a fee simple; yet if that issue had died without issue, the donor might re-enter, for that he aliened before any issue, at what time he had no power to alien to barre the possibilitie of the donor. [h] But if a feme tenant in taile had taken husband, and had issue, and the husband and wife had aliened in fee by deed before the statute, yet the issue might have had a *formedon in descender* (5); for the alienation was not lawful:

---

(3) *If gift be to husband and wife and the heirs of their bodies, the issue by the second marriage inherits.* 8 *Rep. Paine's case. It seems, that a gift in frank-marriage goes to the heirs between the donees only; but a gift to husband and wife, and to the heirs of their bodies, goes to the heirs of the body of the survivor for want of issue between them.* Vid. tamen *Plowd. Comment.*. 251. Hal. MSS.—Lord Hale must be here understood to speak of gifts at common law.—See the preceding note.—[Note 111.]

(4) In 1 Ro. Abr. 841, it is said, that if land had been given to one and his heires *males* of his body, and afterwards he had issue a male and a *female*, and afterwards the male died, the *female* should have inherited the land. 18 E. 3. 46. 18 Ass. 58. are cited as authorities to prove this to have been the common law in respect to fees conditional. But lord Coke's doctrine here is *contra*, and serjeant Rolle refers to it as being so; and in respect to estates in tail male it has been long settled, that a female cannot inherit by conveying her descent through a male. See post. 25. a. and b.—[Note 112.]

(5) In another book lord Coke says, that a *formedon in descender* lay not at *common law*. See 2 Inst. 33. But this seeming contradiction may perhaps be reconciled, by observing, that in the latter book lord Coke is commenting on that part of the statute *de donis*, which gives a *formedon in descender* notwithstanding alienation by the donees, where the gift was to husband and wife, and to the issue between them or in frank-marriage. In such a case the alienation by the donees certainly bound the issue at common law, and consequently before the statute they could not have a *formedon in descender*. But in the case here put by lord Coke the wife *only* was the donee, and her alienation was merely by *deed*, which during coverture was insufficient to bind either her or her issue. However it is proper to mention, that according to some authorities the writ of *mort d'auncester* was the proper remedy for the

lawful: but otherwise it is, if it had beene by fine. And these things, though they seem ancient, are necessarie notwithstanding to be knowne, as well for the knowledge of the common law, as for annuities and such like inheritances, as cannot be intailed within the said statute, and therefore remain at the common law. [i] If the king before the statute of *donis conditionalibus* had made a gift to a man, and to the heires of his bodie begotten, the donee *post prolem suscitatam* might have aliened as well as in the case of a common person. [k] But if the donee had no issue, and before the statute had aliened with warrantie, and died, and the warrantie had descended upon the king, this should not have bound the king of his reversion without assets; but otherwise it was in the case of a common person (1). (l) Of the other side, if lands had beene given to the king and to the heires of his bodie, he could not before issue have aliened in fee, but onely to have barred his issue as a common person might have done, but not to have barred the reversion, for that should have beene a wrong in the case of a subject, and the king's prerogative cannot alter his case, nor make it greater than the donor gave unto him; and it is a maxime in law, that the king can do no wrong. When all estates were fee simple, then were purchasers sure of their purchases, farmers of their leases, creditors of their debts (A), the king and lords had their escheats,

(1 Ro. Abr. 837.)

[19. b.]

[i] 6 E. 3. 56. Jo. of Eltham's case.

[k] 45 Ass. p. 6.

[l] Pl. Com. 246. b. (Post. 392. 370. b.)

---

issue at common law, and that the only case, in which the issue could have a *formedon in descender* before the statute, was, where by reason of some special circumstances he could not have an assise of *mort d'auncestor*. To illustrate this the following case has been given. A man hath issue a son by one wife, she dies, and he marries again, and land is given to him and his second wife, and the heirs of their bodies, and they have a son, and afterwards they both die, and then a stranger abates. Here it is said, that the son by the second wife could not have *mort d'auncestor*, because one point of that writ is to inquire who is next heir to the father, and the son by the first wife is the heir to the father; and therefore, that *formedon in descender* lay at common law for this special case, because otherwise the son by the second wife would have been without remedy for the freehold. See Plowd. 239.—[Note 113.]

(1) But lord Coke in another book says, that though such alienation bound the issue, yet it did not bar the king's possibility of reverter, as it would that of common persons. See the earl of Cornwall's case, cited post. 370. b. and in Holt's case, 9 Co. 132. b.—[Note 114.]

(A) The remark of Mr. Sullivan, sect. 17, supposes it an error in lord Coke to make land liable to debts before the statutes giving execution against the land; but it should be recollected that where land descends on the heir, he is answerable for his ancestor's specialty debts, to the extent of the assets so descending; and if this was so at common law, and before the statutes making land liable to execution, as I apprehend it to have been, it justifies lord Coke's expression as to the security of creditors before the statute *de donis*, because through the heir and the common law execution upon his personal property, the creditor derived a benefit to the value of the land descended. The censure of lord Coke proceeds from not distinguishing between the time of the heir's being liable to the ancestor's debts, in respect of the land descended, and the time when the land itself was first made liable to be taken in execution: the first was at common law, at least I know of no statute from which it can be traced, but the second was clearly of statute origin.

escheats, forfeitures, wardships and other profits of their seignio-
10 Co. 38, in Port. case. ries: and for these and other like cases, by the wisedome of the common law all estâtes of inheritance were fee simple; and what contentions and mischiefs have crept into the quiet of the law by these fettered inheritances, dailie experience teacheth us (2). But see more of this matter in the aforesaid Chapter of Warrantie, 746.

"*Common law.*" See for explication hereof, Sect. 170.

"*As appeareth by the rehearsall of the same statute.*" Here, by
Doct. and Stud. lib. 2. ca. 55. the authoritie of our author, the rehearsall or preamble of a statute is to be taken for truth; for it cannot be thought that a statute, that is made by authoritie of the whole realme, as well of the king, as of the lords spirituall and temporall, and of all the commons, will recite a thing against the truth(B).

"*And now by this statute, tenant in taile is in two manners, that is to say tenant in taile generall, and tenant in taile speciall.*"
This division of an estate taile is perfect and sound; for the *membra dividentia*, viz. generall and speciall, are converted properly with the thing defined, and they are proved by many authorities of law, and approved of all learned men, and so are all the divisions through all his three bookes, which the studious and diligent reader will observe. And how excellent and difficult a thing it is to divide rightly and properly, especially in the law, the learned do know.

(Plowd. 555. 2 Ro. Ab. 780.) [r] 24 H. 8. tit. Feoffments al Uses, 4. 27 H. 8. fo. By this statute the land is as it were appropriated to the tenant in taile, and to the heires of his body; and therefore [r] if an estate be made, either before or since the statute of 27 *H.* 8. *cap.* 10, to a man and the heires of his bodie, either to the use of another and his heires, or to the use of himselfe and his heires, this limitation of use is utterly voyde. For before the said statute of 27 *H.* 8. he could not have executed the estate to the use: and so was it adjudged [s] in an *ejectione firmæ* between *John Cowper*, plaintiffe, and *Thomas Franklin*, &c. defendant(3).

[s] Pasch. 14 Jac. in the king's bench. 2 Co. 78. 1 Cro. Jam. 400. and others cited 2 Co. 78.

---

(2) Lord Coke in many other places is very strong in his representation of the inconveniences produced by the statute *de donis*. See post. 370. b. and Mildmay's case, 6 Co. 40. a.

(B) 19 Vin. 507. pl. 1. 3 Burn's Jus. 223. 1 Vent. 176.

(3) But in Godbolt's report of Franklin and Cooper, it is said to have been resolved, that tenant in tail might stand seised to an use expressed, but that an use could not be averred. Lord Bacon also gives it as his opinion, that an estate tail may be to uses *since* the statute for executing uses, and controverts the reasons for doubting it *before*. Bac. Law Tracts, 8vo. ed. 347. See a great number of authorities on this subject in Vin. Abr. *Uses*, C.—[N. 115.]

Sect. 14, 15.

TENANT in taile generall is, where lands or tenements are given to a man, and to his heires of his bodie begotten. In this case it is said generall taile, because whatsoever woman, that such tenant taketh to wife, (if he hath many wives, and by every of them hath issue) yet everie one of these issues by possibilitie may inherit the tenements by force of the gift; because that every such issue is of his bodie ingendred.

IN the same manner it is, where lands or tenements are given to a woman and to the heires of her bodie; albeit that she hath divers husbands, yet the issue, which she may have by every husband, may inherit as issue in taile by force of this gift: and therefore such gifts are called generall tailes.

"*LANDS,*" *terres, terra,* in his generall and legall signification, (as hath been said before) includeth not only all kinde of grounds, as meadow, pasture, wood, &c. but houses and all edifices whatsoever. In a more restrained sense it is taken for arable ground. Vide Sect. 1.

"*Tenements,*" *tenementa.* This is the only word which the said statute of *W.* 2, that created estates taile, useth; and it includeth, not only all corporate inheritances, which are or may be holden, but also all inheritances issuing out of any [20. a.] of those inheritances, or concerning, or annexed to, or exercisible within the same, though they lie not in tenure, therefore all these without question may be intailed. As [*t*] rents, estovers, commons or other profits whatsoever granted out of land; or uses, offices, dignities which concerne lands or certaine places, may be entailed within the said statute, because all these savour of the realtie. But if the grant be of an inheritance merely personal, or to be exercised about chattels, and is not issuing out of land, nor concerning any land, or some certaine place, such inheritances cannot be intailed, because they savour nothing of the realtie. But examples will illustrate and make this learning cleere. (Ante 6. a.) [*t*] 7 E. 3. 363. 18 E. 3. 27. 7 H. 6. 8. 32 H. 6. 28. 5 E. 4. 3. 1 H. 7. 28. 4 H. 7. 9. 1 H. 5. 1 H. 8. fol. 3. Nevil's case. 10 Co. 33, 34. Pl. Com. in Manxel's case, fol. 2 & 3. (7 Co. 33. 11 Co. 1. 1 Ro. Abr. 837-8. 10 Co. 87.)

The writ of assise [*u*] was *De libero tenemento,* and made his pleint of the office of the fourth part of the serjeant of the common place, and the writ adjudged good; and seeing that a man hath a freehold, *liberum tenementum* in it, by consequent it may be intailed. [*u*] 7 Ass. p. 12. 7 E. 6. 1. (Fitzh. N. B. 178. F.)

The office of the keeping of the church of our lady of *Lincolne* was intailed, and a *formedon* there brought upon that gift of the office by the issue in taile. The [*x*] office of the marshall of *England* intailed (1). The [*y*] office of one of the chamber- 18 E. 3. 27. [*x*] 5 E. 4. 3. 10 E. 4. 14. [*y*] 11 E. 4. 1.

1 H. 7. 28. 4 H. 7. 10. 9 E. 4. 526. 19 H. 8. 3. 1 H. 5. 1.

lains

(1) See in W. Jo. 96, and Collins's Claims of Bar. 183, an account of the original grant and intail of the office of *earl Marshall,* by Crew chief justice in his argument of the case about the office of *great chamberlain* of England

In

lains of the exchequer intailed. 1 *H.* 7. 28. The office of a forrestership intailed. 4 *H.* 7. 10. 9 *E.* 4. 56. b. Charters intailed (2). 19 *H.* 8. 3. Use intailed. Nomination to a benefice intailed.

[a] 7 Co. 33, 34, Nevil's case. 28 H. 6, Lord Vesey's case. (6 Co. 7. b. Post. 392. b. 1 Sid. 261.)

Also a name of dignitie may be intailed within the statute, [a] as dukes, marquesses, earles, viscounts, barons; because they be named of some countie, mannor, towne, or place (3). If the issue in taile [b] in a *formedon* in the *descender* be barred by a false verdict, his release is no barre to his issue, albeit the action is at the common law.

[b] 14 Ass. 2. 3 Eliz. Dyer, 188.

The like law is of a writ of errour. 3 *Eliz. Dyer*, 188. If a gift in taile be made with warrantie, the donee releases the warrantie, this shall not bind the issue in taile; for to all these cases and the like the said statute doth extend.

Pl. Com. in Manxel's case. 10 Co. 58. 1 Ro. Abr. 837.)

But if I grant to a man, and to the heires of his body, to be keeper of my hounds, or master of my horse, or to be my faulconer, or such like, with a fee therefore, yet these cannot be intailed within the said statute, for that they be not issuing out of tenements, nor annexed to, or exercisible within, or concerning lands or tenements of freehold or inheritance, but concerning chattels, and savour nothing of the realtie. And so it is, if I by my deed for me and my heires grant an annuitie to a man, and the heires of his body, for that this only chargeth my person, and concerneth no land, nor savoureth of the realtie (4).

In

In this last case the right to the great chamberlain's office was contested between an *heir male* claiming under an intail 9 *Eliz.* by one of the *Vere* family, who was then seised of the office in fee, and the *heir general* claiming under the limitations of the original grant from the crown. Crew chief justice spoke in the house of lords for the *heir male;* but a majority of the other judges, amongst whom was Doderidge, gave their opinion for the *heir-general,* upon the principle, that this high office, like a title of honour, was inherent in the blood of the first grantee, and incapable of alienation.—[Note 116.]

(2) *But if the tail be barred by collateral warrantie, detinue will lie for the charters.* Hal. MSS.—See 9 E. 4. 52. b.—[Note 117.]

(3) *There are many titles of dignity without any place.* Hal. MSS.—In the King and Knollys, 1 L. Raym. 13, lord chief justice Holt says, that naming a place is not essential to the creation of a dignity, and mentions the earldom of *Rivers* as an instance. But it has been held, that if the king grants a dignity to one and the heirs male of his body, without naming any place, the grantee shall have a fee conditional, and not an estate tail, as he would have if a place had been mentioned. See 12 Co. 81, where this was adjudged in the case of a baronet. However, though dignities and titles of honour having relation to some place are intailable by the crown as tenements within the statute *de donis,* yet neither the donee nor his issue can bar the intail, by fine, recovery, or any other means, as may be done in the case of other intailable things. See lord Purbeck's case, Show. Parl. Cas. 1, and Collins's Claims of Bar. 293, in which it was adjudged, that the surrender of a dignity to the crown by fine was void.—Note, that in lord Purbeck's case his counsel distinguished between ancient honours, as being feodary and officiary, and having relation to a place, from *modern* dignities, as being merely titular and personal, notwithstanding the formality of naming a place in the creation; and from thence infer, that the latter are not within the statute *de donis.*—[Note 118.]

(4) See the case of the earl of Stafford and Buckley, 2 Ves. 170, in which lord chief justice Hardwicke held, that an annuity in fee, granted by the crown

out

In all these cases he hath a fee conditional, as they were before the statute, and the grantee by his grant or release may barre his heire, as he might have done at the common law, for that in these cases he is not restrained by the said statute (5).

"And

---

out of the 4½ per cent. duties payable for exports and imports at Barbadoes, was merely a personal inheritance, and not intailable within the statute *de donis*. According to a manuscript note of the same case, lord Hardwicke, in giving his opinion, said, that an annuity out of the revenue of the *post-office* or *excise* savours no more of the realty than money.—[Note 119.]

(5) Two things seem essential to an intail within the statute *de donis*. One requisite is, that the *subject* be land or some other thing of a *real* nature. The other requisite is, that the *estate* in it be an *inheritance*. Therefore neither estates *pur auter vie* in lands, though limited to the grantee and his heirs during the life of *cestui que vie*, nor *terms for years*, are intailable any more than *personal chattels*; because as the latter, not being either interests in things *real* or of *inheritance*, want both requisites; so the two former, though interests in things *real*, yet not being also of *inheritance*, are deficient in *one* requisite. However, estates *pur auter vie*, terms for years, and personal chattels, may be so settled, as to answer the purposes of an intail, and be rendered unalienable almost for as long a time, as if they were intailable in the strict sense of the word. Thus estates *pur auter vie* may be devised or limited in strict settlement by way of *remainder* like estates of inheritance; and such as have interests in the nature of estates tail may bar their issue and all remainders over by *alienation* of the estate *pur auter vie*, as those, who are strictly speaking tenants in tail, may do by *fine* and *recovery*: but then the having of issue is not an essential preliminary to the power of alienation in the case of an estate *pur auter vie* limited to one and the heirs of his body, as it is in the case of a conditional fee, from which the mode of barring by alienation was evidently borrowed. The manner of settling terms for years and personal chattels is different; for in them no *remainders* can be limited; but they may be intailed by *executory devise* or by deed of *trust*; as effectually as estates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being and 21 years after, and perhaps in the case of a posthumous child a few months more: a limitation of time, not *arbitrarily* prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder as to postpone a complete bar of the intail by fine or recovery for a longer space. It is also proper to observe, that, in the case of terms of years and personal chattels, the *vesting* of an interest, which in reality would be an estate tail, bars the issue and all the subsequent limitations, as effectually as fine and recovery in the case of estates intailable within the statute *de donis*, or a simple alienation in the case of conditional fees and estates *pur auter vie*: and further, that if the executory limitations of personalty are on contingencies too remote, the whole property is in the first taker. Upon the whole, by a series of decisions within the last two centuries, and after many struggles in respect to personalty, it is at length settled, that every species of property is in *substance* equally capable of being settled in the way of intail; and though the modes vary according to the nature of the subject, yet they tend to the same point, and the duration of the intail is circumscribed *almost* as nearly within the same limits, as the difference of property will allow. As to the intail of estates *pur autre vie*, see 2 Vern. 184. 225. 3 P. Wms. 262. 1 Atk. 324. 2 Atk. 259. 376. 3 Atk. 464, and 2 Ves. 681. As to the intail of terms for years and personal chattels, see Manning's case, 8 Co. 94. Lampett's case, 10 Co. 46. b. Child and Bailey,

W. Jo.

"*And to his heires of his bodie begotten.*" In gifts in taile these words (*heires*) are as necessary, as in feoffments and grants; for seeing every estate tail was a fee simple at the common law, and at the common law no fee simple could be in feoffments and grants without these words (*heires*), and that an estate in taile is but a cut or restrained fee, it followeth, that in gifts in a man's lifetime no estate can be created without these words (*heires*), unlesse it be in case of frankmarriage, as hereafter shall be shewed. And where *Littleton* saith (*heires*), yet (*heire*) in the singular number in a speciall case may create an estate taile, as appeareth by 39 Ass. p. 20. hereafter mentioned (1). And yet if a man give lands to *A. et hæredibus de corpore suo*, the remainder to *B. in formâ prædictâ*, this is a good estate taile to *B.* for that in *formâ prædictâ* do include the other. If a man letteth lands to *A.* for life, the remainder to *B.* in taile, the remainder to *C. in formâ prædictâ*, this remainder is void for the incertainte. But if the remainder had beene, the remainder to *C. in eâdem formâ*, this had been a good estate taile; for *idem semper proximo antecedenti refertur.* If a man give lands or tenements to a man, *et semini suo*, or *exitibus vel prolibus de corpore suo*, to a man, and to his seed, or to the issues or children of his body, he hath but an estate for life; for albeit that the statute provideth, that *voluntas donatoris secundùm formam in chartâ doni sui manifestè expressam de cætero observetur*, yet that will and intent must agree with the rules of law. And of this opinion was our author himselfe, as it appeared in his learned reading afore-mentioned upon this statute, where he holdeth, if a man giveth land to a man *et exitibus de corpore suo legitimè procreatis*, or *semini suo*, he hath but an estate for life, for that there wanteth words of inheritance (2).

[20. b.]

39 Ass. p. 20. 20 H. 6. 35. 5 H. 4. 7. b. 14 H. 4. 15. (Post. 385. b. 1 Ro. Abr. 839. 8 Co. 57. 1 Co. 103. Ante 9. b.)

(Cro. Eliz. 121. Ow. 64. S. C. Mo. 103.) Vid. Shelley's case, 1 Co.

(1 Ro. Abr. 837.)

"*Of*

W. J. 15. Duke of Norfolk's case, 3 Cha. Cas. 1. a case in Carth. 267, and one in 1 P. Wms. 1. See also Fearne's Essay on Conting. Rem. and Exec. Dev. 2d ed. p. 122, to the end. Mr. Fearne's work is so very instructive on the dry and obscure subject of remainders and executory devises, that it cannot be too much recommended to the attention of the diligent student.—Note, it was resolved in the 40 Eliz. that the statute *de donis* doth not extend to the Isle of Man; because the statute is *general*, and the Isle of Man is not *specially* named. See 4 Inst. 284. 2 And. 115, and 2 Ves. 350. See also ante 9. a. where the following note by lord Hale, in respect to the case of the Isle of Man, there mentioned by lord Coke to have been adjudged in 40 Eliz. should have been introduced; though as it partly relates to the statute *de donis*, it may come in here without any impropriety.—Nota, *William earl of Salisbury got Man from the Scots, and granted it to William Scroop. Hen. 4. claimed it by conquest from him, granted it* comiti Northumbriæ, *and on his attainder granted it to sir John Stanley and his heirs; and in this case ruled*, 1. *That Man is not parcel of England.* 2. *That it is bound by statutes of England where specially named, otherwise not. Therefore the statutes* de donis, *of uses, of wills, not in force there; and it descends to the coheirs of Ferdinando, and not of his brother William earl of Derby.* Hal. MSS.—As to the intail of copyholds, see post. 60. a.—[Note 120.]

(1) See this case, post. 22. a.

(2) *But devise to one* et hæredibus legitimè procreatis *is tail. H.* 43. *Eliz. C. B. rot.* 1408. *Moor's case*, 711, *but* contra *by act executed* 7 *Rep.* 41. *b.*

—*Dormer's*

"*Of his bodie.*" These words are not so strictly required but that they may be expressed by words that amount to as much: for the example that the statute of *W.* 2 putteth hath not these words (*de corpore*) but these words (*hæredibus*) viz: *Cum aliquis dat terram suam alicui viro et ejus uxori et hæredibus de ipsis viro et muliere procreatis.* If lands be given [c] to *B. et hæredibus quos idem B. de primâ uxore suâ legitimè procrearet*, this is a good estate in especiall taile (albeit he hath no wife at that time) without these words (*de corpore*). So it is [d] if lands be given to a man, and to his heires, which he shall beget of his wife, [e] or to a man *et hæredibus de carne suâ*, or to a [f] man *et hæredibus de se.* In all these cases these be good estates in taile, and yet these words *de corpore* are omitted. (7 Co. 41.) [c] 3 E. 3. tit. Breve, 743. 3 E. 3. tit. Estates. [d] 12 H. 4. 2. [e] 37 H. 6. 15. [f] 5 H. 5. 6. (7 Co. 41.)

It is holden [g] by some opinions, that if there be grandfather, father and sonne, and lands are given to the grandfather, and to his heires begotten by the father, the father dyeth, the grandfather dyeth, the sonne is in as heire to the grandfather begotten upon the body of his father, and the wife of the grandfather in that case shall be endowed. But certain it is, that in some cases one shall have the land *per formam doni* that is not issue of the body of the donee, which see Section 80. [g] 12 H. 4. 2. per Horton. (Post. 27. a.) 26. b. 220. a.

"*Begotten.*" This word may in many cases be omitted or expressed by the like, and yet the estate in taile is good: as *hæredibus de carne, hæredibus de se, hæred' quos sibi contigerit, &c.* as is aforesaid; and where the word of *Littleton* is, ingendred, or begotten, *procreatis*, yet if the word be *procreandis*, or *quos procreaverit*, the estate in taile is good; and as *procreatis* shall extend to the issues begotten afterwards, so *procreandis* shall extend to the issues begotten before (3) (A). 18 E. 2, tit. Bre. 836. 24 E. 3. 28. (7 Co. 41. Ow. 152.)

—*Dormer's case. If lands be limited by deed to the use of I. S. and* hæredum masculorum suotum legitime procreatorum, *remainder over, it is a fee simple; but if it be* hæredum masculorum de se, *or in English*, the heirs of him lawfully begotten, *especially where there is a remainder over, it is tail.* 7 Rep. 41. *Bedell's case. Dormer's case, H.* 38 *Eliz. B. R. rot.* 739. Hal. MSS.—[Note 121.]

(3) 10 E. 3. 19. *Adjudged accordingly*, viz. that where in formedon the writ mentioned *procreatis*, the count was *exeuntibus.* Judgment was demanded of the writ; it was ousted. Hal. MSS. But it is held, that where the words were *in posterum procreandis*, sons born *before* shall be excluded on account of the peculiar force of *in posterum.* Adj. M. 26. *Eliz.* B. R. 3 Leon. 87.—[Note 122.] Qu. and see contra, Forrest. 31, in a case of a deed of settlement without the word "hereafter," besides "to be begotten."

(A) Acc. on a settlement by lord Talbot, where they were hereafter to be begotten. Cases temp. Talbot, 31. Also 2 Vern. 545, per lord Cowper, *arguendo*, S. P.; adjudged accordingly by lord Macclesfield in a case on like words, viz. such daughters as shall be begotten (in a settlement). 10 Mod. 397. See also 1 Wms. 426; Prec. Ch. 489; which seem reports of same case as that in 10 Mod., though the names different. Fearne, C. R. 4 ed. 321. 1 Wms. 229. 2 Bl. R. 1010. See also Modern Cases, in which a devise to one and the heirs of his body to be begotten is treated as passing an estate tail. 2 Ld Raym. 1561. 2 Str. 849. 1 East, 264. And Thrustout *v.* Peak, Vin. Dev. x. a. pl. 11. And Goodright v. Pulleyn, 2 Ld. Raym. 1437.

Sect. 16.

TENANT in taile speciall is, where lands or tenements are given to a man and to his wife, and to the heires of their two bodies begotten. In this case none shall inherite by force of this gift, but those that be engendred between them two. And it is called especiall taile, because if the wife die, and he taketh another wife, and have issue, the issue of the second wife shall not inherit by force of this gift, nor also the issue of the second husband, if the first husband die.

[a] 5 H. 7. 10. 11 E. 3. Formdon, 30. Pl. Com. 35. [b] 10 Co. 120. Chudley's case. 40 Ass. pl. 13. 34 Ass. pl. 1. Fleta. lib. 5. c. 34.

"*TO a man and his wife.*" [a] Then put the case that lands be given to a man and a woman unmarried, and the heires of their two bodies; for the apparent possibilitie to marry, they have an estate taile in them presently. [b] So it is where lands be given to the husband of A. and to the wife of B. and the heires of their bodies, they have presently an estate in taile, in respect of the possibilitie.

(Plowd. 35. Post. 25. b. F. N. B. 205. b. Post. 204. a. 1 Ro. Abr. 419.) [c] 21 H. 6. 7. (Perk. Sect. 18. 170. 2 Sid. 78. 8 Co. 56. b. 8 Co. 154. Plowd. 147. 2 Ro. Abr. 680.

If a feme sole do enfeoffe a married man *causâ matrimonii prælocuti*, it is good for the possibilitie. But put the case that the premises and the *habendum* be in other manner than *Littleton* hath put, and let us see ☞ what the law is in these cases. [c] (1) As if a man in the premises give lands to another and the heires of his bodie, *habendum* to him and his heires for ever; it hath been holden that in this case he hath an estate taile, and a fee simple expectant. And so (it is said) *vice versâ*, if lands be given to a man and to his heires in the premisses, *habendum* to him and the heires of his bodie, that he hath an estate taile, and a fee simple expectant. But *vid.* lib. 8. fo. 154. b. otherwise resolved, *ut patet ibi* (2). [d] If

[21. a.]

---

(1) *Where the estate in the* premises *shall be corrected by the* habendum, *if there happen to be a clause of warranty*, 2 *E.* 2 *Feoffments*, 94. Dedi Adamæ de B. unam carucat. cum C. filiâ meâ in liberum maritagium, habendum Adamæ et hæredibus suis faciend. forinsecum servicium; *and warranty to Adam*, et hæredibus suis in perpetuum. *After the death of Adam and his wife, their issue bring* mort d'auncestor; *and ruled, that it doth not lie, but* formedon, *because* toile, 10 E. 3. 25. Sciatis me dedisse Edmundo et Aliciæ filiæ meæ et heredibus suis in liberum maritagium, habendum et tenendum dictis E. et A. et hæredibus suis liberum maritagium. *If the gift be before the statute* de donis, *it is only frank-marriage; if after the statute, it is tail with fee expectant. Vid.* 10 *H.* 6. 16—19. *H.* 6. 74. *Gift to A. and if he dies without heir of his body reverter to the donor, it is not tail; but if it was by devise, it is tail.*—Hal. MSS..—[Note 123.]

(2) The resolution in 8 Co. 54. b. is, that here the words *heirs of the body*, in the *habendum* qualify the word *heirs* in the *premises* and therefore that there shall be an estate tail without any fee expectant. See acc. Mo. 26. In the case in Cro. Jam. 476, and 2 Ro. Rep. 19. 23. such words were adjudged to pass tail and fee expectant. But the case was attended with circumstances particularly showing an intention to pass *both*: for there was a reservation of tenure to the lord paramount, which could not be if only an estate tail passed to

[d] If lands be given to *B.* and his heires, to have and to hold to *B.* and his heires, if *B* have heires of his bodie, and if he die without heires of his bodie that it shall revert to the donor, this is adjudged an estate taile, and the reversion in the donor. [e] For *voluntas donatoris in chartâ doni sui manifestè expressa observetur;* and therefore in the case next precedent, if these or the like words be added (and if he die without heires of his bodie, that the lands shall revert to the donor), that then the *habendum* shall by authoritie of divers bookes be construed upon the whole deed, to be a limitation or a declaration, what heires are meant in the premises to inherit, and that in that case the reversion is in the donor (3).

[d] 30 Ass. p. 47. 35 Ass. p. 14. 37 Ass. 15. (5 H. 5. 6. 2 Ro. Abr. 68. Cro. Jam. 595. 290. 427. 448.)

[e] W. 2. cap. 22.

[f] If a man make a charter of feoffment of an acre of land to *A.* and his heires, and another deed of the same acre to *A.* and the heires of his bodie, and deliver seisin according to the forme and effect of both deeds, in this case he cannot take a fee simple onely, as some hold, for that liverie was made according to the deed in taile, as well as to the charter in fee, neither can the livery enure onely to the deed of estate taile with a fee simple expectant, for that liverie was made as well upon the deed in fee simple, as the deed in taile. Therefore others hold, that in that case it shall enure by moities, that is, to have an estate taile in the one moitie, with the fee simple expectant, and a fee simple in the other moitie; and so the liverie shall worke immediately upon both deeds (4).

[f] 2 H. 6. 25. 45 E. 2. 20. (Vid. 5 Co. 25. where two fines are levied.)

---

to the donee, and the reversion had remained in the donor, for then the tenure must have been of the donor. Also there was a warranty to the grantee and his *heirs*. However, the court intimated, that their opinion would have been the same, if these special circumstances had not occurred. See further as to the operation of the *habendum* in explaining and qualifying the *premises*, post. 183, and the note on lord Coke's doctrine against *abridging* the latter by the former, post. 299. a. See also Vin. Abr. *Grants*, I, K, L, M, & N.—[124.]

(3) In a note in 1 P. Wms. 57, lord keeper Wright puts the case of a gift by deed to one and his *heirs*, and if he die without *issue*, remainder over, and holds, that the latter words restrain the former, and convert the fee into a tail.—[Note 125.]

(4) 7 *E.* 3. 64. *Land given to husband and wife, and the heirs of the body of husband, and if the husband and wife die without heirs between them lawfully begotten, remainder over, it is only a tail general in the husband.* *Dy.* 171. *Devise to A. and the* heirs male of his body, *and if he die without* heirs of his body, *remainder over, it is only tail male.* Acc. S. C. 1 And. 8; see now, however, Keene *v.* Dickson, 3 T. R. 495; *qu.* however as to this latter case; and see Doe on dem. of Dacre *v.* Dacre, 1 Bos. & P. 250.—Vid. M. 9 Jac. inter *Walsop and Derby. Devise to A. in fee, and afterwards by the same will devise of the same land to B. in fee, they are joint-tenants.* Vid. 18 *R.* 2. *Brief*, 645. *Land given to the father and the heirs of his body, remainder to his son in tail. It seems, the son has election to claim by descent or purchase. (It seems the remainder is void, because included in the first estate.)* Hal. MSS.—[Note 126.]

Sect. 17.

IN the same manner it is, where tenements are given by one man to another with a wife (which is the daughter or cousin to the giver) in frankmariage (5), *the which gift hath an enheritance by these words (frankmariage) annexed unto it, although it be not expressly said or rehearsed in the gift (that is to say) that the donees shall have the tenements to them and to their heires betweene them two begotten. And this is called especial taile, because the issue of the second wife may not inherit.*

Vid. Sect. 19, 20. (2 Ro. Abr. 67.)

"*TO a man with a wife.*" Albeit the gift is made of the land to a man with his daughter, &c. yet is the gift good to them both in speciall taile, and therefore that of *Stephen de la More* in [*g*] 5 *E.* 3, is very remarkeable, where the case was, that *Robert* gave the reversion of lands which *Agnes* his wife did hold for her life to *Stephen de la More, habendum post mortem dictæ Agnetis in liberum maritagium cum Johannâ filiâ ejusdem Roberti*, and it is adjudged that it is a good estate taile. Wherein three things are to be observed: first, that *Joane* the daughter took with her husband an estate in especiall taile, albeit she were named but under a *cum*, viz. *cum Johannâ*, &c. (7). 2. That *cum* doth come after the *habendum*, for that it is all but one sentence. 3. That these words, *in liberum maritagium*, doe create an estate of inheritance in especiall taile, as ☞ *Littleton* saith, *the which gift hath an inheritance by these words (frankmariage annexed unto it, although it be not expresly said, &c.* But this had need of some interpretation, for if lands be given by these words (in frankmariage), according to the rules of law, then do these words create an estate of inheritance in speciall taile: for the consideration of marriage is in that case more favoured in law, than any other consideration. But though the gift be in these words, yet if it be not consonant to the rules of law in other things requisite thereunto, there they create but an estate for life. And therefore to speak once for all, four things be incident to a frankmariage First, that it be given for consideration of marriage either to a man with a woman, or, as some have held, to a woman with a man. For in [*h*] 6 *E.* 3. 33. in *Piers de Saltmarsh* his case, a man gave land to his sonne in frankmariage; and *Fitz. N. B.* 172, taketh the law so also; and 7 *E.* 4. 12. *per Moyle* against a new opinion *in temps H.* 8. *Br.* tit. Frankmariage, the

[21. b.]

5 E. 3. 17.

[*g*] This case is vouched in Pl. Com. 158. to be in 4 E. 3, which being not found (6) in that yeare, it is there so left without any further reference, but you shall find it as above said in 5 E. 3. 17.

W. 2. ca. 1. 19 E. 3. tit. Taile, 1.

(1 Ro. Abr. 840.)

[*h*] 6 E. 3. 33. Fitz. N. B. 172. 7 E. 4. 12. 15 E. 2. Cui in vita. Sect. 24.

---

(5) *Before or after marriage. Dy.* 147. Hal. MSS.—See acc. post. 21. b. and 176. a.

(6) *The case is* 4 *E.* 3. 4. Hal. MSS.

(7) Dedi et concessi Johanni White in liberum maritagium Johannæ filiæ meæ habendum dicto Johanni cum hæredibus suis in perpetuum de capitali domino feodi; *and warranty to him and his heirs. Ruled, that it is neither tail nor frank-marriage; but fee simple only in the husband and nothing in the wife. M.* 23 *and* 24 *El. C. B. Webb and Porter.* Vid. contra 32 *E.* 1. •*Taile* 25. *but* 45 *E.* 3. 20. *agrees.* Hal. MSS.—See acc. the same case in Ow. 26, and Godb. 18. The same case is cited in Mo. 643. pl. 888.—[Note 127.]

the former bookes being not remembered. Secondly, that the woman or man that is the cause of the gift [i] be of the blood of the donor; but it may be made as well after marriage as before, and it may be made with a widow, &c. Thirdly, if the gift be made of such a thing as lyeth in tenure, that the donees hold of the donor at the time of the estate in frankmariage made. A rent service [k] may be given in frankmariage, because it may be holden. And so may a rent charge or rent secke, as *Fitz. N. B.* holdeth, and it appeareth in our bookes that a common was granted in frankmariage. (1) Fourthly, that the donees shall hold freely of the donor till the fourth degree be past. And therefore if land be given to a woman, with a sonne of the donor in frankmariage, there passeth an inheritance; but if the donee that is the cause of the gift be not of the blood of the donor, then there passeth but an estate for life if livery be made. Also if [l] lands be given to a man with a woman of the blood of the donor *in liberum maritagium*, the remainder in fee either to a stranger or to the donees, they have no estate taile, because there is no tenure of the donor (2) but if [m] in that case, the remainder had beene limited to another in taile reserving the reversion in fee to the donor, there the said words (*in liberum maritagium*) create an inheritance, because the donees hold of the donor. And this is the cause that it is holden, that a man cannot devise land in frankmariage because the donee cannot hold of the donor. And *cesty que use* before the statute of 27 *H.* 8, could not have made a gift in frankmariage, because the reversion was in the feoffees. [n] And if the donor doth give lands in *liberum maritagium* reserving a rent, this reservation shall take no effect till the fourth degree be past, but the frankmariage is good; for if the reservation should be good, then could not the donees have an estate taile for want of the words of the heires of their bodyes (3).

[i] 4 E. 3. 8. 31 E.1. Taile 30. Bracton, lib. 2. cap. 7.

[k] 22 R. 2. tit. Descent, 50. Fitz. N. B. 212. 9 H. 6. 35. b. W. 2. ca. 1. acc.

[l] Temps H. 8. Br. frankmar. 11. 13 E. 1. Formdon, 63. Vid. 32 E. 1. Tail, 25. 2 E. 2. Feoffment and Faits, 9. 17 E. 3. 5. a. 45 E. 3. 20. (1 Ro. Abr. 840.)

[m] 20 E. 2. Aid 174. 31 E. 3. Gard. 216.

[n] Bract. lib. 2. cap. 7. 32 E. 1. Taile, 31. 13 H. 4. 74. 4 H. 6. 17. 26 Ass. 66. 31 E. 3. Gar. 29. 26 Ass. p. 66, per Wilbye.

"*In frank-marriage.*" *Liberum maritagium*, free marriage. *Maritagium* is taken for fee taile, and divideth *maritagium* into *liberum et servitio obligatum:* and herewith agreeth *Bracton* [o] lib. 2. cap. 34. and 39. *Maritagium est aut liberum aut servitio obligatum*, and lib. 2. ca. 7. nu. 3 and 4. *Liberum maritagium dicitur, ubi donator vult quòd terra sic data quieta sit et libera ab omni seculari servitio.* And so, before *Bracton*, said *Glanvill*, lib. 7. ca. 18. *Maritagium autem aliud nominatur liberum aliud servitio obnoxium. Liberum dicitur maritagium, quando aliquis liber homo aliquam partem terræ suæ dat cum aliquâ muliere in maritagium, ita quòd ab omni servitio terra illa sit quieta, &c.* And after both of them *Fleta* that followeth them both,

[o] Bract. lib. 2. cap. 34 & 39. & lib. 2. cap. 7. nu. 3 & 4. Glanvil. lib. 7. ca. 1. & ca. 18.

---

(1) 14 *E.* 2. *Aiel.* 1. *Reversion granted by two in frank-marriage.* Vid. 4 *E.* 3, 4. 26 *E.* 3. *Tail*, 27. Hal. MSS.—[Note 128.]

(2) *ut see the contrary of this* Pasch. 40 Eliz. *C. B. lord Barclaye's case, n.* 11. *and all the books here cited prove, that it is at least an estate tail, although no tenure, and it is accordingly adjudged,* 17 *E.* 3. 65. Vid. *H.* 43 *El. B. R.* rot. 140, *between lord Barclaye and the countess of Warwick.* Hal. MSS. —See S. C. in Mo. 643. Cro. Eliz. 635, and 1 Ro. Abr. 750, but the point of Frank-marriage is not reported in the two latter bookes.—[Note 129.]

(3) 13 H. 4. *Mesne*, 74. 30 *E.* 3. 24. *Gift in frank-marriage* salvo forineco servitio *good, and the donee shall hold in chivalry.* Hal. MSS.—[Note 130.]

Fleta, lib. 3. cap. 1.

both, lib. 3. cap. 1. saith, *est autem quoddam maritagium liberum ab omni servitio solutum donatori vel ejus hæredi, &c. Et est similiter maritagium servitio obligatum et oneratum, &c.* And these words (*in liberum maritagium*) are such words of art, and so necessarily required, as they cannot be expressed by words equipollent, or amounting to as much. As if a man give lands to a man with his daughter *in connubio soluto ab omni servitio, &c.* yet there passeth in this case but an estate for life; for seeing that these words (*in liberum maritagium*) create an estate of inheritance against the generall rule of law, the law requireth that they should be legally pursued. But then it may be demanded, if a man had given lands at the common law, *in libero maritagio*, whether had the donees a fee simple without these words (heires), for that it appeareth by that which hath beene said before, that all gifts in taile were fee simple at the common law, and that the statute of *W.* 2, did not create any estate in fee taile, but out of an estate in fee simple. To this it is answered, that these words (*in liberum maritagium*) did create an estate in fee simple at the common law: and it is holden in 31 *E.* 3. Gard. 116. *Par ceux parolx in frankmariage les donees averont les terres a eux et a lour heires perenter eux engendres, et ceo est dit especial taile.* But yet betweene donees in frankmariage and other donees in speciall taile there be many notable diversities. If the king give land to a man and a woman, and the heires of their two bodies, and the woman die without issue, yet shall the man be tenant in taile *apres possibilitie*. But if the king give land to a man with a woman of his kindred in a frankmariage, and the woman dyeth without issue, the man in the king's case shall not hold it for his life, because the woman was the cause of the gift; but otherwise it is in the case of a common person, if lands be given to a man and a woman in especiall taile, and they are divorced *causâ præcontractûs*, both shall hold the lands for their lives; but in [p] case of frankmariage if they be so divorced, the woman shall enjoy the whole land, because she was the cause of the gift (1). If lands holden in socage [q] be given in especiall taile, and the donees die, the issue being within the age of 14 yeares, [r] the next of kinne of the part of the father, or of the part of the mother which can hap the custody shall have it, but in case of frankmariage the heire of the part of the mother shall have it, because as it hath been said she was the cause of the gift.

30 E. 1. tit. Formdon, 66. adjudg. acc. (2 Inst. 336.)

31 E. 3. tit. Gard. 116. Mirr. cap. 2. sect. 15. acc.

9 H. 3, Dower 202.
7 H. 4. 16.

[22. a.]

[p] 13 E. 3. tit. Ass. 19 E. 3. Ass. 83. 12 Ass. 22. 19 Ass. 2. 8 E. 3. Ass. 45. (F. N. B. 204.)

[q] Pl. Com. Carril's case.

[r] 17 H. 3. tit. Gard. 146. 27 E. 3. 79. (Post. 88. a.)

Sect. 18.

AND note, that this word (Talliare) *is the same as to set to some certaintie, or to limit to some certaine inheritance. And for that it is limited and put in certaine, what issue shall inherite by force of such gifts, and how long the inheritance shall endure, it is called in Latine,* feodum

(1) *Keilw.* 104. b. *Accord.* Hal. MSS. See also acc. Perk. Sect. 288.

feodum talliatum, i. e. hæreditas in quandam certitudinem limitata. *For if tenant in generall taile dieth without issue, the donor or his heires may enter as in their reversion* (2).

"*AND note.*" This in our author, throughout his three bookes, betokens some notable point of instruction worthy of more speciall observation, which is often [*s*] used by him, as you may perceive by the Sections noted in the margent (3). (Ante, 17. b.)

[*s*] Sect. 18. 37. 42, 43. 49. 50. 64. 72. 89, 90. 104. 108. 114. 116. 147. 158. 161. 168. 170. 183. 254. 279. 346. 387. 452. 467. 618, 619. 637. 642. 670. 682. 684. 711. 717. 719. 738.

"*Feodum talliatum*, i. e. *hæreditas in quandam certitudinem limitata.*" Here our author doth interpret what *feodum talliatum* is. Of all the estates taile most coarcted or restrained, that I finde in our bookes, is the estate taile in 39 Ass. pl. 20, where lands were given to a man and to his wife and to one heire of their bodies lawfully begotten, and to one heire of the body of that heire only: this case being adjudged in the point is an exception (some say) out of the generall rule put before by *Littleton*, Sect. 13, that all estates taile were fee simple at the common law; for (say they) by this limitation (*hæredi*) in the singular number the donees had not had a fee simple at the common law. *Vide Registrum Judiciale*, fo. 6, a gift make to a man *et hæredi masculo de corpore suo* (4). West. 2. cap. 3. Pl. Co. 251. n. 39 Ass. pl. 20. (1 Co. 66. 104. Ante, 8. b. 1 Ro. Ab. 838.) Sect. 13. Vid. Pl. Com. fo. 29. b. Regist. Judic. fo. 6.

Sect. 19.

IN the same manner it is of the tenant in especiall taile, &c. For in every gift in taile without more saying, the reversion of the fee simple is in the donor. And the donees and their issue shall do to the donor, and to his heires the like services, as the donor doth to his lord next paramont, except the donees in frankmarriage, who shall hold quietly from all manner of service (unlesse it be for fealtie) untill the fourth degree

---

(2) Lord Coke seems to lay too much stress on Littleton's use of *nota, &c.* and other words of a like kind. In the edition by Lettou and Machlinia, *&c.* is frequently omitted, and *item* is very often put where the other editions have *nota*, and *vice versâ*. This shews how very uncertain it is whether any peculiar force ought to be attributed to such words. Indeed where they really come from Littleton himself, they must in general be too slight a foundation for any considerable inference.—[Note 131.]

(3) *The issue in tail attainted in* vitâ patris; *after the death of the father the donor cannot enter, but the issue if pardoned may enter, and hold as special occupant, subject to the charges of the father.* 29 *Ass.* 61. Hal. MSS.—[Note 132.]

(4) In the case of Richards and lady Bergavenny, 2 Vern. 325, the court held a limitation to lady Bergavenny and such heir of her body as should be living at her death, with a remainder over, to be an estate tail. But see further on this subject ante, fol. 8. b. n. 4, where several authorities are referred to in order to enable the student to find in what case *heir* in the singular number ought to be construed *nomen collectivum*.—[Note 133.]

degree is past, and after the fourth degree is past the issue in the fifth degree, and so forth the other issues after him, shall hold of the donor or of his heires as they hold over, as before is said.

(2 Inst. 331. 333.) "*IN every gift in taile without more saying, the reversion of the fee simple is in the donor.*" This is wrought by the construction of the statute of *W.* 2. cap. 1. which hath turned the fee simple of the donee into a particular estate of inheritance, and the possibility of the donor, to a reversion in him expectant upon the estate taile, ☞ so as there be two inheritances of one land: yet this was doubted in our bookes [*t*], and there resolved according to *Littleton*. But I see no cause wherefore that point should be drawne in question, for at the same session of Parliament (in which the statute *de donis conditionalibus* was made) viz. ca. 3, it is expressly said, *vel per donum in quo reservatur reversio*, so as by the judgment of the same parliament a reversion was settled in the donor.

[22. b.]

[*t*] 12 E. 4. 23. 5 H. 7. 14. West. 2 ca. 13. Pl. Com. 247, 248. 251. 562. 2 E. 2. tit. Resceit, 147. 33 H. 6. 27. 39 E. 3. 18. 45 E. 3. 20. (Post. 142. b. Plowd. 151. 162. 196, 197. Cro. Cha. 400.)

"*The reversion of the fee simple is in the donor.*" A reversion is (1) where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate, as here in the case of *Litt.* Tenant in fee simple maketh gift in taile, so it is of a lease for life, or for yeares. If a man extend lands by force of a statute merchant, staple, recognizance or *elegit*, he leaveth a reversion in the conusor. But since *Littleton* wrote, the description must be more large upon the statute of [*a*] 27 *H.* 8, for at this day, if a man seised of lands in fee make a feoffment in fee, (and depart with his whole estate) and limit the use to his daughter for life, and after her decease, to the use of his sonne, in taile, and after to the use of the right heires of the feoffor; in this case, albeit he departed with the whole fee simple by the feoffment, and limited no use to himselfe, yet hath he a reversion (2); [*b*] for whensoever the ancestor takes an estate for life, and after a limitation is made to his right heires, the right heires shall not be purchasors. And here in this case when the limitation is to his right heires, and right heire he cannot have during his life (for *non est hæres viventis*) the law doth create an use in him during his life, untill the future use commeth *in esse*, and consequently the right heires cannot be purchasors; and no diversitie when the law creates the estate for life, and when the party. And all this was adjudged betweene [*c*] *Fenwicke* and *Mitford* in the king's bench: and if the limitation had been to the use of himselfe for life, and after to the use of another in taile, and after to the use of his owne right heires, the reversion of the fee had been in him, because the use of the fee continued over in him (3); and

[*a*] 27 H. 8. ca. 10. (Cro. Cha. 24. 1 Ro. Abr. 625. 1 Co. 104. b. 2 Co. 91. 2 Ro. Abr. 417. 1 Leon. 182.)

[*b*] 38 E. 3. 26. 27 E. 3. p. 118. 24 E. 3. 36. 40 E. 3.

[*c*] Tr. 31 Eliz. inter Penwicke & Mitford. 1 Leon. 256. 32 H. 8. Gard. 93. 28 H. 8. Dier, 8, 9, 10. &c. Buckenham's case. 5 Marie. Dier, 163. (1 Ro. Abr. 828. Mo. 284.)

the

(1) By what words a reversion will pass, see Vin. Abr. *Reversion*, G. and Com. Dig. *Estates*, B. 12.

(2) Vid. 3 & 4 *P. & M. Dy.* 134. contra. Hal. MSS. But see the case cited by lord Hale in the next note, and also ante 12. b. and note 2, there.

(3) Casus Com. Bedford, M. 34, 35 Eliz. Poph. n. 8. *Feoffment to the use of the feoffor for* 40 *years, remainder to B. in tail, remainder to the right heirs of*

the statute doth execute the possession to the use in the same plight, qualitie, and degree, as the use was limited.

[d] If a man make a gift in taile, or a lease for life, the remainder to his own right heirs, this remainder is void, and he hath the reversion in him, for the ancestor during his life beareth in his body (in judgment of law) all his heires, and therefore it is truly said that *hæres est pars antecessoris*. And this appeareth in a common case, that if land be given to a man and his heires, all his heires, are so totally in him, as he may give the lands to whom he will.

[d] 1 H. 5. 8. 4 H. 6. 20. 9 Eliz. Dier, Bromley's case.

[c] So it is if a man be seised of lands in fee, and by indenture make a lease for life, the remainder to the heirs male of his owne body this is a void remainder; for the donor cannot make his owne right heire a purchaser of an estate taile without departing of the whole fee simple (A) out of him (4): as if a man make a feoffment in fee to the use of himselfe for life and then to the use of the heires male of his body, this is a good estate taile executed in himselfe, and the limitation is good by way of use, because it is raised out of the state of the feoffees, which the feoffor departed with, and that is apparent, for a limitation of use to himselfe had without question beene good.

[c] Dier 5. Marie 156. Groswold's case adjudge. Bendlowes Serjeant in his report agreeth. (Heb. 36. 33. 1 Mod. 237. 1 Ro. Rep. 240.)

[f] If a man make a feoffment in fee to the use of himselfe in taile, and after to the use of the feoffee in fee, the feoffee hath no reversion, but in nature of a remainder, albeit the feoffor have the estate taile executed in him by the statute, and the feoffee is in by the common law, which is worthy of observation.

[f] 20 Eliz. Dier.

☞ To

---

of the feoffor. It is the old reversion, and the feoffor may devise it; for the use returned to the feoffor for want of consideration to retain it in the feoffee till the death of the feoffor. Hal. MSS.—See the earl of Bedford's case in Poph. 3. Vid. 27 *E.* 3. 8. 4 *H.* 6 20. 42 *Ass.* 2. 9 *E.* 3. 14. 10 *E.* 3. 48. *Lands granted by A. by fine for the life of A. remainder to A.'s right heires. It is a reversion in A. and he may grant it.* Hal. MSS. *Dy.* 237. *Fine to husband, as that which he and his wife have of his gift, which render to the conusor for life remainder to the right heirs of the husband. It is a void remainder, and the wife survivor shall have it for life.* Hal. MSS.—[Note 134.]

(A) The rule against a man making his right heir a purchaser, extends to fee as well as estate tail, nor must lord Coke be understood to the contrary. In Mr. Gwillim's edit. of Bacon's Ab., tit. *Remainder and Reversion*, amongst the additions, from a MS. I furnished, the rule is ingeniously accounted for by ld. ch. b. Gilbert. See title *Rem.* A. n. 2.

(4) *Where heir shall be purchaser Vid. fol.* 9. *b.* 11 *H.* 6. 13. *Devise to B. for life, remainder to C. in tail, remainder to the next* heir *of the devisor and the heires of his body, it is a purchase in the heir.* Quære *there if it had been* heirs *—Archer's case,* 1 *Rep.* 66. *b. Devise or conveyance to A. for life remainder to his* next heir male, *and to the heirs male of the body of such* heir male, *it is a purchase in the heir, because in the* singular *number, and the limitation is applied to it. Vid.* 1 *Rep.* 104. *Shellie's case. Use limited for life to A. remainder to the heirs male of the body of A. and the heirs male of the body of such heirs male. It is a limitation, and A. has a tail executed. But if the ancestor takes estate for years, remainder limited to the heirs male of his body, it doth not vest in the ancestor. Accord.* hic. *fol.* 13. *Hodgkinson's case.* Hal. MSS.—See Hodgkinson's case from lord Hale's MSS. at the end of n. 6. ante 14 a.—[Note 135.]

[g] 13 H. 7. 6. 28 H. 8. Dier, 12. (8 Co. 81. b. Cro. Jam. 201. Post. 271, b.)

☞ To conclude this point, [g] whosoever is seised of land, hath not only the estate of the land in him, but the right to take profits which is in nature of the use, and therefore when he makes a feoffment in fee without valuable consideration to divers particular uses, so much of the use as he disposeth not, is in him as his ancient use in point of reverter. As if a man be seised of two acres, the one holden by knights service by prioritie, and the other by knights service holden by posterioritie, and maketh a feoffment in fee of both acres to the use of himself and his heirs, the old use continues in him, and the prioritie and posterioritie remaine. So it is of lands of the part of the mother, the use shall go to the heire of the part of the mother, which could not be, if it were not the old use, but a thing newly created. The like law of lands of the custome of Borough-English, Gavelkind, &c. (1).

[23. a.]

5 E. 4. 7. 1 Co. 76. 84, 85. 100, &c. Chudley, 2 Co. 56. 57. 58. 77, 78. 4 Co. 22. 6 Co. 34, 43.

"The donees and their issue shall do to the donor, and to his heirs the like services, as the donor doth to his lord next paramount." The reason of this is, that when by construction of the said statute there was a reversion settled in the donor, for that the donee had an estate of inheritance, the judges resolved that he should hold of his donor, as his donor held over (2): as if the tenant had made a feoffment in fee at the common law, the feoffee should have holden of the feoffor as he held over, and before the statute of *W.* 2, the donee had holden of the donor as of his person, and now of him as of his reversion: but if a man make a lease for life or years, and reserve nothing, he shall have fealtie only and no rent, though the lessor hold over by rent, &c. And this, that *Littleton* saith, is regularly true, if the donor maketh no speciall reservation, for then the speciall reservation excludes the tenure which the law would create. As if tenant by knights service maketh a gift in taile reserving fealtie and rent, the donee shall hold in socage, by fealtie and rent, and not by knights service (3). But if a man hold land of the king in grand serjeantie, and maketh a gift in taile generally, in this case the donee shall not hold of the donor by grand serjeantie, because no man can hold by grand serjeantie, but of the king only, as hereafter shall be said; and therefore seeing grand serjeantie doth include knights service, he shall in that case hold of the donor by

(Post. 143. a.)

---

(1) See further on this subject the several books cited ante 12. b. in n. 2, to which add Prec. in Cha. 222. 319, and Plowd. 545, and note f, in the English translation of Plowden. It may be an useful hint to observe, that the English edition of Mr. Plowden's Commentaries, which most deservedly bear as high a character as any book of Reports ever published in our law, has a great number of additional references and some notes; and that both of these are generally very pertinent, and show great industry and judgment in the editor.—[Note 136.]

(2) *And therefore gift in tail saving the reversion* tenend' de capitalibus dominis feodi per servitia debita *is void, and the donee shall hold of the donor, as he holds over.* 6 *E.* 3. 28. 45 *E.* 3. 27. 2 *E.* 4. 5. 4 *H.* 6. 20. *Champernon's case.* Vid. 27 *H.* 8. 18. Hal. MSS.—[Note 137.]

(3) *But if tenant by chivalry makes gift in tail rendering rent only, the tenure shall be chivalry but the rent* accumulative. *Vid.* hic. 52. *Dy.* 52. *Keilw.* 125. —Hal. MSS.—[Note 138.]

by knights service. If a man seised of land in the right of his wife holden by knights service giveth the same lands in taile generally, the donee shall not hold of him by knights service, because his wife held the land, and he had nothing but in her right. And in that case the baron hath gained a new reversion by wrong, and therefore such a donee shall doe fealtie only (4). (2 Ro. Abr. 501.)

A. seised of two acres of land holdeth the one of *B.* by knights service, and twelve pence rent, and the other of *C.* in socage and one pennie rent, and makes a gift in taile of both acres without any expresse reservation of any tenure. In this case the donor hath but one reversion. And yet he shall make several avowries, because there be soverall tenures created by law in respect of the severall tenures over: and the avowrie is made in respect of the tenures. (Doctr. Plac. 53.)

Lord, mesne and tenant, the tenant holdeth by four pence, and the mesne by twelve pence, the tenant makes a gift in taile without reserving any thing, by reason whereof he holdeth by four pence, in respect of the tenure over. Afterwards the reversion escheats, now shall the donee hold by twelve pence, for the mesnaltie which was four pence is extinct, and the law reserved the tenure upon the gift in taile, in respect of the mesnaltie, and when the mesnaltie is extinct, the former rent between the donor and donee is extinct also; and then by the same reason that the donee shall take advantage, if the donor by release or confirmation had holden by lesser services, by the same reason he shall be prejudiced, when he holdeth by greater services (5). (2 Ro. Abr. 501.) 49 E. 3. 10.

"*Except the donees in frankmarriage.*" It is to be understood, that although the land be given *in liberum maritagium*, in fee marriage generally, yet first the law doth make a limitation of this word (free), viz. till the fourth degree be past, for the reason that our author here yeeldeth (6). And 2. albeit it be free marriage, yet the donees and their issues until the fourth degree be past shall do fealtie, for that it is incident to everie tenure (except frankealmoigne) and cannot be separated from it, and therefore the donees and their issues shall hold it as freely till the fourth degree be past as the donor can make it. See more of this in the Chapter of Frankalmoigne. Bracton, lib. 2. fo. 21. Britton, c. 119. Fleta, lib. 3. cap. 11. & lib. 6. cap. 2. Vid. Sect. 17. 20. (Ante 11. b. Post. 178. a.)

---

(4) Quære *of this case, for the new reversion is held in chivalry.* *Vid.* 4 *H.* 6. 21. *by Balth. B. holds of A. in chivalry, and gives in tail to C. who makes lease to R. for life and dies. The issue of C. shall be in ward to A. not to B. the donor.* Hal. MSS.—[Note 139.]

(5) Vid. *Keilw.* 125. 129.—Hal. MSS.

(6) *And therefore after the fourth degree the issue shall have formedon and count of a gift in frankmarriage; but the warranty and acquittal are gone.* 12 *H.* 4. 9. Vid. 10 *E.* 3. 25. 4 *E.* 3. 5. *Attornment by donee in frankmarriage.*—Hal. MSS.—[Note 140.]

Sect. 20.

AND the degrees in frankmarriage shall be accounted in this manner, viz. from the donor to the donees in frankmarriage the first degree, because the wife that is one of the donees ought to be daughter, sister, or other cosen to the donor. And from the donees unto their issue shall be accounted the second degree, and from their issue unto their issue the third degree, and so forth. And the reason is, because that after every such gift, the issues of the donor, and the issues of the donees after the fourth degree past of both parties in such forme to be accounted, may by the law of the holy church entermarie (1). *And that the donee in frankmarriage shall be said to be the first degree of the foure degrees, a man may see in a plea upon a writ of right of ward, P.* 31 *E.* 3, *where the pl. pleadeth that his great grandfather was seised of certaine lands, &c. and held the same of another by knights service, &c. who gave the land to one* Ralph Holland *with his sister in frankmarriage, &c.*

[a] Vide Sect. 17. 19. 138. 268, 269, 271. 733.

WHERE *Littleton* saith [a] that the donees in frankmariage shall hold by fealtie only until the fourth degree be past, and then the issue in the fifth degree shall hold of the donor as the donor holdeth over, [23. b.]

[b] Glanvill. lib. 7. cap. 18. Bract. lib. 2. fol. 21. Britton, c. 119. Fleta, lib. 3. cap. 11. & lib. 6. cap. 2.

[b] *Vide Bracton ubi supra, Ita quod ille cui terra sic data fuit, nullum inde faciat servitium usque ad tertium hæredem, et usque quartum gradum, ita quod tertius hæres sit inclusus.* And herewith also agreeth *Fleta ubi supra.* And the [c] learning of degrees set out in the civil and canon law (wherein I find some difference) is worth the knowledge, to the end that *Littleton* and the law in this case may the better be understood, which I will divide into certain rules; whereof the first is, that a person added to a person in the line of consanguinitie maketh a degree. And it is to be understood, that a line is threefold, viz. the line ascending, descending, and collaterall. And first for example, of the ascending line, take the sonne and add the father, and it is one degree ascending; add the grandfather to the father, and it is a second degree ascending.

[c] Vid. 10 E. 3. tit. Avowry, 157. 31 E. 3. Cessavit, 22. 31 E. 3. Gard. 116. 21 H. 7. 30.

Rule 1.

So as how many persons there be, take away one, and you have the number of degrees. If there be foure persons

(Plowd. 444.)

Rule 2.

---

(1) Nota, *by the intent of Littleton in some cases before the fourth degree passes from the donor there may be intermarriage, and yet the land shall be holden quit till it be passed. A. gives land in frank-marriage with the daughter of his sister, the issue of A. and the donee may intermarry after the fourth degree, yet the fourth degree shall not be passed* quoad *the tenure.* Vid. pag. sequent. *A. gives to the daughter of N. in frank-marriage, C. and the issue of N. may intermarry, because they are in* quinto gradu consanguinitatis, *yet this is only the first degree* quoad *the privilege of tenure.* Hal. MSS. There is something apparently wanting in the state of lord Hale's latter case; for it is not expressed who *C.* is, and how *C.* and the issue of N. are related in the *fifth* degree. But this accidental omission may be easily supplied, and the doctrine will be equally intelligible by only supposing the consanguinity to be as lord Hale's case requires.—[Note 141.]

persons it is the third degree, if five the fourth, for one must exceed, and then you have the degree. Likewise by the descending, take the father, and add the sonne, and it is one degree; then take the sonne and add the grandchild, and it is the second degree; and so likewise further. Wherein observe that the father, son and grandchild, albeit there are three persons, yet they make but two degrees, because (as it hath been said) one must exceed for making a degree.

Rule 3.] It is to be noted, that in every line the person must be reckoned from whom the computation is made. And there is no difference between the canon and civill law in the ascending and descending line (2); for those whom the civilians do reckon in the second degree, the canonists do reckon in the first (3); and those whom they place in the fourth, these place ☞ in the second. Therefore if we will know in what degree two of kindred do stand according to the civill law, we must begin our reckoning from one, by ascending to the person from whom both are branched, and then by descending to the other to whom we do count, and it will appeare in what degree they are. For example, in brothers and sisters sonnes, take one of them and ascend to his father, there is one degree; from the father to the grandfather, that is the second degree; then descend from the grandfather to his sonne, that is the third degree; then from his sonne to his sonne, that is the fourth. But by the canon law there is another computation, for the canonists do ever begin from the stocke, namely, from the person of whom they do descend; of whose distance the question is. For example, if the question be, in what degree the sonnes of two brothers stand by the canon law, we must begin from the grandfather and descend to one sonne, that is one degree; then descend to his

[24. a.]

(Vid. Stat. 32 H. 8. cap. 38. of marriages. 2 Inst. 683. 25 H. 8. cap. 22.)

(Plowd. 444.)

---

(2) The words *but in the collateral line there is* seem necessary to the sense of this passage; and though not to be found in any edition of lord Coke's Commentary, were probably omitted by mistake.

(3)
```
   A.        G. and A. are in the fourth degree per utramque legem.
  ___        N. and K. are in the fourth degree by the canon law, but
C . . . B . . . D  in the eighth degree by the civil law. N. and C. are in the
:       :       :  forth degree by the canon, in the fifth by the civil law.
H . . . E . . . L  Vide pro computatione graduum consanguinitatis juxta
:       :       :  utramque legem Caus. 35. quæst. 5. pars. 2 in Decret.
I . . . F . . . M  Juxta jura canonica.—I. Ascendentium et descendentium
:       :       :  quot sunt personæ, de quibus quæritur, computatis inter-
K . . . G . . . N  mediis, primâ demptâ, tot sunt gradus inter eas. II. Pro-
```
collateralibus. Collateralium in lineâ æquali quoto gradu quis distat à stipite communi, toto distant inter se vel sibi attinent. Collateralium in lineâ inæquali quoto gradu remotior distat à communi stipite, toto inter se distant.—*Juxta jus civile.*—I. In lineâ rectâ ascendentium et descendentium quot sunt personæ, de quibus quæritur, computatis intermediis, unâ demptâ, tot sunt gradus inter eas. II. Collateralium. 1. In lineâ æquali, quota gradu qui distat à communi stipite, toto duplicato distant inter se, vel sibi attinent; nam quælibet persona facit gradum. 2. In lineâ inæquali, quot sunt personæ, stipite dempto, tot sunt gradus.—Nota in contractibus matrimonialibus computatio canonica est recepta, et hoc per decretalem Innocentis tertii in concilio generali. Hal. MSS.—[Note 142.]

his sonne, that is another degree; then descend againe from the grandfather to his other sonne, that is one degree; then descend to his sonne, that is a second degree; so in what degree either of them are distant from the common stocke, in the same degree they are distant betweene themselves: and if they be not equally distant, then we must observe another rule. In what degree the most remote is distant from the common stocke, in the same degree they are distant betweene themselves, and so the most remote maketh the degree. And albeit the donee be a cousin in the third or fourth degree from the donor, yet in this computation it maketh the first degree: *gradus dicitur a gradiendo, quia gradiendo ascenditur et descenditur.* And thus much of the civile and canon law is necessarie to the knowledge of the common law on this point (1): and herewith agreeth our author in the words following.

"*The issues of the donor, and the issues of the donees after the fourth degree past of both parties in such forme to be accounted, may by the law of the holy church entermarie.*" (Of the holy Church). [*d*] So as hereby it appeareth, that the computation of the degrees in this case, must be according to the canon law. But it is necessarie to be knowne concerning marriages betweene persons of kindred one to another, that it is enacted [*e*] by the statute of 32 *H.* 8, that no reservation or prohibition (God's law except) shall trouble or impeach any marriage without the Levitical degrees (2).

[*d*] Brit. c. 119. Accord. Flet. lib. 3. ca. 11. & lib. 6. c. 2.
[*e*] 32 H. 8. ca. 38.

The case vouched by *Littleton* in 31 *E.* 3, you shall finde abridged by *Fitz.* tit. Gard. 116. And albeit this yeare of 31 *E.* 3, was never in print till *Fitzherbert* did abridge it and publish it in print, *anno* 11 *H.* 8, and goeth under the name of broken yeares, yet here it appeareth by our author, that the same is of authoritie in law, as hereafter also in other places shall be observed.

---

(1) See further as to consanguinity and the manner of computing its degrees by the civil and canon law, Blackst. Law Tracts. 8, vo. ed. v. 1. p. 14, and 173, and the annotations in the edit. of the *Corp. Jur. Canon.* by the *Pithæi* on that part of Gratian's *Decretum* cited by lord Hale, and Inst. lib. 3. tit. 6, et Dig. 38. tit. 10, and the commentators on those titles.

(2) *The following passages from the canon law are in* Hal. MSS.—Extrav. de consang. et affin. c. 9. Vir qui à stipite quarto gradu mulieri, quæ ex alio latere distat quinto, licitè copulatur.—Nota antiquitus usque ad septimam generationem nullus de suâ cognatione ducat uxorem. Decret 2. Causa 52. quæst. 2. can. 11. Sed in concilio generali sub Innocentio 3° prohibitio copulæ conjugalis quartum consanguinitatis et affinitatis non excedat, viz. in collateralibus; sed in directè ascendentibus prohibetur contractus matrimonialis in infinitum. Extrav. de consanguinitat, &c. can. 8.—See further as to the prohibition of marriages for affinity or consanguinity in Tayl. Elem. Civ. L. 314. Inst. lib. 1. tit. 10. Dig. lib. 23. tit. 2. Cod. lib. 5. tit. 4. Nov. 74. Gibs. Cod. Jur. Ecclesiast. Anglican. 1st ed. v. 1. p. 494. Burn. Eccles. L. tit. *Marriage.* Vin. Abr. *Marriage.* E.—[Note 143.]

Sect. 21.

AND all these entailes aforesaid be specified in the said statute of W. 2. *Also there be divers other estates in taile, though they be not by expresse words specified in the said statute, but they are taken by the equitie of the same statute. As if lands be given to a man, and to his heires males of his bodie begotten; in this case his issue male shall inherit, and the issue female shall never inherit, and yet in the other entailes aforesaid, it is otherwise.*

"*AND all these entailes aforesaid be specified in the said statute of W. 2.*" And so it appeareth by the said statute. "*Also there be divers other estates in taile, &c.*" And herewith agreeth *Carbonel's* case, 33 *Edw.* 3, *titulo Taile*, 5.

That the cases of the statute are set down but for examples of estates taile, generall and speciall, and not to exclude other estates taile. 3 *E.* 3. 32. 18 *Ass. p.* 5. 18 *E.* 3. 46. 1 *Mar. Dyer*, 46. Pl. Com. Seignior *Barkley's* case, fo. 251. For, *Exempla illustrant non restringunt legem.*

3 E. 3. 32. 18 E. 3. 46. 18 Ass. p. 5. 1 Mar. Di. 46. Pl. Com. 251. (5 Co. 99. 3 Co. 31.)

[24. b.] ☞ "*Equitie*" is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischiefe, or cause of the making of the same, shall be within the same remedie that the statute provideth: and the reason hereof is, that for the law-makers could not possibly set downe all cases in expresse terms: *Æquitas est convenientia rerum quæ cuncta coæquiparat, et quæ in paribus rationibus paria jura et judicia desiderat.* And againe, *Æquitas est perfecta quædam ratio quæ jus scriptum interpretatur et emendat, nullâ scripturâ comprehensa, sed solùm in verâ ratione consistens. Æquitas est quasi æqualitas. Bonus judex secundum æquum et bonum judicat, et æquitatem stricto juri præfert. Et jus respicit æquitatem* (1).

Bract. lib. 4. fol. 186.

"*As if lands be given to a man, and to* [*f*] *his heires males of his bodie begotten; in this case his issue male shall inherit, and the issue female shall never inherit, &c.*" This shall be explained afterward, Sect. 24. (2).

[*f*] 18 Ass. p. 5. 18 E. 3. 46. 33 E. 3. tit. Taile 5. 3 E. 3. 32.

Pl. Com. Seignior Barkley's case. 1 Mar. Dy. 46. V. Sect. 24.

Sect. 22 & 23.

IN the same manner it is, if lands or tenements be given to a man and to his heires females of his bodie begotten; in this case his issue female shall inherit by force and forme of the said gift, and not his issue male. For in such cases of gifts in taile, the will of the donor ought to be observed, who ought to inherit, and who not.

AND

---

(1) As to the construing statutes by equity, see Plowd. 9, 10. 17, 18. 36. 46. 53. 57. 59. 82. 88. 109. 124. 177. 204. 244. 363, 364. 366. 371. 464. 466. See also Vin. Abr. *Statutes, E.* 6; Hatt. Treat. on Stat.; Ash. Exposit. of Stat. by Eq.; and Com. Dig. *Parliament*, R. 10.

(2) *And see such special heir is in by descent, and shall have his age*, 24 *E.* 3. 60.—Hal. MSS.—[Note 144.]

AND in case where lands or tenements be given to a man, and to the heires males of his bodie, and he hath issue two sonnes, and dieth, and the eldest son enter as heire male, and hath issue a daughter, and dieth, his brother shall have the land, and not the daughter, for that the brother is heire male. But otherwise it is in the other entailes, which are specified in the sayd statute.

THESE two Sections, or any thing therein, do need no explanation, in respect they shall be also explained hereafter in the next Section, saving onely these words (*who ought to inherit*) are verie observable, for they implie a diversitie betweene a discent and a purchase. For when a man giveth lands to a man and the heires females of his body, and dyeth, having issue a son and a daughter, the daughter shall inherit; for the will of the donor (the statute working with it) shall be observed. But in case [*g*] of a purchase it is otherwise; for if *A.* have issue a sonne and a daughter, and a lease for life be made, the remainder to the heires females of the bodie of *A.* *A.* dieth, the heire female can take nothing, because she is not heire (3); for she must be both heire

(Post. 164. 1 Co. 103, 104.) (Hob. 31.) [*g*] 9 H. 6. 24. 11 H. 6. 13, 14. 37 H. 8. Br. tit. Done, 42. tit. Nosme 1, & 40. Dyer, 23. 23 El. 374. Shelly's case, 1 Co.

(3) *A. hath issue a son and a daughter. The daughter marries B. and has issue two daughters. A. devises to his son;* but if he die without issue my land shall go to my right heirs of my name and posterity, *and dies. The son dies without issue. Ruled, that the land shall not go to the uncle, for though of his name, he is not heir, for the issue of the daughter is heir. H.* 11 *Jac. C. B. Counder and Clerke, Mo.* 863, *and Hob.* 29. Hal. MSS.—See the same case in 1 Brownl. 129.—This case of Counder and Clerke is apparently cited by lord Hale in confirmation of lord Coke's position as to the necessity of being *heir* as well as *female,* in order to take by *purchase* under a limitation to the *heir female;* and it is observable, that there is not one word in lord Hale's note intimating the least disapprobation of the doctrine. However, it so happens, that in more modern times the propriety of this doctrine has been questioned by very respectable persons, who have treated it as equally unsupported by reason and authorities of law. But perhaps this censure of lord Coke may have been too hasty; and it may be doubted, whether there is a passage in all his works, more capable of standing the severest test of modern criticism. Therefore the remainder of this note shall be employed in the defence of lord Coke's doctrine, and in explaining the qualifications with which it ought to be understood; and for this purpose it shall be formally examined, first as a reasonable rule of construction, and secondly by the authorities and determined cases.

When land is given to the *heirs female of the body* of one, either not having *any* preceding estate, or not having a preceding estate of *freehold,* the words cannot be construed as giving an inheritable quality to an estate already vested and limiting the course of descent, but necessarily must operate on the first taker as a *descriptio personæ* and *name of purchase;* and lord Coke's doctrine means nothing more, than that those claiming under such a description should *fully* answer to it, and consequently that such as have only *half* of the description should be excluded. Now it is to be considered, that the description consists of *two* parts, one requiring that the donee should be *heir,* the *other* that the donee should be *female;* and if being *heir* without being *female* will not give a title, why on the other hand should being *female,* without being also *heir,* be sufficient? It is not a solid objection to lord Coke to say, that his construction is strict, literal, and founded on a rigid adherence to the proper and

heire and heire female, which she is not, because the brother is heire, and therefore the will of the giver cannot be observed, because

---

and technical sense of words; because it is reasonable to presume in favour of the established sense of all words, unless there are *other* words or some special circumstances to shew a *different* sense in the mind of the person using them, and lord Coke apparently intends to put a case in which *neither* occur. But it has been observed, that where *heirs female of the body* are words of *limitation*, a female may take by *descent* as *special heir*, though not *heir general;* and it is asked, why should not the same person be equally capable of taking by *purchase?* This objection is plausible but not unanswerable. Where *heirs female of the body* are words of *limitation*, they are necessarily used to regulate the *succession* in a *special* manner, which object of the donor cannot be attainted without a continual exclusion of *heirs general* when they happen to be males; and this establishment of a *new* kind of heirship is a ground for presuming that the donor by *heirs* means, not those who are so by the *general* law of descent, but those who are so according to the *special* course of descent he professes to introduce. But where *heirs female* are only words of *purchase*, they are used to describe who shall take the estate at *one* particular *time* and in *one instance*, and establishing a *new* course of succession is not the object in view; and it not being so, the ground of presumption, which governs the former case, is wanting. But it may be insisted, that, in the case put by lord Coke, *heirs female of the body* have a *double* effect, and after operating as words of *purchase*, operate a *second* time as words of *limitation*, and being allowed to point at an *heir special* in their *latter* application, ought to have the same construction in the *former;* for in *such* a case it would be strange to suppose, that *heirs female* were used in two different senses. This is refining on the objection made to lord Coke's doctrine, and placing it on a stronger light than it hitherto appears to have been urged. But even in this shape the objection would not prove any thing absurd in lord Coke's *general doctrine*, and would only shew that he had chosen an improper example for its illustration, and that he should have stated a case in which *heirs female* can only operate as words of *purchase*, as where a gift is made *to the heirs female of the body of A. and their heirs*, or *the heirs of their bodies*. So much for the propriety of lord Coke's doctrine independently of authorities; but if it is compared with them, it will appear still more defensible, and by them it is even applied to the same sort of case as is stated by him. The necessity of being *actually heir* in the strict sense of the word, to take by *purchase* under that description, appears by authorities of three kinds.—The first order of cases consists of those, by which it has been settled, that if land is given to *A.* for life, with remainder to the *heirs*, or *heires of the body* of *B.* and *A.* dies before *B.* or *B.* is attainted of felony, and afterwards dies before *A.* the remainder becomes void. In the former case it is so, because *B.* being living at the determination of the particular estate, no person can *then* answer to the description of his heir, for *non est hæres viventis*. In the latter case it is so, because *B.'s* attainder, by corrupting his blood, prevents his having an heir. Now in *both* these cases there is as much reason for departing from the rigid sense of the word *heirs*, and presuming in favour of an *heir apparent* in the *first* case, and of such person *as would be heir* if there was not an attainder in the *second*, as there is for presuming in favour of an *heir special* in the case of a gift to the *heirs female;* and yet the doctrine is so fixed by authorities, that the judges of modern times have not yet deviated from it even in the case of *last wills*, except when induced to adopt a less strict construction by some *additional* words strongly expressive of using *heirs* in a *special* sense, as where land is devised *to the heir male of A. now living*. See post. 378. Hussey's case, Bro. Abr. *Done*, 61, the case of James

because here is no gift, and therefore the statute cannot worke thereupon. And so it is if a man hath a sonne and a daughter, and

---

James and Richardson, Pollexf. 457, that of Burchett and Durdant, 2 Ventr. 311, Darbison and Beaumond, in Vin. Abr. *Devise*, U. b. pl. 5, but more accurately in 1 P. Wms. 229, and Fortesc. Rep. 18, and that of Frogmorton and Wharrey, Wils. vol. 2. part 3. page 125, and 144. See further Vin. Ab. *Remainder*, I. —Another series of authorities, conformable to lord Coke's doctrine, consists of cases, in which it has been agreed, that where *heir* is a word of *purchase*, the *heir* at *common law* shall take *Gavelkind* or *Borough English* land, unless the *customary* heir is *expressly* mentioned, though if used as a word of *limitation*, the *customary* heir shall take without being named. See Bro. Abr. *Discent*, 59. See also ante, 10. a. and n. 4. there, and the case of Starkey and Starkey, Trin. 19 G. 2, in the Exch. 5 N. Abr. 404. This rule in respect to *customary* land is a very cogent argument for lord Coke in point of authority; for the property which is the *subject* of the gift, furnishes a very colourable pretence for preferring the *customary* heir; and the peculiar descent of the land by *force* of the *custom* in the person who thus takes by purchase is precisely the same sort of argument for the *customary* heir, as those who differ from lord Coke draw from the special descent by force of the gift where *heirs female of the body* are words of *limitation*. On a nice comparison it will be found, that the analogy between the gift of the *customary* land to *heirs*, and the gift of *common law* land to *heirs female of the body*, is almost perfect; for in both cases the words operate first as words of *purchase*, and then as words of *limitation*; and as in the latter case the heir female by *purchase* must be the *heir at common law*, and the heir by *descent* must be a *special* heir, according to the course of descent prescribed by the donor, so in the former case the heir by *purchase* is the heir at *common law*, and the heir by *descent* is the heir special according to the *custom*.—But the authorities of the *third* kind are those, which occur in respect to gifts to heirs *male* or *female*, and therefore apply more closely. Of these the earliest is John Farringdon's case, 9 H. 6. 23. and 11 H. 6. 12. in which one question was, whether a great-grandson could take by purchase under a remainder devised to the testator's *next heir male and the heirs male of his body*, the great grandson's mother, who was the testator's *heir general*, being alive when the estates precedent to the remainder determined. The case was argued twice, but there is an *adjornatur* in the Year Book, and what was the opinion of the court is not any where mentioned, but there is reason for supposing, that it was against the remainder; for in 20 H. 6. 44. Newton, *then* a judge, though he had before argued as counsel for the remainder in Farringdon's case, lays it down as clear law, that if land is given to *A.* for life, remainder to the right heirs *male* of the body of *B.* to hold to them and their heirs for ever, the son of a daughter of *B.* being his heir, may take notwithstanding he makes out his description through a *female*; and Fortescue, chief justice, assents to the position. This construction of *heirs male of the body* as words of purchase, being attended to, will be found almost necessarily to be a clear authority with lord Coke; for it shews, that as words of *purchase* they describe *males* being also *heirs general*, whereas as words of *limitation* it is agreed they have a different import, and signify such males as shall be *heirs special* according to the particular course of descent marked out by the donor, though they do not happen to be *heirs general*; which distinction is the whole amount of lord Coke's doctrine. But the next authority, which is in Bro. Abr. *Done*, 61, applies more directly. There lord Brooke, after mentioning the difference taken by Ellerker in Farringdon's case between *descent* and *purchase*, adds in confirmation of it, that *by* Hare, master of the Rolls, an antient apprentice, *there is a difference between a gift*

in

and dieth, and lands be given to the daughter, and the heires females of the bodie of her father, the daughter shall take nothing (Post 26, b.)

☞

in possession to a man and his heirs female, &c. and a gift to a stranger the remainder to the heirs female of another, for there heirs in deed *must be when the remainder falls, and otherwise the remainder is void for ever.* The same doctrine is in Plowd. Quær. 87, and 133, and the very learned author illustrates it by a case, the same as that stated by lord Coke. In *Quære* 87, the words of the book are, *If a remainder is appointed to the right heirs female of the body of* I. S. *who dies, having a son and daughter, the remainder shall be void; because the daughter cannot have it, in regard that she is not heir, though she be female.* The next authority is Shelley's case, which arose between the second son of Edward Shelley and a *posthumous* son of Edward's deceased eldest son. One point was whether the eldest son could take by *purchase*, under a remainder *to the heires male of Edward's body, and the heires male of the bodies of such heirs male*, in which case his estate would not have been devested by the birth of the posthumous son of his brother, the eldest son having left a daughter, who at Edward's death was his *heir general.* Judgment was given against the second son; but from the report of lord Coke and More, it seems not to have been absolutely requisite to have decided whether the second son could take by *purchase;* for the judges held that on account of the preceding use for life to Edward, the remainder operated as words of *limitation*, though Edward died before the use to him could arise, and that so the second son took in course and nature of a *descent*, till the birth of his brother's posthumous son, who then became entitled. See Mo. 140, and 1 Co. 106. However, lord Dyer in his report of the case places the remainder in *both* points of view, and besides observing that by *descent* the second son could only take the remainder till the birth of his elder brother's posthumous son, also says, that *he could not have it as a purchaser, because he was not heir of the body of his father, for the daughter of the eldest son was heir general, and the second son was not heir male of the body of his father unless he was heir as well as male.* These words from lord Dyer, when it is considered that he was one of the judges on whose opinion Shelley's case was decided, and that they are introduced to explain the reason of the judgmens, are very strong evidence, that the judges in Shelley's case gave their sanction to lord Coke's doctrine in the *full* extent of it, that is, in the case of a gift where *heirs male of the body* were both words of purchase and of limitation; and lord Dyer's authority ought to have the greater weight, because he is not contradicted by any other report of the same case; not even by lord Anderson, who was counsel for the second son, for he only takes notice of lord Coke's account of the reasons of the judgment, by observing that they were not mentioned in court. See 1 And. 71. Accordingly Mr. serjeant Rolle cites Shelley's case as having determined the point. See 2 Ro. Abr. 416. F. pl. 5. Ashenhurst's case, Mich. 7 Jam. is the next authority, and in that land was devised to executors till 900*l.* should be raised for the preferment of the testator's three daughters, and afterwards to his right heirs males for ever, and one Board was found by special verdict to be the *heir male;* but the court of king's bench held that he could not take the remainder, because the three daughters were the *heirs general;* and in Easter, 17 James, the judgment was affirmed in the exchequer chamber. This case is the stronger, because it arose on a will, and the testator, in the devise to his *heirs male*, mentions his *heirs general*, which no doubt was urged as a circumstance to shew that the testator meant a *special* kind of heir, and might have warranted a departure from the strict sense of *heir* without overturning lord Coke's general rule. See Hob. 34. and Palm. 50. *Counden* and *Clerke* already stated from lord Hobart at the beginning of this note in another case where

☞ nothing but an estate for life, because there is no such person she being not heire. But where a gift [25. a.]

is

where a *devise* to *heirs male* could not take effect, because the *heires general* were *females;* and this judgment appears to have been also affirmed on error in B. R. See Jenk. Cent. 294. There are several modern determinations to the same purpose. Southcott and Stowell, which was adjudged about the 29 of Cha. 2, one having two sons covenanted to stand seised to the use of the eldest in special tail male, remainder to the heirs male of the covenantor, or according to one report of the case the heirs male *of his body*, and for want of such issue to his own right heirs. The eldest son dies, leaving a son and daughter; the covenantor dies, and then the son of the covenantor's eldest son; and the question was, whether the second son or the daughters of the eldest son should have the estate. The court determined in favour of the second son because the grandson survived the grandfather, and being *heir general* as well as *male* could take either by *purchase* or *descent* on his death, and therefore it was immaterial whether an estate for life arose to the covenantor by implication or not; but it was agreed by the whole court, and even by the counsel for the second son, that if the grandson had not survived, the second son could not have taken by *purchase*, because his nieces would have been *heirs general*, and consequently he could not have been complete heir. See 1 Freem. 216. 225. 1 Mod. 226. 237. 2 Mod. 207. and 3 Kebl. 704. In 1695, lord keeper Somers, in the case of *Starling* and *Elrick*, decred against one who claimed to to take by purchase under a devise to *heirs male*, because a *female* was the *heir general*. See Prec. in Chanc. 54. The case of Ford and lord Ossulston, which was determined in Mich. 7 Ann. by the king's bench, is still stronger; for in that one Ford having issue three sons and a daughter, and also a brother, devised to his three sons successively in tail male, with remainder to his own right heirs male for ever, and the three sons being dead without issue, the whole court held, that the brother could not take as male heir, 1, because a devise to heirs male operates as a limitation to *heirs male* of the body, and the brother could not be heir male of the devisor's body: 2, because the remainder to the heirs male were words of purchase, and by purchase the brother could not take as heir male, his niece being the heir at common law; and so jealous was lord chief justice Holt of departing from the established doctrine, that notwithstanding the special circumstances in the case of Pybus and Mitford, which will presently be stated, he doubted the authority of that case. See 3 Salk. 336. 11 Mod. 189, and Vin. Abr. *Devise*. U. b. pl. 2. in marg. The doctrine was thought to be so firmly settled by this last case, that in 1722 lord ch. Macclesfield, in Dawes and Ferrers, which was a case similar to that of Ford and Ossulston, interrupted the counsel for the person claiming as *heir male*, by saying that *he would not suffer the bar to dispute what was the land-mark and foundation of the law;* adding, that in the case of *Ford* and *lord Ossulston* the points had been determined on *trials at bar in every court in Westminster Hall, and appeared to be so very plain a case, that in the king's bench the plaintiff's own counsel would not ask a special verdict.* See 2 P. Wms. 1, and Prec. in Chan. 54. However it was not thought proper to acquiesce in this opinion of lord Macclesfield, and a bill of review being brought to reverse his decree, lord ch. Hardwicke directed a case for the opinion of the king's bench: but the four judges of that court followed lord Macclesfield, and the person under whom the claim was made not being *heir general*, they, in February, 1743, certified, that *he could not take by the description of right heir male.* See the certificate in Vin. Abr. *Devise*, W. b. in a note on pl. 13. Such is the list of grave authorities which confirm lord Coke's doctrine as to the necessity of being *very heir*, in order to take by *purchase*

under

is made to a man, and to the heires female of his bodie, there the

under the description of *heir male* or *heir female*, whether *of the body* or not; and if they wanted aid from his name, it will scarce be denied by the coldest of his admirers, that his private opinion on a point of law he had so fully considered, will even in these times, when perhaps we are too apt to decry those ancient authors whose writings are still the grand sources of information and instruction, be no *mean* addition to their weight. However it must be confessed, that there are some cases, in which the doctrine has been deviated from; but all of them, except one, are determinations *since* his time, and besides, most of them may rather be deemed *exceptions* to lord Coke's *general rule*, than proofs of its *non-existence*. The earliest of these is a case in the time of Elizabeth, and cited by lord Hale in *Pybus* and *Mitford*, 1 Ventr. 381. A son of the testator's brother was admitted to take under a *devise* to the testator's *heir male*, though he left three daughters; but the reason was, because the testator introduced the devise with taking notice that his brother had left a son, and that he himself had three daughters who were his *right heirs*, and he also gave the daughters 2000*l.* on condition not to trouble the *heir*. In this case the *special* intent of *heir male* is so marked by the *other* words, as clearly to take it out of the general rule; and that lord Hale meant to cite it as an *exception* appears from his saying, that it is not inconsistent with *Counden* and *Clerke*. See 1 Ventr. 382. *Bowman* and *Yates*, 1 Cha. Cas. 145, is another case which was determined on *special* circumstances; for the son of a second marriage was allowed to take a rent charge under a limitation to heirs male by a second wife, though not strictly heir, there being a son of the first wife, because the settlement was apparently made as a provision for the issue of the second marriage. The case of Pybus and Mitford, adjudged 36 Ch. 2, is liable to a similar observation. One, who had issue two sons by two different wives, covenanted to stand seised to the use of the heirs male of his body by his second wife. The point determined by three judges against one was, that an use arose to the covenantor for life, and that so the limitation to his heirs male on the body of his second wife being a remainder in tail special executed in him, his son by the second wife took by *descent* as *special* heir; but Hale, chief justice, held, that the son of the second wife, though not heir general, might have taken by purchase, and according to Ventris, Wild, justice, was of the same opinion, though another book mentions, that in this respect all the three other judges differed from lord Hale. See 1 Freem. 370, 371. But the reasoning of lord Hale shews, that he did not mean to shake Coke's *general* doctrine, and that he founded himself on the special penning of the deed; and he distinguished it, by observing that the limitation was to the heirs by the second wife, and that the covenantor had taken notice in the deed that another was his *heir general*, there being a proviso, that if the son by the first wife should, after the death of the son by the second wife, and within five years after attaining 21, pay 1,200*l.* for the covenantor's younger children, the uses should cease; and for these two reasons he thought the deed sufficient to describe a *special* heir. See Pybus and Mitford, 1 Ventr. 372. 1 Freem. 351. 369. Raym. 228. 1 Mod. 121. 159. 3 Keb. 129. 239. 316. 338, and 2 Lev. 75, in which last book the case is most fully stated. In Wall and Baker, Trin. 8 W. 3, the circumstances were still more special; for according to lord Cowper's state of the case the testator expressly directed, *that if his heir should be a female, his heir male should pay to his heir female* 12*l.* *a year out of his lands;* words manifestly implying, that by *heir male* was meant a *special* kind of heir in contradistinction to the *heir general*. See 1 Stra. 41, 42. Hitherto lord Coke's general rule as to being both heir and female to take by purchase seems unimpeached. But it must

be

the donee being the first taker is capable by purchase, and the heir

be owned, that there is a case in which the doctrine, after a very solemn discussion, received a most severe attack from a judge of the highest authority. This happened in the famous case of Brown and Barkham, determined by lord chancellor Cowper; who held a younger brother to be capable of taking as heir male under a devise to the heirs male of the body of the testator's great-grandfather, though the daughter of an elder brother was *heir general*, and instead of founding his decree on *special* circumstances, which were not wanting in the case, most expressly denied lord Coke's distinction between descent and purchase. See Prec. in Cha. 442. 461. Gilb. Rep. 116. 131, and 1 Stra. 35. But lord Cowper's decree, notwithstanding his high character, was not acquiesced in; for in November 1741 the same case was brought, by bill of review, before lord chancellor Hardwicke, who indeed decreed in favour of the same person, but was far from following lord Cowper in his reasons. He admitted lord Coke's distinction to have been long ago established, and professed to determine wholly on the special circumstances, without the least intention of impeaching the general rule. In giving judgment he divided the case into two questions: 1st, whether it was an established rule, that he who claims as heir male by purchase must be general heir as well as nearest male descendant; 2dly, whether the apparent intent of a testator to the contrary may not create an exception to the general rule. According to a very good note of the case, lord Hardwicke's words on the first question were these: *As to the first of these questions, it cannot be denied but that the distinction between an heir male of the body to take by descent, who is the nearest male descendant of the party claiming through males, and to take by purchase, who must be heir as well as male descendant of the body, has been long ago established. The statute* de donis *established the first, and the second has been laid down by lord Coke in his Comment upon Littleton, and is taken from his argument in Shelley's case and Dyer's report of that case, and he has been followed by some later authorities. Lord Cowper argued strongly against this rule; but as his argument is well known and very common, I shall not now take notice of it. If this doctrine had been* res integra *at the time of his decree, or was so now, I am so fully convinced of the unreasonableness of it that I would never establish it. But when a rule of law has long prevailed, it ought to be supported, though it be not strictly agreeable to natural reason; for in many instances it is more material that the law is settled than how it is settled. But as I think that this case may be determined without determining this question, I shall leave the rule unimpeached, and found my decree on the second question.* He then proceeded to consider the second question, and after stating several authorities to shew there might be exceptions to the general rule, he pointed out the particular circumstances which he relied upon in the case before him, and on account of them only affirmed lord Cowper's decree. Lord Hardwicke's guarded manner of expressing himself on this last case amounts to a full acknowledgment of the general rule, and is the strongest authority to prove its existence, because he avowed his dislike of it.—Upon the whole, it is submitted to the learned reader, that the general rule of being *heir general* to take as heir male or female by *purchase* may be defended as a reasonable rule of construction, where the words merely operate as words of purchase, and more particularly if the superadded words of limitation are to heirs general, as where land is given to the *heirs female of the body of one and the heirs of their bodies;* that the authorities before and in the time of lord Coke fully warranted him in advancing the rule in its full extent, that is, where the words operate as words both of purchase and limitation; that the rule has been confirmed by many cases since lord Coke's time; and lastly, that as lord Cowper's opinion is the single direct authority

in

heire female by descent (1), *secundum formam doni:* and therefore *Littleton* purposely added these words, *who ought to inherit.*

Sect. 24.

ALSO, if lands be given to a man and to the heires males of his body, and he hath issue a daughter, who hath issue a sonne, and dieth, and after the donee die; in this case the son of the daughter shall not inherit by force of the entaile; because whosoever shall inherit by force of a gift in taile made to the heires males, ought to convey his descent whole by the heires males. Also in this case the donor may enter, for that the donee is dead without issue male in the law, insomuch as the issue of the daughter cannot convey to himselfe the descent by an heire male.

"*WHOSOEVER shall inherit by force of a gift in taile, &c.*" *Vide* Tr. [*h*] 28 *H.* 6. tit. Devise, 18, (which is not in the booke at large, but written *verbatim* out of *Statham*). If a man devise lands to a man, and to the heires males of his body, and (2) hath issue a daughter, which hath issue a sonne, this sonne shall be inheritable, and notwithstanding in a gift in taile the law is otherwise, and that by the opinion of all the judges in the exchequer chamber. But I hold this case to be ill-reported, unlesse you will referre the opinion of the judges to the gift in taile last mentioned.

Vid. Sect. 719.

[h] 1 H. 6. 24. 11 H. 6. 13, 14. 28 H. 6. tit. Devise, 18. Statham, tit. Devise. Pl. Com. in Scholast. case, 414. b. 20 H. 6. 43. 37 H. 8 Br. tit. Donne&Rem.61. tit. Nosme, 1, & 40. (Hob. 32. Post. 377.)

For

---

in any printed book against the rule, and it has been acted upon and acknowledged in several subsequent cases, it ought still to be observed, where the construction rests singly on the words *heirs female*, and they stand unexplained by any other words or circumstances.—(Note 145.] Post 164. a. n. 2.——Note in one of the MSS. belonging to sir Thomas Sewell there is a report of the case of Gwyn *v.* Hook, which was argued in B. R. Mich. 17 Geo. 2. and is a decision in favour of lord Coke's doctrine applied to a will. The certificate of Lee, C. J. and the three other judges, it being a case out of Chancery, is given at length, and appears clearly to have been founded on lord Coke's rule. The case of Cannel and Beeby, before ld. Hardwicke, 25 Nov. 1745, which is amongst sir E. Wilmot's MSS. notes, was decreed in Chancery, upon the same rule, against one claiming under a devise to his next heir male of the surname of Beeby, and the heirs male of his body for ever: the claimant not being heir general; and the decree is stated to have been made on the authority of Ford *v.* Lord Ossulston, Nov. 1708; Daws *v.* Ferrars, 2 P. Wms.; and Gwyn *v.* Hook. See further, Mr. Fearne, in his 3d edition, 143 to 147. [But see Wills *v.* Palmer, 5 Burr. 2615; and Goodtitle d. Weston *v.* Burtenshaw, App. No. 1. Fearne's Contingent Remainders, 7 edit.]

(1) It is very unusual to create an estate in tail *female*, and I have seen an argument, in which it has been attempted to prove, that the law of England will not allow of a descent through females only, even in the cases of estates tail; but other authors as well as Littleton and Coke mention *such* descents, nor did I ever hear any authority cited to support the contrary doctrine. See Plowd. Quær. 87, and 133.—[Note 146.]

(2) The word *he*, to describe *the devisee*, is wanting. See acc. Stath. Abr.

(1 Ro. Abr. 841.)

For first, albeit a devise may create an inheritance by other words than a gift can, yet cannot a devise direct an inheritance to descend against the rule of law. Secondly, there is no intent of the devisor appearing, that the sonne of the daughter should, against the rule of law, inherit, and the statute provideth, that *voluntas donatoris, &c. observetur.* And I have heard this case often denied to be law, both in the king's bench and in the common pleas. *Vide* Pl. Comment. 414. b. And so it is [*i*] *mutatis mutandis*, when a gift in taile is made to a man, and to the heires females of his body, and he hath issue a sonne, who hath issue a daughter, this daughter shall never inherit, because she must convey by descent from females. And for the reason hereof see a notable case in 15 E. 2. tit. Corone, 385, where it is adjudged (as before it had beene) that the sonne of a female should have an appeale of the death of a cosine, and yet the daughter herselfe should never have had it. But there it is agreed, that the sonne of a female [*k*] in a *libertate probandâ*, should be no witnesse or proofe against the issue of the male. And the reason of this diversity is very observable: for by the common law the female ☞ might have had an appeale as heire to any of her ancestors, as well as the male. But by the statute of *Magna Charta*, cap. 34, *Nullus capitur aut imprisonetur propter appellam fœminæ de morte alterius quam viri sui*, which restraineth not the sonne of the female. And there *Scrope* saith *per touts le serjeantis d' Angleterre*, that is, by all the judges of the coife in *England*, it was awarded, that the issue of the female should have an appeale for the death of his cousin. But in a *libertate probandâ*, the issue of the blood female shall not be received to prove villenage in the issue of the blood male, for the mother was diabled by the common law, and the mother might be a neife *de eu et trene*, that is, of the water and whippe of three cords (meaning such a bond-woman as is used to servile workes and correction), and enfranchised by her husband. All which appeareth in the said booke. And it is holden in 17 *E.* 4. 1. that if a man be slaine which hath no heire of the part of his father, that his uncle of the part of his mother shall have the appeale, and yet he must of necessity make his conveyance by a woman. *Vid.* 20 *H.* 6. fo. 33. the question suddenly demanded and debated, and no consideration or mention had of the said former judgments and authorities. There it is compared to a gift in tale to a man and to his heires males of his body, that the heire male of the daughter shall not inherit; which hath no affinity to it; and yet the authority of the booke is great, for it is by the assent of all the justices of the one bench and the other in the exchequer chamber; and therefore I leave the learned and judicious reader to his owne judgment. [*l*] *Vide Stanford*, 58. b. 15 *E.* 2. 384. If a man give lands to a man and to the heires males of his body begotten, remainder to him and to his heires females on his body begotten, the donee hath issue a sonne, who hath issue a daughter, who hath issue a sonne, this sonne is not inheritable to either of both these estates taile, because, as *Littleton* saith, the male must make his conveyance only by males, and so must the female by females. But in this case the land shall revert to the donor. And therefore the safest way, when a man will entaile his lands to the heires males and females of his bodie, is to limit the first estate to him and the heires males of his body, the remainder to him and to the heires of his body, and then all his issues whatsoever

[*i*] 11 H. 6. 13.

15 E. 2, tit. Cor. 385. (Ante, 6. b.

[*k*] Mirror, c. 2. sect. 7 Vid. Glanvil. lib. 14. cap. 3.

[25. b.]

(2 Inst. 68.) Vid. Seignior de la Ware's case, 11 Co. fo. 1.

17 E. 4. 1.

20 H. 6. 33.

(Post. 377.) [*l*] Stanford, 58. b. 15 E. 2. tit. Coron. 384.

soever are inheritable. But if *A.* hath issue a sonne and a daughter and dieth, and the sonne hath issue a daughter and dieth, and a lease for life is made, the remainder to the heires females of the body of *A.*; in this case the daughter of *A.* shall not take *causâ quâ suprà*. But albeit the daughter of the son maketh her conveyance by a male, she shall take an estate taile by purchase, for she is heire and a female: but if lands be devised to one for life, the remainder to the next heire male of *B.* in taile, and *B.* hath issue two daughters, and each of them hath issue a sonne, and the father and daughters die, some say this remainder is void for the uncertainty; some say that the eldest shall take it, because he is worthiest; and others say that both of them shall take, for that they both make but one heire(1). If lands be given to a man and to the heires males or females of his body, he hath an estate in generall taile in him.

(Hob. 31.)

11 H. 6. 13. 9 H. 6. 25.

Sect. 25.

IN the same manner it is, where lands are given to a man and his wife, and to the heires males of their two bodies begotten, &c.

"*TO a man and his wife.*" But what if tenements be given to a man, and to a woman being not his wife, and to the heires males of their two bodies? They have also an estate taile, albeit they be not married at that time(2). And so it is, if lands be given to a man which hath a wife, and to a woman which hath a husband, and the heires of their two bodies; they have presently an estate taile, [*m*] for the possibility that they may marry. But if lands be given to two husbands and their wives, and to the heires of their bodies begotten, [*n*] they shall take a joint estate for life and several inheritances, viz. the one husband and his wife the one moity, and the other husband and wife the other moity, and no crosse remainder or other possibility shall be allowed by law, where it is once settled and has taken effect. But if lands be given to a man and two women, and the heires of their bodies begotten, [*o*] in this case they have a joynt estate for life and every of them a severall inheritance, because they cannot have one issue of their bodies, neither shall there be by any construction a possibility upon a possibility (3), viz. that he shall marry the one first and then the other (4). And the same law it is, [*p*] when land is given to two men and one woman, and to the heires of their bodies begotten.

11 E. 3. Formedon, 20. (Ante, 20. b.)

[*m*] 15 H. 7. 10. 1 Co. Dillon & Frein's case. 40 Ass. p. 13.

[*n*] 24 E. 3. 29. a. (Dy. 330.)

[*o*] 7 H. 4. 16. 16 E. 3. 78. Littleton, fo. 66. 15 Eliz. Dier, 326.

[*p*] 44 E. 3. tit. Taile, 13.

---

(1) Vid. hic. fol. 10. b. *Harpur's case*, Hal. MSS.

(2) *If husband and wife are divorced* à vinculo, *they are only tenants for life; for the law doth not presume that they will marry again.* 7 *H.* 4. 16. 3 *H.* 6. 43. Hal. MSS.—[Note 147.]

(3) As to the doctrine of not allowing possibility on a possibility, see post. 184.

(4) *Here it cannot be tail, for the uncertainty which of them he will marry first. But if a gift was to A. and B. a feme sole and to the heirs of their bodies, remainder to A. and C. a feme sole and to the heires of their bodies, it is tail.* Hal. MSS.—[Note 148.]

Sect.

☞ Sect. 26, 27. [26. a.]

26, 27. These two Sections need no explanation at all.

ALSO, if tenements be given to a man and to his wife, and to the heires of the bodie of the man, in this case the husband hath an estate in generall taile, and the wife but an estate for terme of life.

ALSO, if lands be given to the husband and wife, and to the heires of the husband which he shall beget on the body of his wife, in this case the husband hath an estate in speciall taile, and the wife but an estate for life.

Sect. 28.

ALSO if the gift be made to the husband and to his wife, and to the heires of the body of the wife by the husband begotten, there the wife hath an estate in speciall taile, and the husband but for terme of life (1). *But if lands be given to the husband and the wife, and to the heires which the husband shall beget on the body of the wife, in this case both of them have an estate taile, because this word* (heires) *is not limited to the one more than to the other* (2).

19 H. 6. 75. a. Regist. 239. 17 E. 2. tit. Taile, 23. 3 E. 3. 32. 4 E. 3. 43. 5 E. 3. 29. b. and 34. a. 21 E. 3. 43. 12 H. 4. 1. [q] 3 E. 3. 32. 21 E. 3. 43. 19 H. 6. 75, per Hody. Regist. 239. (1 Sid. 83.

"*HEIRES.*" This word (*heires*) is *nomen operativum*. To which of the donees it is limited, it createth the estate taile; but if it incline no more to the one than to the other, then both doe take, as here *Littleton* putteth the case. And therewith accordeth the case of [q] 3 *E.* 3, where it appeareth, *quòd Robertus de S. dedit Johanni de Riparijs et Matildæ uxoriejus, et hæredibus quos idem Johannes de corpore ipsius Matildæ procrearet, &c.* and this adjudged to be an estate in especiall taile in them both, because the estate is equally tailed to the heires of the baron as to the heires of the wife. (3) If lands be given to the husband and the

(1) In pleading seisin of such an estate in husband and wife, it shall be alleged, that they *were seised together and to the heirs of the body of the wife in her right;* and not that they were seised *of the freehold or fee tail.* Per Fitzherbert, 27 *H.* 8. 21. b.—[Note 149.]

(2) *And they have in such case the same estate, as where lands were given to them, and the heirs of their two bodies begotten.* L. and M.

(3) Vid. *Hob. case* 113. *page* 84. *Gift to husband and wife for their lives, and after their decease to the heirs of the body of the husband* procreand' super corpus *of the wife, is tail only in the husband, and the wife hath only for life; and it is the same with* hæredibus *of the husband* de corpore *of the husband on the wife* procreand'. Skete and Oxenbridge. *So Tr. Jac. B. R. Repps and Bonham. Land limited to husband and wife for their lives, and after their decease*

the wife, and to the heirs of the body of the survivour, the gift is good, and the survivour shall have an estate in taile generall, but the estate taile vesteth not till there be a survivour. And hereby it appeareth [r] that a gift made to a man and to *the* heires of his body, is as good as to *his* heires of his body.

[r] 20 E. 3. Briefe 377.

---

decease hæredibus *of the body of the wife by the husband to be begotten; it is taile only in the wife. But it was agreed, that if it had been to the heires which the husband should beget on the body of the wife, or to the heirs of the body of the wife and of the body of the husband to be begotten, it had been tail in both.*— 8 *R.* 2. Tail, 32. *Gift to the husband and wife and to the heirs of their bodies issuing, and if the wife* obierit sine hæredibus, *yet tail in both.* 12 *E.* 3. Variance, 77. *E.* 3. 64. ibid. 93. *Land given to husband and wife and to the heires of the body of the husband, and if the husband and wife* obierint sine hæredibus inter eos procreatis, *remainder over; yet it is tail general in husband only.*— *Land given to the husband and wife and to the heirs of the husband of the body of his wife to be begotten; it is only tail in the husband.* Hic. *sect.* 29. *Yet if gift be to the husband and wife and to the heirs of the body of the wife by the husband to be begotten, the tail is only in the wife.* His heirs *appropriate in the first case,* of the body *in the second case.*—Hal. MSS. But where the gift is to the wife *only*, and to the heires of the body of the husband, then the tail is not in *either*, of which lord Hale gives the following case as an instance.—Nota *P.* 1651. *Sir Leventhorpe Franck's case. Land given to the wife for life, remainder to the heires of the body of the husband on the body of the wife to be begotten. Ruled that it is not tail executed* omnino *in the wife but a contingent remainder in the heir of the husband's body, it being limited to the heirs of the husband's body; and that as the wife died in the life of her husband, the remainder was void.* Hal. MSS.—The same case is reported by the name of Gossage and Tayler in Styl. 325, but there the remainder is differently expressed; for it is not to the heirs of the bodies of both in *direct* terms, but it is *to the use of the heirs to begotten upon the body if Susanna by Leventhorpe her husband;* which most probably were the words of the remainder; for Glyn's argument in favour of the wife's having an estate tail appears to have been founded on the remainder's not pointing *expressly* to the heirs of *either.* —After Sir Leventhorpe Franck's case, lord Hale puts a *quære* and then adds —V. 3. E. 3. Formedon, 8. *Land given to I. S.* et uxori suæ quam postæ desponsaverit *et* hæredibus de corporibus eorum; *the wife takes nothing, because not known at the time; but it is a tail in the husband. Yet* nota, hæredibus de corporibus; *if the wife had taken an estate, it had been a tail in both.* Hal. MSS. According to this case the tail is in the husband, though the wife takes no estate, and the tail is expresly to the heirs of the bodies of both. But this is more than was contended for by the counsel for the wife's estate tail in *Gossage* and *Tayler*, who admitted the contrary to have been settled by the case in Dy. 99. pl. 64. and by *Lane* and *Pannell*, which is in 1 Ro. Rep. 238. 317. and 438. See also contra post. Sect. 352, and the case of Frogmorton on the demise of Robinson against Wharrey, in Wils. vol. 2. page 125, and 144, where on a surrender of copyhold lands to *A.* whom the surrenderor intended to marry, and to the heirs of their two bodies, it was adjudged, that the wife took for life with a contingent remainder to the heirs of the bodies of her and her husband.—[Note 150.]

[26. b.]

☞Sect. 29.

ALSO, if land be given to a man and to his heires, which he shall beget on the body of his wife, in this case the husband hath an estate in speciall taile, and the wife hath nothing.

20 H. 6. 36.

[s] 1 Co. fol. 140. b. Chudleigh's case adjudge. (7 Co. 41.)

THIS is evident by that which hath been said, and needeth no explanation. But it hath beene said, [s] that if a man give land to another and to his heires of the body of such a woman lawfully begotten, that this is no estate taile for the uncertainty by whom the heires shall be begotten, for that the brother of the donee or other cousin may have issue by the woman, which may be heire to the donee, and estates in taile must be certaine. Therefore our author to make it plaine in all his cases added to these words (his heires) which he shall ingender. But that opinion is, since our author wrote, over-ruled, and that estate adjudged to be an estate taile, and begotten shall be necessarily intended begotten by the donee (1).†

† *This reference seems misplaced as the note appears to relate to the concluding sentence in the commentary on sect. 28.*

Sect. 30.

ALSO, if a man hath issue a sonne and dyeth, the land is given to the sonne, and to the heires of the body of his father begotten, this is a good entaile, and yet the father was dead at the time of the gift. And there be many other estates in the taile, by the equity of the said statute, which be not here specified.

(Ante 20, b.

17 E. 2 Taile, 23. 2 E. 3. 1. tit. Taile, 7. 4 and 5 Ph. & Mar. Dier, 156. 12 H. 4. 1. 15 H. 7. 10. (F. N. B. 213. E. 2 Leon. 25. Co. Entr. 254.)

"*IF a man hath issue a sonne and dyeth, &c.*" *John de Mandeville* by his wife *Roberge* had issue *Robert* and *Mawde*. *Michael de Morevill* gave certaine lands to *Roberge* and to the heires of *John Mandeville*, her late husband on her body begotten, and it was adjudged that *Roberge* had an estate but for life, and the fee taile vested in *Robert* (heires of the body of his father being a good name of purchase), and that when he dyed without issue, *Mawde* the daughter was tenant in taile as heire of the body of her father, *performam doni* (2) and the formedon which she brought supposed, *quòd post mortem præfatæ Robergiæ et Roberti filii et hæredis ipsius Johannis Mandeville et hæred' ipsius Johannis*

---

(1) *So gift to A. and* the *heires* which her husband shall beget of her body *is taile in the wife; and yet is is not said* her *heirs nor heirs of* her *body.* 41 *E.* 3. 24. Hal. MSS. —[Note 151.]

(2) Nota, *in Littleton's case the son takes by purchase, and in Mandevile's case he takes by purchase jointly with the mother. But if the gift had been to Roberge and to the heires of her body by the husband begotten, or to the heires of her body and of the body of the husband begotten, it seems taile only in the wife.* Quære, *and* vid. 12 *H.* 4. 102, *by Thirninge; Litt. sect.* 352. *and* 1 *Rep. Shellie's case,* 104. Hal. MSS.—[Note 152.]

nis de præfatâ Robergiâ per præfatum Johannem procreat' præfat' Matildæ filiæ prædict' Johannis de præfatâ Robergiâ per præfatum Johannem procreatæ sorori et hæredi prædicti Roberti descendere debet per formam donationis prædict'. And in truth the land did not descend unto her from *Robert* (3), but because she could have no other writ it was adjudged to be good. In which case it is to be observed, that albeit *Robert* being heire took an estate taile by purchase, and the daughter was no heire of his body at the time of the gift, yet she recovered the land, *per formam doni*, by the name of heire of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore when the gift was made she tooke nothing but in expectancy, when she became heire *per formam doni*. But where a man by deede gave lands to *Emme* late wife of *John Master, habendum et tenendum prædict' Emme et hæredibus Johannis Master de corpore ejusdem Emme procreat';* in that case the sonne and heire of *John Master* begotten on the body of *Emme* took no estate with *Emme* in the lands, because he was named after the *habendum* (4).

(Post. 220.)

5 H. 4. 3. a.

(2 Ro. Abr. 67. 68.)

If

---

(3) *And therefore though Maud had been of the half blood, she should have taken.* Hic *Hodgkinson's case cited fol.* 14. *sect.* 6. *M.* 30, 31 *Eliz. B. R. Morris and Maule W.* Vid. *H.* 31, *W. n.* 23. Hal. MSS.—See ante fol. 14. a. n. 6.—[Note 153.]

(4) *Where one named after the* habendum *shall take.—H.* 13. Jac. *Brookes and Brookes. In customary grant by copy, one not named in the premises, being named in the* habendum, *may take a present estate.* Venit. I. S. et cepit de domino, habendum *to him and his wife is good. In frank-marriage a wife shall take, though named only in the* habendum. Hic *sect.* 17. 4 *E.* 3. 4. 5 *E.* 3. 17. Brief, 703.—*So it seems in render by fine to B.* habendum *to B. and C. his wife.* 8 *E.* 3. 31. 24 *E.* 3. 58.— *So by a deed by way of remainder, a stranger to the deed, though not named in the premises, shall take.* Hic *fol.* 183. *sect.* 283. 8 *E.* 3. 50. *But otherwise regularly one shall not take a present interest jointly with another, unless he be party to the deed and named in the premises.* 8 *B.* 2. Feoffments, hic. fol. 378. *sect.* 721. 3 *H.* 6. 18. 27. 16 *E.* 2. Ass. 371. *Trin.* 16 Jac. rot. 1089. *Greenwood and Tyler. Hob.* 314. *But if by deed intended or poll A. grants the manor of S.* habendum *to B.* et hæredibus, *it is good though he was not named in the premises.* Hal. MSS.—See the case of Brookes and Brookes cited by lord Hale in Cro. Jam. 434, and 2 Ro. Abr. 66, 67, and Vin. Abr. *Grant*, K. a. in which two last books there are many other cases relative to the same subject. See further ante 7. a. where lord Coke writes, that if *A.* gives land to hold to *B.* and his heirs, it is good, though he is not named in the *premises;* to which lord Hale adds—*But gift in the* premises *to A.* habendum *to A. and B. is void as to B. M.* 25 *Eliz. Ow. Vid. ante* 6. *a. Plowd. Comment.* 156. *Throgmorton's case.* Hal. MSS. See also ante where lord Coke describes the office of the *habendum*, on which lord Hale gives the following annotation—*It is not necessary to repeat the thing granted, it being sufficient that it is named in the* premises. *H.* 44 *Eliz. B. R. Hill and Giles adjudged. One named in the* premises *shall not take by the* habendum, *unless,* First, *in case of frank-marriage, hic sect.* 17. Secondly, *in case of grant by copy. T.* 15 *Jac. B. R. Brooke's case. Cro. Jam.* 434. Thirdly, *in case of a remainder. Lease to husband and wife,* habendum *to the husband for* 10 *years; the wife takes nothing. T.* 31 *El. Mo. So lease of the site of a rectory and all tithes appertaining to it* habendum *the site* cum pertin' *for* 20 *years, the tithes pass only at will. H.* 28. *El. Mo.* 222. *Carye's case. Grant to A.*

and

If a man hath issue two daughters and dieth seised of two acres of land in fee simple, and the one coparcener giveth her part to her sister, and to the heires of the body of her father, in this case the donee hath an estate taile in the moity of the donor's part, for the donee is not the entire heire, but the donor is heire with the donee, and she cannot give to the heires of her owne body, and the donee hath the other moity of her sister's part for life. If a man hath issue a sonne and a daughter, and dieth, and land is given to the daughter, and to the heires females of the body of her father, she taketh but an estate for life; because she is not heire female to take by purchase, as before hath been said. [27. a.]

(Ante 24. b. 25. a.)

"And to the heires of the body of his father." These words (*the heires*) are observable; for if they were (*his heires*) it cleerly altereth the case. And therefore, if lands be given to the sonne and to his heires of the body of his father, the sonne cannot take as heire of the body of his father, because the grant is to him and to his heires, &c. and consequently he hath a fee simple (1). But if there be grandfather, father and sonne, and the father dieth, and lands be given to the sonne, and to the heires of the body of the grandfather, this is a good estate taile in the sonne; so as *Littleton* did put his case of the father but for an example (2).

(Ante 20. b. Post. 220. a.)

"And there be many other estates in the taile, &c." This needeth no explanation.

Sect. 31.

BUT if a man give lands or tenements to another, to have and to hold to him and to his heires males, and to his heires females, he, to whom such a gift is made, hath a fee simple, because it is not limited by the gift, of what bodie the issue male or female shall be, and so it cannot in any wise be taken by the equitie of the said statute, and therefore he hath a fee simple.

"LANDS or tenements." This rule extendeth but to lands or tenements, and not to the inheritance that noblemen and gentlemen have in their armories or armes. For where the nobleman or gentleman hath a fee simple in his armories or armes, yet is the same descendible to the heires males lineall or collaterall. For

(Ante 18. b. Post. 68. b.)

---

and B. habendum *to A. for years, remainder to B. for years, is good; but lease of two acres to A. and B.* habendum *one acre to A. for years, the other to B. for years, is bad. T.* 4 *Eliz.* Vid. *Hob.* 172. Hal. MSS.—See *contra* to this last case, Mod. 26, by *Brown arguendo.* For other instances of differences between the *premises* and *habendum*, particularly where the former has been *joint* and *several*, see Mo. 43. 247. 880.—[Note 154.]

(1) *Yet gift to A. and* his *heirs of the body of B. his wife, who is dead, is tail.* 12 *H.* 4. 1. Rationem diversitatis quære, *for the second son is his heir of the body of the father.* Hal. MSS.—[Note 155.]

(2) Vid. *Dy.* 24. 247. 274. 157. 394, *for the form of the writ.* Hal. MSS.

For albeit a female be heire at the common law, yet the shield, armories and armes descend unto them that are able to beare them (farre exceeding the nature of Gavelkind, but with several differences). And all the females of that family in respect that they be of the same blood, may in a losenge or under a curtaine manifest of what family they be by expressing the armories and armes belonging to that family, and the husbands of them may impale them or quarter them with their owne, as the case shall require. And for distinction and better explanation hereof: If the king by his letters patents giveth lands or tenements to a man, and to his heires males, the grant is void, for that the king is deceived in his grant, in as much as there can be no such inheritance of lands or tenements as the king intended to grant. But if the king for reward of service granteth armories or armes to a man and to his heires males without saying (of the body), this is good, and, as hath been said, they shall descend accordingly (3).

11 H. 8 tit. Patents. Br. 104. (1 Co. 43. b. 46. b. Mo. 424. Cro. Eliz. 478.)

27 H. 8. 27.

If a man by his last will devise lands or tenements to a man and to his heires males, this by construction of law is an estate taile, the law supplying these words (of his bodie)(4). *Vide* the Prince's [*t*] case, where it appeareth that an act of parliament may limit an inheritance of lands or tenements, otherwise than common law would doe, and create a new estate of inheritance, and many authorities in law there cited worthy of note and observation *Rot. Parliam. anno* 1 *E.* 4. *nu.* 26. (5)†. The [*u*] duchie of *Lancaster* is entailed to king *Edward* the fourth and his heires kings of *England*. And king *Henry* the sixth did by his letters patents grant *Johanni filio Johanis Talbot, quòd ipse et hæredes sui domini manerij de Kingston Lisle in comitatu Berk. ex nunc domini et barones de Lisle nobiles et proceres regni habeantur, teneantur, et reputentur, &c.* (A.) By this he had a fee simple qualified in the dignity (6).

[*t*] 8 Co. 1. The Prince's case. 21 E. 3. 4. 22 E. 3. 3. 24 E. 3. 53. 9 H. 6. 25. 9 E. 4. 15. 1 Marie. Dier, 94. (7 Co. 41.)

[*u*] Per literas patents authoritate parliamenti.

† *Reference* (5) *appears to be misplaced, and it seems, should come after the word* observation, *at the end of the preceding sentence.*

2 *H.* 5.

---

(3) See further as to the descent of *Arms*, p. 140. b. See also on the subject of *Arms* in general, Dugd. Ant. Usage in bearing of Arms, and several pieces in Hearn. Antiq. Disc. 2d ed. vol. 1.

(4) *Dy.* 116. Hal. MSS.:—See further lord Ossulstone's case, 3 Salk. 336, and 11 Mod. 189. See S. C. cited 2 P. Wms. 2, and in Vin. Abr. *Devise*, U. b. pl. 2. in marg.

(5) In the case on the title to the earldom of Oxford decided in parliament 1 Cha. 1, the judges held, that a limitation of the earldom to Aubrey de Vere and his heirs males, being by act of parliament, was sufficient to raise a fee simple descendible to males only. See W. Jo. 100.—[Note 156.]

(A) See the case of the barony of Lisle, which was written by the honourable Hume Campbell, but not published till 1790, and then only distributed privately, as I have understood.

(6) Lord Hale adds the following instances of *special* limitations. *King Henry the third* dedit manerium de Penreth et Sourby Alexandro regi Scotiæ et hæredibus suis regibus Scotiæ; *and Alexander having daughters, of which one was married to the earl of Hunt. died, not having any heir king of Scotland,* et câ de causâ *King* E. 1. *recovered seisin, and the coheirs of Alexander were excluded. Lib. Parl. E.* 1. 134. 308. *The hospital of Saint Katharine was founded by queen Eleanor, wife of Hen.* 3, *reserving the patronage* sibi et reginis Angliæ

(3 Co. 20, 21.)

2 *H.* 5. fol. 1. A grant was made to a man, and to his heires tenants of the manor of *Dale* (7). A man seised of lands in Gavelkind gives or devises the same to a man and to his eldest heires. He cannot hereby alter the customary inheritance, but as in the case of our ☞ author, *ut res magis valeat*, the law rejecteth (males), so in this case the law rejecteth this adjective (eldest). And so it is if lands be given to a man, and to the eldest heires females of his body, yet all the daughters shall inherit, as it hath been resolved.

Mich. 26 & 27 Eliz. in Com. Banco. Leonard Lovelace's case.

[27. b.]

"*And so it cannot in any wise be taken by the equitie of the said statute, &c.*" For it is a certaine rule in law, that in every estate in taile within the said statute, it must be limited either by expresse words, or by words equipollent, of what body the heire inheritable shall issue. And it was [*x*] adjudged in parliament, that where lands were given to a man, and to his heires males, that this was a fee simple, and that as well the heires females as heires males should inherit, for the grant of a subject shall be taken most strongly against himselfe.

[*x*] 18 Ass. p. 5. 18 E. 46. 6. (Not so in the King's case.) 9 H. 6. 23. 25. 8 Co. fol. 1, the Prince's case.

"*And therefore he hath a fee simple.*" *Littleton's* reason being shortly collected is this. Whosoever hath an estate of inheritance, hath either a fee simple or a fee taile; but where lands be given to a man and his heires males, he hath no estate taile, and therefore he hath a fee simple.

Ancient tenures, fol. 3.

What actions tenants in taile may have and cannot have, *vide* Sect. 595. What great alterations have been made since *Littleton* wrote concerning not only leases to be made by tenant in taile, but barres also of the estate taile itselfe by force of certaine acts of parliament made since *Littleton's* time, you shall read Sect. 56. and 708 (1).

Angliæ pro tempore existentibus, et eo titulo regina Philippa uxor E. 3. habet patronatum. *Claus.* 7 *E.* 3. *parte* 2. *m.* 2. Hal. MSS.—[Note 157.] See the case of St. Catherine's Hospital, 1 Vent. 149. and by the name of Atkins *v.* Montague, 1 Ch. Ca. 214.

(7) See further as to a qualified fee ante 1. b. and the books cited in n. 5, there.

(1) By what acts tenant in tail may prejudice his issue or those in remainder or reversion without fine or recovery, and where his acts shall not affect them, see Vin. Ab. *Estate*, F. a. to I. a. and *Tayle*, D. E. F.

Chap. 3. Sect. 32.

Tenant in Taile after Possibility of Issue extinct.

TENANT in fee taile after possibility of issue extinct is, where tenements are given to a man and to his wife in especiall tail, if one of them die without issue, the survivor is tenant in taile after possibility of issue extinct. And if they have issue, and the one die, albeit that during the life of the issue, the survivor shall not be said tenant in taile after possibilitie of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the taile, then the surviving party of the donees is tenant in taile after possibilitie of issue extinct.

LITTLETON having spoken of estates of inheritance, viz. fee simple and fee taile, now he treateth of tenants of freehold *tantùm*, that is, for terme of life, and therein first of tenant in taile after possibility of issue extinct; and he giveth unto him the first place, because this tenant hath eight qualities and priviledges which tenant in taile himselfe hath, and which lessee for life hath not [a]. As first, he is dispunishable for waste (2). Secondly, he (Dr. & Stud. b. 2. c. 1.) (4 Co. 63. 1 Ro. Abr 296.)

[a] Temps. E. 1. Wast. 125.

39 E. 3. 16. 31 E. 3. Aid, 35. 42 E. 3. 22. 43 E. 3. 1. 45 E. 3. 22. 28 E. 3. 96. 46 E. 3. 13. 27. 2 H. 4. 17. 7 H. 4. 10. 11 H. 4. 15. 21 H. 6. 56. 10 H. 6. 1. 26 H. 6. Aid, 77. 3 E. 4. 11. 13 E. 2. Entre Conge, 56. Fits. N. B. 203. Lewes Bowles' case, 11 Co. fol. 8.

shall

---

(2) See acc. 2 Inst. 202. But yet he cannot have action of waste against another, for he cannot account *ad exhæredationem;* and it is said, that tenant in tail loses his action of waste, if he becomes tenant in tail *after possibility of issue extinct* pending the writ. See Bro. Abr. *Waste,* pl. 14. 69, 60. 2 Ro. Abr. 825. pl. 5. Mo. 18, and post. 53. b. Note also that is said, that though such tenant is not punishable for waste, yet if he cuts down trees, they are not his property. 4 Co. 63 (*a*). As to this difference between being dispunishable for waste in felling trees and having the property in them, see 1 P. Wms. 528. See also 2 P. Wms. 241, where it is said by the court, that if tenant for life cuts down timber, it belongs to those who at the time of its being severed were seised of the first estate of inheritance.—[Note 158.]——(*a*) But note that according to Ld. Coke in 4 Co. 63, that though dispunishable for waste he shall not have the absolute property in the timber felled. Ld. Nott in his own MSS. R. of Skelton *v.* Skelton, 16 Nov. 29 C. 2. reasons in support of the same distinction, and in Abraham *v.* Bubb and ux. 1 July, 31 C. 2d, he acted upon it; and though in a subsequent stage of the same case he somewhat narrowed the injunction he had before granted, yet he avowed retaining the opinion as to the property in the timber when cut, and signified that in any future case he would, for the timber already cut, have the law tried in trover, and as the law should be adjudged, grant or deny a perpetual injunction, and in the mean time would stay waste. See, however, Ld. Hardwicke's words, in Garth *v.* Cotton, 1 Dickens Rep. from his lordship's own note. See also the case of Abraham *v.* Bubb and ux. Freem. 53. Nott. MSS. 949. 1028. [This point since decided in favour of tenant in tail after possibility, &c. Williams *v.* Williams, 15 Ves. 419, and 12 East, 210.]

shall not be compelled to attorne. Thirdly, he shall not have ayde of him in the reversion. Fourthly, upon his alienation, no writ of entrie *in consimili casu* lyeth. Fifthly, after his death no writ of intrusion doth lie. Sixthly, he may joine the mise in a writ of right, in a speciall manner. Seventhly, in a *præcipe* brought by him he shall not name himselfe tenant for life. Eightly, in a *præcipe* brought against him he shall not be named barley tenant for life. And yet he hath four other qualities, which are not agreeable to an estate in taile, but to a bare lessee for life. [*b*](1) First, if he maketh a feoffment in fee, this is a forfeiture of his estate(2). Secondly, if an estate in fee, or in fee taile, in reversion, or remainder, descend or come to this tenant, his estate is drowned, and the fee or fee taile executed. Thirdly, he in the reversion or remainder shall be received upon his default, as well as upon bare tenant for life (3). Fourthly, an exchange between a bare tenant for life and him is good, for their estates in respect of their quantity are equal; so as the difference standeth in the quality, and not in the quantity of the estate. And as an estate taile was originally carved out of a fee simple, so is the estate of this tenant out of an estate in especiall taile. And he is called tenant in taile after possibilitie of issue extinct, because by no possibility he can have any issue inheritable to the same estate taile. But if a man giveth land to a man and his wife, and to the heires of their two bodies, and they live till each of them be an hundred yeeres old, and have no issue, yet do they continue tenant in taile, for that the law seeth no impossibilitie of having children. But when a man and his wife be tenant in especiall taile, and the wife dieth without issue, there the law seeth an apparent impossibility that any issue that the husband can have by any other wife should inherit this estate. And let this tenant keep his estate, for he hath these priviledges in respect of the privity of his estate, and of the inheritance that was once in him. [*c*] For in the case of *Evens* (4), *Mich.* 28 & 29 *Eliz.* it was adjudged, that where tenant in taile after possibility of issue extinct granted over his estate to another, that his grantee was compelled to attorne in a *quid juris clamat* (5), as a bare tenant for life, and so be named in the writ; for by the assignement the privity of the estate being altered, the priviledge was gone; and this judgement was affirmed in a writ of error, and herewith agreeth 27 *H.* 6. tit. Aid. *Statham*, 29 *E.* 3. 1. b. (6).

[28. a.]

(Cro. Eliz. 671.)

[*b*] 13 E. 2. Entre Cong. 56. 45 E. 3. 22. 28 E. 3. 96. 27 Ass. p. 60. F. N. B. 159. 32 E. 3. tit. Ag. 55. 50 E. 3. 4. 9 E. 4. 17. 2 R. 2. Resceit 147. 41 E. 3. 12. 20 E. 2. Resceit. 36 E. 3. 33. Lewes Bowles' case, ubi supra.

[*c*] 11 Co. fol. 83. Lewes Bowles' case. (Post. 316.) 27 H. 6, tit. Aid. Statham. 29 E. 3. 1. b.

27 H. 6. tit. Aid. 29 E. 3. 1. b.

---

(1) 43 *Ass.* 24. Hal. MSS.

(2) *So if he mispleads*, 39 E. 3. 16. Hal. MSS.

(3) 28 E. 3. 96. Contra *as to receipt.* Hal. MSS.

(4) *M.* 26, 27 *Eliz. B. R. Leon. T.* 29 *Eliz. Clench.* 88. *Evans and Aprichard.* Hal. MSS. See Aprice's case, 2 Leon. 40. 3 Leon. 241, which seems to be the case referred to by lord Coke and lord Hale. The anonymous case in 1 Leon. 290, and 3 Leon. 121, seems also to be the same case.

(5) 28 *E.* 3. 96. *Grantee has the privilege.* Hal. MSS. But see the reasons for the judgment cited by lord Coke in the books cited in note 4.

(6) Quære *if punishable for waste.* Hal. MSS. See 2 Inst. 302.

Sect. 33.

ALSO, if tenements be given to a man and to his heires which he shall beget on the bodie of his wife, in this case the wife hath nothing in the tenements, and the husband is seised as donee in especiall taile. And in this case, if the wife die without issue of her body begotten by her husband, then the husband is tenant in taile after possibility of issue extinct.

"*IF the wife die without issue.*" So as the estate of this tenancy must be altered by the act of God, and that by dying without issue; for if a feoffment in fee be made to the use of a man and his wife for tearme of their lives, and after to the use of their next issue male to be begotten in taile, and after to the use of the husband and wife, and of the heirs of their two bodies begotten, they having no issue male at that time; in this case the husband and wife are tenants in speciall taile executed (7), and after they have issue a sonne, in this case they are become tenants for life, the remainder to the sonne in taile, the remainder to them in speciall taile (8); for albeit their estate taile

Lewes Bowles' case, 11 Co. fol. 80. (1 Ro. Rep. 178. 2 Saund. 383. 387. Cro. Eliz. 315. 1 Co. 76. 2 Co. 61.)

---

(7) Cordall's case, Cro. Eliz. 315, is to the contrary; for there land was devised to *A.* for life, remainder to his first and other sons in tail male, remainder to the heirs of *A.*'s body, and according to Croke, who mentions the case as reported to him by lord Coke, it was resolved, that *A.*'s estate tail was not executed for the possibility of the mean estate's interposing, but was so disjoined during *A.*'s life, that his wife could not be endowed. But see Cas. B. R. temp. Hardw. 17, where lord Hardwicke says, that Cordall's case has been several times denied to be law —[Note 159.]

(8) Sic nota *remainder supported, without particular estate, by the possibility that issue may be born. But if such tenant levies a fine, now this remainder is destroyed, because the estates are confounded.* Hal. MSS.—Here it is proper to add, that there is a difference between subjoining the inheritance to the particular estate by the *same* conveyance as limits the intermediate contingent remainder, and an accession of one to the other by a *distinct* and *subsequent* act or conveyance; for in the latter case the contingent remainder is destroyed, though not in the former. See acc. Purefoy and Rogers, 2 Saund. 380. It has even been adjudged, that in the latter case the *descent* of the inheritance on the person having the particular estate will destroy the contingent remainder, where the descent has been *subsequent* to the commencement of the particular estate. See *Kent* and *Harpool*, 1 Ventr. 306. T. Jo. 76. *Hooker* and *Hooker*, Cas. in B. R. temp. Hardw. 13. But a descent of the fee on tenant for life will not hurt the contingent remainder, where the particular estate and the descent take place at the *same time*, and are derived from the *same person;* as where land is devised to *A.* for life, remainder over on a contingency, and at the devisor's death the reversion descends upon *A.* as his heir. See acc. Archer's case, 1 Co. 96. Plunkett and Holmes, 1 Lev. 111, and Boothby and Vernon, 9 Mod. 147. The case of Wood and Ingersole, Cro. Jam. 260, seems *contra;* but see the observation on the last case in T. Jo. 79, and Pollexf. 481. It would be a great omission not to apprize the student, that the subject of this note is fully gone into by Mr. Fearne in his Essay on Contingent

taile is turned to an estate for life, yet they have but a bare estate for life; but if the issue die, and the husband die having no other issue, and then the sonne die without issue, the wife shall have the privileges belonging to a tenant in taile after possibility of issue extinct, as it appeareth in *Lewes Bowles'* case *ubi supra*, where it is said, that the estate of this tenant must be created by the act of God, and not by limitation of the party, *ex dispositione legis*, and not *ex provisione hominis* [*d*]. If land be given to a man and to his wife, and to the heires of their two bodies, and after they are divorced *causâ præcontractûs*, or *consanguinitatis*, or *affinitatis*, their estate of inheritance is turned to a joint estate for life; and albeit they had once an inheritance in them, yet for that the estate is altered by their owne act, and not by the act of God, viz. by ☞ the death of either party without issue, they are not tenants in taile after possibility of issue extinct (1). Lands are given to the husband and wife, and to the heires of the body of the husband, the remainder to the husband and wife, and to the heires of their two bodies begotten; the husband dies without issue; the wife shall not be tenant in taile after possibility, for the remainder in speciall taile was utterly void, for that it could never take effect; for so long as the husband should have issue, it should inherit by force of the generall taile, and if the husband die without issue, then the speciall estate taile cannot take effect, in as much as the issue, which should inherit the especiall, must be begotten by the husband, and so the generall, which is larger and greater, hath frustrated the especiall which is lesser. And the wife in that case shall be punished for waste.

[*d*] 7 H. 4. 16. 8 E. 1. Ass. 415. 12 Ass. 22. 19 Ass. p. 2. 13 E. 3. Ass. 91, in fine. (9 Co. 140, 141. 7 Co. 42. b. Kenne's case, and 4 Co. 29.)

[28. b.]

(1 Ro. Abr. 841.)

Contingent Remainders. See page 111 to 118 of the second edition, where the author most learnedly and ingeniously states the several distinctions, explains the reasons on which they depend, and endeavours to reconcile all the cases on this nice subject.—[Note 160.]

(1) *Husband and wife tenants in special tail; the husband was attainted of treason or levies fine with proclamations; the husband dies having issue by the wife: the issue cannot inherit, and yet to many purposes the wife surviving is tenant in tail* after possibility, *for if she makes lease for* 21 *years according to the statute, it shall bind the conusee, or if it is for three lives, it shall not be a forfeiture. H.* 22 Jac. Rot. *Crocker and Kelsey. Hob. Rep. Melton's case. Vid.* 9 *Rep. Beaumont's case. It seems, she cannot suffer recovery after.* Quære. Vid. *this case of Beaumont afterwards debated. H.* 13 *Cha. B. R. in Baker and Willis, Cro. Cha.* 476. The case of Crocker and Kelsey is in W. Jo. 60. Hutt. 84. Cro. Jam. 688. Bridgm. 27. 2 Ro. Rep. 490. 498. 1 Ro. Abr. 843. pl. 3, and O. Bendl. 139. 143. Beaumont's case is in 9 Co. 138. b, and Melton's case is in Hob. 254. Note, that in the case of Crocker and Kelsey, the question was on the operation of a lease for 21 years *not* warranted by the 32 H. 8, the ancient rent not having been reserved; but the issue in tail having levied a fine during the wife's life, it was adjudged that the lease was good; but it seems to have been agreed, that the wife, notwithstanding the husband's death, was tenant in tail so as to be capable of making leases within the statute. Indeed this *latter* point had been adjudged in a former case, which is in Godb. 102. See too 4 Leon. 57. As to the *former* point, besides the books already cited, see 2 Sid. 62.—[Note 161.]

Sect. 34.

AND note, that none can be tenant in taile after the possibility of issue extinct, but one of the donees, or the donee in especial taile. For the donee in generall taile cannot be said to be tenant in taile after possibility of issue extinct: because alwaies during his life, he may by possibility have issue which may inherit by force of the same entaile. And so in the same manner the issue, which is heir to the donees in especiall taile, cannot be tenant in taile after possibility of issue extinct, for the reason abovesaid.

** And note, that tenant in taile after possibility of issue extinct shall not be punished of waste, for the inheritance that once was in him,* 10 *H.* 6. 1. *But he in the reversion may enter if he alien in fee,* 45 *E.* 8. 22.

IF lands be given to a man with a woman in frankmarriage, albeit the woman (which was the cause of the gift) dieth without issue, yet the husband shall be tenant in tayle *after possibility, &c.* for that he and his wife were donees in especiall taile, and so within the words of *Littleton*. The residue of this Section is evident.

* This, and that which follows, is not in the first (2) edition (which I have). And therefore (that I may speake it once for all), it was wrong to the authour to adde any thing (especially in one context) to his worke. (Dr. and Stud. 61. 11 Co. 80.)

☞ CHAP. 4. *Curtesie of England.* Sect. 35. [29. a.]

TENANT by the curtesie of England is, where a man taketh a wife seised in fee simple or in fee taile, generall, or seised as heir in taile especiall, and hath issue by the same wife male or female born alive (oyes ou vife (1), *albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesie of England, because this is used in no other realme but in England onely.*

And some have said, that he shall not be tenant by the curtesie, unlesse the childe, which he hath by his wife, be heard crie; for by the cric it is proved, that the childe was born alive. Therefore Quære (2).

" *TAKETH*

---

(2) By the *first* edition, lord Coke means that printed at *Rohan*, as appears by the preface to this his Commentary on Littleton. But the edition of *Lettou* and *Machlinia*, which was really the first, is also without the addition here mentioned. It appears to have been first introduced into the edition by *Redman*.—See further as to the subject of *tenant in tail after possibility*, Vin. Abr. *Tayle*, I. and *Waste*, pl. 12.

(1) Instead of *oyes ou vife*, the words are *neez vife* in L. and M. This latter reading is conformable to lord Coke's translation.

(2) This *quære* is in L. and M. but not in Roh.

"TAKETH *a wife seised.*" And first of what seisin a man shall be tenant by the curtesie. [*e*] There is in law a two-fold seisin, viz. a seisin in deed, and a seisin in law, whereof more shall be said Sect. 468*, and 681. And here *Littleton* intendeth a seisin in deed, if it may be attained unto. [*f*] As if a man dieth seised of lands in fee simple or fee taile generall, and these lands descend to his daughter, and she taketh a husband and hath issue, and dyeth before any entry, the husband shall not be tenant by the curtesie, and yet in this case she had a seisin in law; but if she or her husband had during her life entred, he should have been tenant by the curtesie (3). [*g*] A man seised of an advowson (4) or rent in fee hath issue a daughter, who is married, and hath issue, and dyeth seised, the wife, before the rent became due or the church became voyd, dieth, she had but a seisin in law, and yet he shall be tenant by the curtesie, because he could by no industry attaine to any other seisin. *Et impotentia excusat legem* (5). But a man shall not be tenant by the curtesie of a bare right, title, use (6), or of

[*e*] F. N. B. 194. (Post. 153.)

[*f*] 1 Mar. Dyer, 55.

(Post. 40.)

[*g*] 7 E. 3. 66. 3 H. 7. 5. (6 Co. 68. a. 1 Co. 97. b. 8 Co. 34. Ante 15. b.)

(8 Co. 96.)

* *It should be* Sect 448.

a reversion

(3) But entry is not always necessary to give seisin *in deed;* for if the land is in lease for *years*, curtesy may be without entry, or even receipt of rent, the possession of the lessee for years being deemed the possession of the husband and wife. See the case of De Grey and Richardson, 3 Atk. 469. Lord Coke's doctrine about seisin for a *possessio fratris* is the same. See ante 15. a. In n. 4. there, the case of Newman and Newman is cited, from Wils. vol. 2. p. 516, but no hint being given of the point adjudged, it may be proper to add here, that in that case the court construed the possession of a mother to be a possession for an infant her son as his guardian by law, she being next of blood to whom the inheritance could not descend, and held it a sufficient seisin to exclude the daughters by a former *venter*.—[Note 162.]

(4) *Whether it be an advowson in gross or appendant. A. seised of a manor, to which an advowson is appendant, dies, having issue a daughter, who takes husband and dies before entry into the manor. It seems, that the husband shall not be tenant by the curtesy of the advowson, nor of the rents incident to the manor, because he had not seisin of the principal.* Hal. MSS.—[Note 163.]

(5) According to Perkins, the husband shall have curtesy in an advowson, though he suffers the ordinary to present by lapse on an avoidance in his wife's life-time. Perk. Sect. 468. But such a case is not within lord Coke's reason for allowing curtesy of an advowson without seisin *in deed:* nor do I find any authority to support the doctrine, besides Mr. Perkins's name. *That* indeed, on account of the learning and ingenuity displayed in his *Profitable Book* on the laws of England, ought *in general* to have considerable weight; though one, who wrote soon after Mr. Perkins, describes him to be *a man that writeth of diverse titles of our law rather subtilly than soundly.* Fulb. Paral. 40. a. See also a more particular character of Mr. Perkins in Fulb. Prepar. 28. a.—[Note 164.]

(6) Here an use *before* or *not executed* by the 27 H. 8. must be meant; for an use within that statute is a legal estate. See acc. 2 And. 75. 147, and by lord Coke himself in Cro. Jam. 201. See also 1 New Abridgm. 660. But though in strictness of law there cannot be curtesy of *trusts*, yet since lord Coke's time our courts of equity have allowed curtesy both of trusts and of other interests, which, though in *law* mere rights and *titles*, are deemed *estates* in *equity*, and made to conform to many of the rules and consequences incident to estates in *law*. See 1 Atk. 603, the case of Cashborn and Inglish, in which lord ch. Hardwicke decreed curtesy of an *equity of redemption*. See S. C.

more

a reversion (7) or remainder expectant upon any estate of freehold, unlesse the particular estate be determined or ended during the coverture.

At the coronation of king *R.* 2, saith the record, [*h*] *Johannes rex Castilæ et Legionis, Dux Lancastriæ, coram dicto domino rege et consilio suo comparens, clamavit ut comes Leicestriæ officium Seneschalciæ Angliæ, et ut dux Lancastriæ ad gerendum principalem gladium domini regis vocat' Curtana die coronationis ejusdem regis, et ut comes Lincoln' ad scindendum et secandum coram ipso domino rege sedente ad mensam dicto die coronationis; et quia fact' diligenti examinatione coram peritis de consilio regis de præmissis, satis constabat eidem consilio, quòd ad ipsum ducem tanquam tenentem per legem Angliæ post mortem Blanchiæ quondam uxoris suæ pertinuit officia prædict' prout superius clamabat exercere, consideratum fuit per ipsum regem et consilium suum prædictum quòd idem dux officia prædicta per se et sufficientes deputatos suos faceret, et exerceret, et feoda debita in hâc parte obtineret. Qui quidem dux officium Seneschalciæ prædict' personaliter adimplevit, &c.* And every man that claimed to hold by grand serjanty to do any service to the king at his coronation, exhibited his petition to the said duke as steward of *England*, who upon hearing the proofes either allowed or disallowed the same.

[h] Process. Fact. ad Coronationem R. 2. Anno regni sui primo Rot. claus. m. 45.

[29. b.]

In letters patents made by king *H.* 6, to *Richard* earle of *Salisbury* you shall find this clause, *Quod charissimus consanguineus noster Richardus, nunc comes Sarum, qui Aliciam filiam et hæredem Thomæ nuper comitis Sarum adhuc superstitem duxit in uxorem, et cum eâdem Alicià prolem tempore mortis prædictæ Thomæ habuit et habet superstitem de præsenti, eoque prætextû idem Richardus nunc comes Sarum nomen statum et honorem comites Sarum, &c. habet, et pro tempore vitæ suæ de jure prætextû præmissorum habere debet* (1). The name of the issue which

Rot. Patent. ann. 20 H. 6.

---

more fully reported in Vin. Abr. *Curtesy*, E. pl. 23. However, a *wife in point of benefit* may have a trust of inheritance, which may be so declared as to prevent curtesy, as by directing the profits during the wife's life to be paid for her *separate* use; for in such a case the intention to exclude the husband from curtesy is manifest, and he cannot have an equitable seisin. 3 Atk. 715. It is also proper to remark, that though *curtesy* out of a *trust* is allowed, yet *dower* has been refused; a partiality not easy to be reconciled with reason, however settled by the current of authorities. Curtesy of money to be laid out in lands. 2 Vern. 536; 1 Ves. 174. Which authorities overrule the opinion in 2 Ch. Ca. 110. But as to this see post. 31. b.—[Note 165.]

(7) Mr. Perkins makes a *quære*, whether, if a woman seised in fee makes lease for life, reserving rent to her and her heirs, the husband shall not have curtesy in the rent during the lease; but he seems to admit, that the husband shall not have curtesy of the land itself, unless the lease determines before the wife's death. Perk. Sect. 467. See post. 32. a. where in a like case lord Coke says, that the wife shall not have dower. But if a rent is incident to a reversion expectant on an estate tail, the husband shall have curtesy of the rent till the tail determines. Post. 30. a.—[Note 166.]

(1) *So* nota, *till issue the husband cannot use the title of his wife's dignity; but afterwards he may. So adjudged by Hen.* 8, *in the case of Wimby, who claimed the title of Lord Talboys in right of his wife.* Hal. MSS.—This annotation shews, that in the opinion of lord Hale a title of honour admits of curtesy.

which the said *Richard* earl of *Salisbury* had by the said *Alice* was *Richard*, who married with *Anne* the sister and heire of *Henry Beauchampe* earle of *Warwicke*, who was earle of *Warwicke* to him and to his heires, and duke of *Warwicke* to him and to the heires males of his body. And *Richard* the sonne having then no issue by his wife, king *H.* 6, in 27 yeare of his raigne granted to him that he should be earle of *Warwicke, licèt ipse et prædicta Anna exitum inter eos ad præsens non habent.* These and many more I have read concerning this matter, and only say to the reader, *Utere tuo judicio, nihil enim impedio.*

Rot. Patent de anno 27 H. 6. m.

[i] Vid. 1 E. 3. 6. 5 E. 3. 26. (Post. 30.)

[i] If an estate of freehold in seigniories, rents, commons, or such like be suspended, a man shall not be tenant by the curtesie; but if the suspension be but for yeares, he shall be tenant by the curtesie. As if a tenant make a lease for life of the tenancie to the seignioresse, who taketh a husband, and hath issue,

---

curtesy. But lord Coke, after stating *two* precedents, one of curtesy in a title of honour, and another of curtesy in an office of honour, avoids making the least inference, and professedly leaves the reader to his own judgment; from which reserve it may be conjectured that he had his doubts. In fact, the point had been several times controverted in lord Coke's time. About the year 1580, Richard Bertie claimed the barony of Willoughby in right of his lady Catherine, duchess of Suffolk, he having had issue by her. The claim was referred by queen Elizabeth to lord Burghley, and two other commissioners, as was also a claim of the same dignity by Peregrine Bertie, the son and heir of the duchess of Suffolk by Richard Bertie. At one time the precedents urged for the husband were thought to make an impression on the commissioners; but finally they made a report in favour of the son, who was accordingly admitted to the dignity in the life-time of his father. See Coll. Proceed. on Claims of Baron. 1 to 23. But notwithstanding this case, two other claims of a like kind were made within a few years after, the first about 1586, by sir Thomas Fane, in right of his wife Mary, the daughter and heir of Henry lord Bergavenny, and the second about 1604, by Sampson Lennard, in right of his wife Margaret lady Dacres. Of the event of the *former* claim, I do not find any account; but as to the *latter* it appears, that king James referred it to commissioners, and that lady Dacres dying before any decision, the affair was compromised in 1612 by the king's granting precedency to the husband as eldest son of lord Dacres. The letters patent giving this precedency recite, that the commissioners *had found baronies on the like right conferred on the husband in several families, and in this particular barony of Dacres three several precedents.* There are other expressions equally remarkable for a studied ambiguity, such as leave undecided whether the pretension to the wife's title was deemed a claim of *favour* or of *right* from the crown, and appear calculated to *avoid* an adjudication of the point; and in this unsettled state of things, it is not surprising, that lord Coke should be so cautious of advancing any positive doctrine on the subject. I cannot learn that there have been any claims of dignities by curtesy since lord Coke's time, and from the want of modern instances of such claims, and from some late creations, by which women have been made peeresses, in order that the families of their husbands might have titles, and yet the husbands themselves continue commoners, it seems as if the prevailing notion was against curtesy in titles of honour. However, I have not yet discovered, whether this great question has ever formally received the judgment of the house of lords.—For the particulars of Wimby's case cited by lord Hale, see Coll. Claims of Bar. 11. 44. and 72.—[Note 167.]

issue, the wife dieth, he shall not be tenant by the curtesie (2), but if the lease had been made but for yeares he shall be tenant by the curtesie.

W. 2. ca. 1. Litt. ca. Dower, fol. 40. sect. 52. Paine's case, 8 Co. fol. 34.

"In fee simple or in fee taile generall, or seised as heir in taile especiall, and hath issue by the same wife male or female." 2. Of what estate. If lands be given to a woman and to the heires males of her body, she taketh a husband, and hath issue a daughter, and dieth, he shall not be tenant by the curtesie; because the daughter by no possibilitie could inherit the mother's estate in the land; and therefore where *Littleton* saith, issue by his wife male or female, it is to be understood, which by possibility may inherit as heir to her mother of such estate. *Littleton* himself explaineth this by expresse words, Cap. Dower, fo. 40. Sect. 52. And therefore if a woman tenant in taile generall maketh a feoffment in fee, and taketh back an estate in fee, and take a husband and hath issue, and the wife dieth, the issue may in a *formedon* recover the land against his father, because he is to recover by force of the estate taile as heir to his mother, and is not inheritable to his father (3).

"And hath issue." 3. The time of having the issue. 4. What kinde of issue. If a man seised of lands in fee hath issue a daughter, who taketh husband and hath issue, the father dieth, the husband enters, he [a] shall be tenant by the curtesie, albeit the issue was had before the wife was seised. And so it is albeit the issue had dyed in the life-time of her father before any descent of the land, yet shall he be tenant by the curtesie (4). If a woman [b] seised of lands in fee taketh husband, and by him is bigge with childe, and in her travell dyeth, and the childe is ripped out of her body alive, yet shall he not be tenant by the curtesie, because the childe was not borne during the marriage, nor in the life of the wife, but in the meane time her land descended, and in pleading he must allege that he had issue during the marriage.

[a] Old Tenures 21 H. 8. tit. Dower, 198.

[b] Vide Paine's case, ubi supra.

If the wife be [c] delivered of a monster, which hath not the shape of mankinde, this is no issue in the law; but although the issue hath some deformity in any part of his body, yet if he hath humane shape this sufficeth. *Hi, qui contra forman humani generis converso more procreantur, (ut si mulier monstrosum vel prodigiosum fuerit enixa) inter liberos non computentur. Partus tamen cui natura aliquantulum ampliaverit vel diminuerit non tamen superabundanter, ut si sex digitos vel nisi quatuor habuerit, benè debet inter liberos commemorari. Si inutilia natura reddidit membra,*

[c] Bract. lib. 5. 437, 438. Brit. ca. 66. and ca. 83. Fleta, lib. 1. c. 5. and lib. 6. cap. 54. (Ante 3. b. 7. b. 8. a.)

---

(2) Lord Coke means, that the husband shall not be tenant by the curtesy of the *seigniory*, it being suspended during the *whole* time of the marriage by the lease of the *tenancy* to the wife. See further as to the effect of *suspension* on curtesy in Perk. sect. 459, 460, 461, 462.—[Note 168.]

(3) The husband could not have curtesy in respect of the *fee*, because that was defeated by the son's recovery in the formedon; nor in respect of the *tail*, because the wife's feoffment *before* the marriage had discontinued the *tail*, and consequently there could be no seisin of it *during* the marriage. This seems to be the *rationale* of the case put by lord Coke.—[Note 169.]

(4) Yet in some cases the time of having issue is of consequence. See post. 40.

membra, ut si curvus fuerit aut gibbosus vel membra tortuosa habuerit, non tamen est partus monstrosus. Item puerorum alii sunt masculi, alii fœminæ, alii hermaphroditæ. Hermaphrodita tam masculo quàm fœminæ comparatur secundum prævalescentiam sexûs incalescentis.

If the issue be born deaf or dumbe, or both, or be born an ideot, yet it is a lawful issue to make the husband tenant by the curtesie and to inherite the land.

[d] 28 H. 8. 25. Dyer. Paine's case, ubi supra.

"*Borne alive.*" If it be borne alive [d] it is sufficient, though it be not heard cry; for peradventure it may be born dumbe. And this is resolved cleerly, in Paine's case *ubi supra* (A). For the pleading (as hath beene said) is, that during the marriage he had issue by his wife, and upon that point the triall is to be had, and upon the evidence (5) it must be proved, that the issue was alive, for *mortus exitus non est exitus*, so as the crying is but a proofe that the childe was born alive, and so is motion, stirring, and the like. And it is said by an ancient author [e] that it was ordained in the raigne of king *H.* 1. *Que touts que* ☞ *survequissent lour fems dount ills ussent conceive tenuissent les heritages lour fems pur lour vies.* [30. a.]

[e] Mirror, cap. 1. sect. 3.

[f] 9 E. 3. 38. 16 E. 3. Aid, 129. Stat. de Consuetudinibus Kanciæ.

By the custom of Gavelkind [f] a man may be tenant by the curtesie without having of any issue (1).

[g] 21 H. 3. tit. Dower, 198. Paine's case, ubi supra. (1 Leon. 167.)

"*Albeit the issue after dieth or liveth.*" And therefore [g] if a woman tenant in taile generall taketh a husband, and hath issue, which issue dyeth, and the wife dieth without any other issue, yet the husband shall be tenant by the curtesie, albeit the estate in taile be determined, because he was intitled to be tenant *per legem Angliæ* before the estate in taile was spent, and for that the land remaineth. But if a woman maketh a gift in taile, and reserve a rent to her and to her heires, and the donor taketh a husband and hath issue, and the donee dieth without issue, the wife dieth (A), the husband shall not be tenant by the curtesie of the rent, for that the rent newly reserved is by the act of God determined, and no state thereof remaineth. But [h] if a man

(Post. 32. a.) [h] Brooke, tit. per le Curtesie, 86. 10 E. 3. 27.

(A) See Mr. Vaillant's note on Dyer, 25. b. in his valuable ed.

(5) Vid. Pasch. 9 E. 1. rot. 4. Si habuit exitum, qui auditus fuit clamare seu vocem edere infra quatuor parietes; quia *puer* non fuit *visus* nec *auditus* clamare ab *hominibus masculis*, licet per fœminas nominatus fuit Johannes. *Therefore husband not tenant by the curtesy.* H. 5 E. 1. rot. 1. Wighorn. Hal. MSS.—I cannot guess what lord Hale's view could be in citing this record, unless it was to shew, that anciently in the case of curtesy the having *male* issue born alive could be proved by *men* only; which must be confessed to have been a most unaccountable peculiarity.—[Note 170.]

(1) On the other hand, curtesy by the custom of Gavelkind is subject to several disadvantages; for it is only of a *moiety* of the wife's land, and it *ceases* if the husband *marries again*. See Robinson Gavelk. b. 2. c. 1, where the learned author suggests, that some have doubted, whether there is any such variance between the common law and the custom, and therefore undertakes to prove it by authorities on record.—[Note 171.]

(A) Read "the wife dieth, and then the donee dieth without issue," &c. See Mr. Ritso's Intr. p. 238.

a man be seised in fee of a rent and maketh a gift in taile generall to a woman, she taketh husband and hath issue, the issue dieth, the wife dieth without issue, he shall be tenant by the curtesie of the rent, because the rent remaineth (2). The diversity appeareth.

"If the wife dies, the husband shall hold the land, &c." Foure things doe belong to an estate of tenancy by the curtesie, viz: marriage, seisin of the wife, issue, and death of the wife. But it is not requisite that these should concurre together all at one time. And therefore, if a man taketh a woman seised of lands in fee, and is disseised, and then have issue, and the wife die, he shall enter and hold by the curtesie. So if he hath issue which dieth before the * descent, as is aforesaid.

And albeit the state be not consummate untill the death of the wife, yet the state hath such a beginning after issue had in the life of the wife as is respected in law for divers purposes.

First, after issue had, he shall doe homage alone, and is become tenant to the lord, and the avowrie shall be made onely upon the husband in the life of the wife, as shall be said hereafter when we come to the apt place (3). Secondly, if after issue [i] the husband maketh a feoffment in fee, and the wife dieth, the feoffee shall hold it during the life of the husband, and the heire of the wife shall not during his life recover it in *sur cui in vitâ*; for it could not be a forfeiture, for that the estate, at the time of the feoffment, was an estate of tenancy by the curtesie initiate (4) and not consummate. And it is adjudged in 29 *E.* 3, that the tenant by the curtesie, cannot claim by a devise, and waive the state of his tenancy by the curtesie, because, saith the booke, the freehold commenced in him before the devise for terme of his life.

(6 Co. 57. b. Post. 67. a. 124. b.)
[i] 34 E. 2. Cui in vita, 13. 2 E. 2. Cui in vita, 26. 10 E. 3. 12. Dier, 21. Elis. 363. 29 E. 3. fo. 27.

"And he is called tenant by the curtesie of England, because this is used in no other realme but in England onely."

"By the curtesie." In Latine *per legem Angliæ.*

"In England onely." It is also used within the realme of *Scotland*, and there it is called *Curialitas Scotiæ.* And so it is in the realme of *Ireland* (5).

* *Descent* is here inserted for *Disseisin.* See Mr. Ritso's Intr. p. 118.

"And

(2) *So if it was a rent* de novo *granted in tail, and the wife dies without issue, the husband shall be tenant by the curtesy.* Hal. MSS.—[Note 172.]

(3) Hic *sect.* 90. 21 *E.* 3. 35. Hal. MSS.

(4) 4 *E.* 2. Cui in vita, 15. 34 *E.* 1. ibid. 30. 10 *E.* 3. 11. 22 *H.* 6. 24. *If husband entitled to the tenant by the curtesy aliens and retakes estate to him and his wife, by which the wife is remitted, he shall not be tenant by the curtesy.* Contra, *if it was before issue had.* 9 H. 7. 1. Vid. *T.* 7 Jac. *Ley, n.* 11. *Sparrey's case.* Hal. MSS.—See Ley's Rep. 9.—[Note 173.]

(5) Pat. 11 H. 3. m. 3. Cûm consuetudo et lex Angliæ sit, quòd si aliquis desponsaverit aliquam hæreditatem habentem, et ex eâ prolem habuerit, cujus clamor auditus fuerit infra quatuor parietes, et vir supervixerit uxorem, habebit totâ vitâ suâ custodiam hæreditatis uxoris, licêt ea hæredem habuerit ex primo viro,

(8 Co. 34.)

"And some have said, that he shall not be tenant by the curtesie, unlesse the childe, which he hath by his wife, be heard crie; for by the crie it is proved, that the childe was borne alive." Our author having delivered his owne opinion before, viz. *born alive*, now he sheweth the opinions of others: for so is said in the [*k*] statute *De tenentibus per legem Angliæ;* and of that opinion is *Glanvill* [*l*] lib. 7. cap. 8. *Bracton*, lib. 5. tract. 5. cap. 30. *Britton*, cap. 50. fol. 132. *Fleta*, lib. 6. cap. 50, &c. But the reason is against their opinion: for by the cry it is proved, &c., so as it is but an evidence to prove the life of the infant.

[*k*] Vet. Mag. Car. part. 2. fol. 70.

[*l*] Glanvill, lib. 7. cap. 8. Bract. lib. 5. tract. 5. ca. 30. Britton, cap. 50. fo. 132. Fleta, lib. 6. cap. 54.

"Some have said." By these and the like speeches our author intendeth, that the point had been controverted, but thereby, except it be in this Section, where formerly he delivered his opinon, as hath been said, he tacitly insinuateth his owne judgement, which in all the rest holdeth for good law and warranted by good authority throughout his three bookes; which kinde of speech and the like I have collected together, as it appeareth by the Sections in [*m*] the margent.

[*m*] Sect. 40. 119. 132. 136. 137. 138. 141. 145. 148. 156. 170. 179. 192. 202. 227. 234. 269. 336. 339. 357. 400. 435, 436. 440. 443. 460. 462. 478. 501. 503. 506. 522. 523, 524. 534. 576-601. 633, 634. 640. 642, 643. 644. 646. 658. 675. 689. 721. 723. 726. 730, 731. 733. 734.

"Therefore quære." This quære is not in the originall edition of *Littleton*, and therefore to be rejected (6).

And some have said, that in divers cases man shall by having of issue be tenant by the curtesie where a woman shall not be endowed. And therefore they say, if lands be given to two women and to the heires of their two bodies begotten, and one of them take husband and have issue and die, the inheritances being severall the husband shall be tenant by the curtesie, as it is adjudged 7 *E.* 3, and in other books [*m*] this judgment is cited and allowed. But certain it is, that if land be given to two men and to the heires of their two bodies begotten, and the one taketh wife and dieth, she shall not be endowed, for no estate in the land is alered by that marriage. But I leave the reader to his owne opinion, or rather to suspend it until he come to the proper place in the next chapter. If lands holden of the king by knights service *in capite* descend to a woman, and after office found she intrude and taketh hasband and hath issue, in this case the husband shall be tenant by the curtesie (1); and yet if the heire male after office in the like case intrudeth and taketh wife, his wife shall not be endowed, for so it is provided by the statute of *Prærogativa Regis*, cap. 18, that in that case there accrues to the heire no freehold, nor dower to the wife, which

(2 Ro. Abr. 90. & Post. 183. contra.) 7 E. 3. 6. [*m*] 17 E. 3. 51.

[30. b.]

Prærog. Regis. ca. 13.

---

viro, qui plenæ ætatis est; præceptum est, quòd eadem lex observatur in Hiberniâ. Hal. MSS.—The same extract from the patent roll of 11 H. 3, is given in Hal. Hist. C. L. 180.—[Note 174.]

(6) It appears by the various reading already given, that this *quære*, though not in the *Rohan* edition, which lord Coke thought the oldest, is in that by *Letton* and *Machlinia*, which is really the original one. [*But see Editor's preface to the thirteenth Edition.*]

(1) 1 *H.* 7. 17, *Dy.* 95. Hal. MSS.

which by interpretation is as much as to say, that the heire shall have no freehold as to this respect to give any dower to his wife. If a man marry the neife of the king by licence, and hath issue by her, and after lands descend to the niefe and the husband enter, the niefe dieth, he shall be tenant by the curtesie of this land, and the king upon any office found shall not evict it from him, because by the marriage the niefe was infranchised during the coverture. But if a free woman marry the villaine of the king by licence, and lands descend to the villaine, the villaine dieth, the wife shall not be endowed, but upon an office found the king shall have the land, for the villaine remained still a villaine to the king. A woman[n] taketh husband, and hath issue, lands descend to the wife, the husband enters, and after the wife is found an ideot by office, the lands shall be seised by the king (2) for the title of the tenancy by the curtesie and of the king begin at one instant, and the title of the king shall be preferred. A man shall be tenant by the curtesie of a castle[o] which serveth for the publicke defence of the realme, but a woman shall not be endowed thereof, as shall be said more at large hereafter. (3)

33 E. 3. tit. Travers, 86. (4 Co. 55. 1 Leon. 47.)

[n] Pl. Com. Dame Hales' case, 263.

(9 Co. 129.)

[o] Magna Carta. 30 E. 1. Dower, 81. 17 H. 3. Dower. Bract. lib. 2. fol. 46. & 314. (Post. 32. a. Cro. Cha. 300. 1 Ro. Abr. 675.)

A man shall be tenant by the curtesie of a common *sauns nomber*, but a woman shall not be endowed thereof, because it cannot be divided. A man shall be tenant by the curtesie[p] of a house that is *Caput Baroniæ* or *Comitatûs:* (4) ‡ but it appeareth by 4 *H.* 3. Dower, 180, that a woman shall not be endowed of it. For the law respecteth honour and order. A man is entitled to be tenant by the curtesie, and maketh a feoffment in fee upon condition, and entreth for the condition broken, and then his wife dieth, he shall not be tenant by the curtesie, because albeit the state given by the feoffment be conditionall, yet his title to be tenant by the curtesie was inclusively absolutely extinct by the feoffment, for the condition was not annexed to it (5). As if the lord disseise the tenant, and maketh

[p] 4 H. 3. Dower, 180. Bract. fol. 93. Fleta, lib. 5. cap. 23. 2 E. 2. Dower, 123. 3 E. 3. Dower, 102. 9 H. 7. 1. 30 E. 3. (Hob. 336. Post. 278.)

‡ *The note here referred to does not relate to this sentence of the Commentary, but seems meant to apply to the next sentence but one ending with "* annexed to it," *or to the subsequent one ending with "* feoffment." *The very case of lord Hale is mentioned by lord Coke, post.* 266. a. *and therefore note* (5) *appears to be more a remark upon note* (4), *or a continuation of it, than a note upon the Commentary; yet fo.* 266 *elucidates, or is connected with, the cases here advanced by lord Coke*

a feoffment

(2) Mr. serjeant Hawkins makes a *quære* of this, observing that the fee and freehold were in the wife, and that the wife of an ideot shall have dower. Hawk. Abr. of Co. Littl. 42. It has been also remarked, that there is not any concourse of titles between the king and the husband; the husband's title by curtesy not being *consummate* till the death of the wife, when the king's title determines. See Plowd. 264. Engl. ed. in a note by the Editor. However, note the reasoning in Plowden. See also 8 Co. 170, where it is adjudged, that though in the case of idiotcy the office for *some* purposes has relation to the time when the idiot's estate commenced, yet the king is only entitled to the profits from the finding of the office; which, as it may have some influence on the point of curtesy, is proper to be attended to.—[Note 175.]

(3) See post. 31. b.

(4) *If disseisee enters on disseisor's heir, and makes feoffment on condition, and enters for condition broken, and the heir enters, the right is revived.* Vid. 19 *H.* 6. 43. Hal. MSS.—[Note 176.]

(5) Hic *fol.* 266. Hal. MSS.

a feoffment in fee of the land upon condition, and entreth for the condition broken, yet the seigniory is extinct, for that was inclusively extinct by the feoffment. See more of tenant by curtesie, Section 52 (6).

Chap. 5. Of Dower. Sect. 36.

TENANT in dower is, where a man is seised of certaine lands or tenements in fee simple, fee taile generall, or as heire in speciall taile, and taketh a wife, and dieth, the wife after the decease of her husband shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty by metes and bounds for terme of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine yeares at the time of the death of her husband, [for she must be above nine yeares old at the time of the decease of her husband,] (1) † *otherwise she shall not be endowed.*

[q] Lib. Rub. cap. 70. Glanvill. lib. 6. cap. 1. Bract. lib. 2. fol. 92. Britt. cap. 101. Fleta, lib. 5. cap. 22.

"*TENANT in dower.*" (7) *Tenens in dote. Dos*, dower, in the common law [q] is taken for that portion of lands or tenements which the wife hath for terme of her life of the lands or tenements of her husband after his decease, for the sustenance of herself, and the nurture and education of her children (8). *Propter onus matrimonii, et ad sustentationem uxoris et educationem liberorum cùm fuerint procreati si vir præmoriatur: et hoc propriè dicitur dos mulieris secundum consuetudinem Anglicanam.* And *dos* is derived *ex donatione, et est* ☞ *quasi donarium*, because either the law itselfe doth (without any gift) or the husband himself giveth it to her, as shall be said hereafter. And at this day *dos* or dower is not taken by the professors of the common law, either for the land which the wife bringeth with her in marriage to her husband, for then it is either called in frankmarriage or in marriage, as hath beene said [31. a.]

---

(6) See also Wright's Ten. 193, and Vin. Abr. *Curtesy*, and the same title New Abr.

(1) † All between the brackets in L. and M. and in Roh.

(7) Nota, *in tenancy in dower the wife shall be said to be in by the husband.* 36 *H.* 6. *Dower*, 30. *But tenancy by the curtesy is in the* Post. 5 E. 2 *Entry*, 66. Hal. MSS.—[Note 177.]

(8) The following note is by the editor of the eleventh edition of lord Coke's Commentary,—(The reason why the law gave the wife dower will appear, if we consider how the law stood anciently; for by the old law, if this provision had not been made, and the party at the marriage had made no assignment of dower, the wife would have been without any provision, for the personal estates even of the richest were then very inconsiderable; and before trusts were invented, which is but lately, the husband could give his wife nothing during his own life, nor could he provide for her by will, because lands could not be devised, unless it was in some particular places by the custom, till the statute of Hen. 8.)—[Note 178.]

said, nor for the portion of money or other goods or chattels which she bringeth with her in marriage, for that is called her marriage portion. And yet of ancient time [r] *dos mulieris*, the dower or dowrie of the woman was also applied to them. But it is commonly taken for her third part, which she hath of her husband's lands or tenements.

In Domesday, *Dos* is called *Maritagium*.

To the consummation of this dower three things are necessary; viz. marriage, seisin, and the death of her husband.

Dos [s], the very name doth import a freedome, for the law doth give her therewith many freedomes. *Secundum consuetudinem regni mulieres viduæ, &c. debent esse quitæ de tallagiis, &c.* And tenant in dower shall not be distreyned for the debt due to the king by the husband in his life time in the lands which she held in dower. And other privileges she hath; of all which *Ockham* yeelds the reason, *Doti ejus parcatur quia præmium pudoris est* (2).

[r] Britton, cap. 101. Bracton, lib. 2. fo. 92. Glanv. lib. 6. ca. 1. lib. 7. ca. 1. 2 Co. 93. Bingham's case. 4 H. 3. Dower, 179.

[s] Claus. 11 H. 3. nu. 17. Regist. 142, 143. F. N. B. 150. Ockham, fol. 40.

"*Where a man.*" If the husband be an alien [t] the wife shall not be endowed. So if the husband be the king's villaine, the wife shall not be endowed (as hath beene said); but if the husband be a villaine to a common person, the wife shall be endowed if she be intitled to dower before the entrie of the lord. And so if a free man take a neife to wife, and dieth, she shall be endowed. The wife of an ideot (3) *non compos mentis*, outlawed, or attainted of felony or trespasse, attainted of heresie, *præmunire*, or the like, shall be endowed. But if the husband be attainted of treason, albeit it be treason done after the title of dower, she shall not be endowed, as shall be said hereafter.

[t] Bract. fol. 298. 19 E. 2. Dower, 171. Dame Hales' case. 13 E. 3. Dower. Statham. 13 E. 1. tit. Dower. (Post. 392. b.

"*Seised.*" Here this word (seised) extendeth itselfe as well to a seisin in law, or a civill seisin, as to a seisin in deed, which is a naturall seisin: but seised he must be either the one way or the other during (4) the coverture. For a woman shall be endowed of a seisin in law. As where lands or tenements descend to the husband before entry, he hath but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actuall possession, for it lieth not in the power of the wife to bring it to an actuall seisin, as the husband may do of his wife's land,

(Ante 29. a.)

---

(2) Claus. 26 H. 3 m. 15. Mulier ratione tenuæ in dotem non debet venire coram justiciariis itinerantibus ratione communis summonitionis. *But yet she shall be attendant to the heir for a third part of the services, for which he is attendant over. Tenant in frank-marriage in the fourth degree dies; his issue endows his mother; she shall be attendant as the issue is, and shall not hold acquitted. So if A. gives to B. in taile rendering during his life* 5*s and afterwards* 10*s. the wife of B. endowed shall hold of the heir by a third part of* 10*s. But if there be tenant by* 5*s. and mesne hold over by* 10*s. and tenant dies without heir, his wife shall be attendant to the mesne only for the third part of* 5*s. Keilw.* 124. 129. Hic. *fol.* 46, *lease by tenant in tail, avoided by the issue, yet revived against tenant in dower.* Hal. MSS.—[Note 179.]

(3) See ante 30. b. n. 2.

(4) *Lessee for life surrenders to him in reversion on condition, and enters for the condition broken; yet the wife of the reversioner shall be endowed. Noy*, n. 284. *Ormand's case.* Hal. MSS.—See Noy, 66.—[Note 180.]

land, when he is to be tenant by curtesie, which is worthy the observation. And yet of every seisin in law, or actuall seisin of lands or tenements, a woman shall not be endowed [u]. For example, if there be grandfather, father, and sonne, and the grandfather is seised of three acres of land in fee, and taketh wife, and dieth, this land descendeth to the father, who dieth either before or after entry, now is the wife of the father dowable. The father dieth, and the wife of the grandfather is endowed of one acre and dieth, the wife of the father shall be endowed onely of the two acres residue, for the dower of the grandmother is paramount the title of the wife of the father, and the seisin of the father which descended to him (be it in law or actuall) is defeated (5), and now upon the matter the father had but a reversion expectant upon a frechold, and in that case, *Dos de dote peti non debet:* although the wife of the grandfather dieth living the father's wife (6). And here note a diversity [w] betweene a descent and a purchase. For in the case aforesaid, if the grandfather had infeoffed the father, or made a gift in taile unto him, there in the case abovesaid, the wife of the father, after the decease of the grandfather's wife, should have been endowed of that part assigned to the ☞ grandmother, and the reason of this diversitie is, for that the seisin, that [31. b.] descended after the decease of the grandfather to the father, is avoyded by the indowment of the grandmother, whose title was consummate by the death of the grandfather; but in the case of the purchase or gift, that took effect in the life of the grandfather (before the title of dower of the grandmother was consummate), is not defeated, but only *quoad* the grandmother, and in that case there shall be *Dos de dote*. And yet there is another diversitie [x] (1) where the wife of the father is first endowed, and where the wife of the grandfather; for in the same case after the decease of the grandfather and father the sonne entreth and indoweth his mother of a third part, against whom the grandmother recovereth a third part and dyeth, the mother shall enter againe into the land recovered by the grandmother, because she had in it an estate for terme of her life, and the estate for the life of the grandmother is lesser in the eye of the law, as to her, than her owne life. Also the husband [y] (2) may be seised in his demesne, as of fee absolutely, yet the woman shall not be indowed,

[u] 43 E. 3. 32. 45 E. 3. 13. 5 E. 3. 4. F. N. B. 149. 8 E. 3. tit. Ass. 393. 19 E. 2. Dower, 170. 23 E. 3. Dower, 80. (Perk. sect. 315, 316. 4 Co. 122. 1 Ro. Abr. 677.)

[w] 5 E. 3. tit. Voucher, 249. Paris's case, 9 E. 3. 4.

(4 Co. 122.)

[x] 8 E. 3. tit. Ass. 393. 13 R. 2. Dower, 55, 22 E. 3. 5. 8 E. 3. 3. 7 H. 6. 4. (Post. 42. a. 4 Co. 122.)

[y] 6 E. 3. 50. F. N. B. 149. (Cro. Cha. 190. 191. 1 Ro. Abr. 676. 474. Cro. Jam. 615. Doctr. Plac. 148. 2 Co. 77.)

as

---

(5) Hic. *sect* 8. 8 *E.* 3. 13. 8 *Ass.* 6. *But by some the heir shall have mort d'ancestor of such seisin.* Hal. MSS.

(6) 17 E. 3. 65. hic *fol.* 42. Vid. 6. *E.* 3. 43, contra. Nota *the case* 5 *E.* 3. *Vouch.* 249. *A. gives in tail to B. his eldest son who dies, the wife of B. is endowed of the third part of the whole. A. dies. his wife brings dower against the wife of B. she vouches the heir of her husband by reason of the reversion, and adjudged that he shall warrant.* But quære *if she shall recover in value the third part of the whole, or only the third part of two parts. It seems only the third part of two parts, by reason of the eviction. Therefore* quære *if in this case the seisin of B. be not fully avoided. Suppose that the wife of A. had first recovered, during her life the wife of B. cannot demand dower except of the two parts which were in the hands of the heir.* Hal. MSS.—[Note 181.]

(1) 8 *E.* 2. *Recovery in value*, 10. Hal. MSS.

(2) Hic. *sect.* 56. *fol.* 42. Hal. MSS.

as she shall not be indowed both of the land given in exchange, and of the land taken in exchange, and yet the husband was seised of both, but she may have her election to be indowed of which she will.

Also of a seisin for an instant a woman shall not be indowed (3); as if *Cestuy que use* [z] after the statute of 1 *R.* 3, and before the statute of 27 *H.* 8, had made a feoffment in fee, his wife should not be indowed (3 a).

[z] 27 H. 8. 23. F. N. B. 17 H. 3. Dower, 192.

Likewise if two joyntenants be in fee, and the one maketh a feoffment in fee, his wife shall not be indowed (4). And so if the conusee of a fine doth grant and render the land to the conusor, the wife of the conusee shall not be indowed, for it is not possible that the husband could have indowed his wife of such an estate, as the usual pleading is, *Lib. Intrat.* 225. *Quia dicit quòd W. quondam vir suus nunquam fuit seisitus de tenementis prædictis de tali statu ita quòd eandem A. inde dotâsse potuit* (A).

"*Of lands or tenements*" (B). Of a castle that is maintained for the neccessary defence of the realme a woman shall not be indowed, because it ought not to be divided (C); and the publique shall be preferred before the private (5). But of a castle that is onely maintained for the private use and habitation of the owner, a woman shall be indowed. And so it was adjudged in the court of [a] common pleas, where in a writ of dower the demand was *de tertiâ parte Castri de Hilderker in Comitatu Northumb.* And the statute of *Mayna Charta*, cap. 7, where it is provided, *nisi domus illa sit Castrum*, is to be understood, a castle maintained for the necessary and publike defence of the realme. And this agreeth with ancient records, [b] (albeit in the argument of the said case they were not vouched) the effect whereof be,

Vide Sect. 242. (Post. 165. a. Ante 30. b.

[a] Pasch. 23 Eliz. in Com. Banco. Bract. fol. 96. Brit. ca. 103. Flet. l. 5. c. 23. 30 E. 1. tit. Dower, 81. b. 30 E. 1. Vouch. 298.

17 H. 3. Dower, 192. 8 H. 3. Dower, 196. 8 H. 3. lib. 194.

[b] Pat. 1 E. 1. part 1. m. 17. Esch. 4 E. 1. nu. 88.

Non

---

(3) *If tenant for life makes a feoffment in fee and dies, the wife shall not be endowed.* 3 *H.* 4. 6. 14 *H.* 4. *Yet if tenant at will makes feoffment and dies, his wife shall be endowed. Cited by Jones*, 9 *Cha. to have been adjudged* 34 *Eliz. in Moseley and Taylor.* Hal. MSS.—See W. Jo. 317.—[Note 182.]

(3 a) That there cannot be dower of a *trust*, see Forrest. 138. 2 Atk. 525. See further, 2 P. Wms. 700.—[Note 183.]

(4) S. P. acc. in *MS. Common Place-book, supposed to be by judge Doderidge*, and 14 H. 4. 13 B. and P. 34 E. 1. Fitzh. Dower, 178, cited.—See further Cro. Eliz. 502. Noy, 64. Cro. Jam. 615. 1 Atk. 442, and 2 Blackst. Com. 132.

(A) Wife not dowable upon an equitable seisin, though husband is entitled to curtesy upon it. Finally settled against dower on such a seisin. Dixon *v.* Saville, Bro. Cha. Ca. 326.

(B) As to mines of coal, &c. see F. N. B. 149; and Stoughton v. Leigh, 1 Taunt. 402.

(C) 8 Ves. 144.

(5) Pat. 1 E. 1. m. 17. Præsertim cum hujusmodi mulieribus castra, quæ fuerunt virorum suorum, et quæ sunt de guerra, vel etiam homagia et servitia aliquorum, quæ sunt de guerra, in dotem non debuerunt, nec consueverunt assignari, ideo salvis nobis castris et homagiis prædictis, &c. Hal. MSS.—[Note 184.]

Non debent mulieribus assignari in dotem castra quæ fuerunt virorum suorum et quæ de guerra existunt, vel etiam homagia et servitia aliquorum de guerra existentia. Wherein it is to be observed, that the law is not satisfied with the names of things, or nominatives, but with things reall and substantiall. But of the principal mansion, or capitall messuage, the wife shall be indowed, [c] *si non sit Caput Comitatûs, sive Baronia* (6), for the honour of the realme, or (as hath beene said) a castle for the publique defence of the realme. And so are the old bookes to be intended, as it was resolved *Tr.* 17 *Eliz.* in the court of common pleas, which I heard and observed. And of an estate taile in lands determined, a woman shall be indowed in the like manner and forme as a man shall be tenant by the curtesie, *mutatis mutandis.*

[c] Bract. l. 2. f. 93. Brit. c. 103. Flet. lib. 5. ca. 22. Trin. 17 El. in Com. Banco.

"In fee simple, fee taile generall, &c." If a man be tenant in fee taile generall, [d] and make a feoffment in fee, and taketh back an estate to him and to his wife, and to the heires of their two bodies, and they have issue, and the wife dyeth, the husband taketh another wife and dyeth, the wife shall not be endowed, for during the coverture he was seised of an estate taile speciall, and yet the issue which the second wife may have by possibilitie may inherit (7).

[d] 41 E. 3. 30. 44 E. 3. 26. 30 H. 8. 3 Dyer, 41.

The same law it is, if in this case he had taken backe an estate in fee simple, and after had taken wife and had issue by her; yet she shall not be indowed, for that the fee simple is vanished by the remitter, and her issue hath the land by force of the entaile. But in that case the tenant cannot plead that the husband was never seised of such an estate whereof the demandant might be indowed, but he must plead the speciall matter (8).

30 H. 8. Dyer, 41.

"And taketh a wife." If a man so seised as is aforesaid, taketh an alien wife, and dyeth, she shall not be endowed (9); but if the

---

(6) Vid. *a whole manor reseised, because it was* caput baroniæ, *though assigned by the husband.* Claus. 20 H. 3. m. 20, pro uxore Roberti Fitzwalter. Hal. MSS.—But this doctrine must be understood to be applicable only to *baronies by tenure*, of which it is said there is not any now remaining except Arundel; and therefore creating a person baron by a title taken from a principal mansion-house in his possession will not make the house *caput baroniæ*, and so exclude the wife from dower out of it, because such a barony is merely *titular*, and a titular barony cannot have *caput baroniæ*. Adj. in lady Gerrard's case, 1 L. Raym. 72, and other books. See Mad. Bar. Angl. 10.—[Note 185.]

(7) Vid. 24 E. 3. 28. 59. *Tenant in tail has issue A. and B. and leaves to A. for years and releases to him and his heirs with warranty, and A. takes C. to wife and dies having issue D. tenant in tail dies, D. dies, and C. recovers dower against B. Adjudged.* Hal. MSS.—[Note 186.]

(8) 21 *E.* 3. 36. 3 *H.* 6. 55. Hal. MSS.—Ante 296. Post. 40. a. F. N. B. 149. F.

(9) Nota, *anciently a woman alien was not dowable; but by special act of parliament not printed,* Rot. Parl. 8 H. 5. n. 15, *all women aliens, who from thenceforth* (desores ou avant) *should be married to Englishmen by license of the king, are enabled to demand their dower after the death of their husbands, to whom they should in time to come be married, in the same manner as English women.*

the king take an alien borne, and dyeth, she shall be endowed by the law of the crowne. And *Edmond*, the brother of king *Edward* the first, married the queen of *Navarre*, and dyed, and it was resolved [*e*] by all the judges, that she should be indowed of the third part of all the lands whereof her husband was seised in fee (10).

(Doct. Plac. 148. Post. 33. a.)

[*e*] Rot. Parl. 26 E. 1. Rot. 1.

If a *Jew* born in *England* taketh to wife a *Jew* borne also in *England*, the husband is converted to the Christian faith, purchaseth lands, and infeoffeth another, and dyeth, the wife brought a writ of dower, and was barred of her dower, and the reason yielded in the record [*f*] is this, *Quia verò contra justitiam est quòd ipsa dotem petat vel habeat de tenemento quod suit viri sui, ex quo in conversione suâ noluit cum eo adhærere et cum eo converti* (1).

[32. a.]

[*f*] Dors. claus. 18 H. 3. m. 17.

"Of the third part of such lands and tenements in severalty by metes and bounds." Albeit of many inheritances that be entire, whereof no division can be made by metes and bounds, a woman cannot be endowed of the thing itselfe, yet a woman [*g*] shall be endowed thereof in a speciall and certaine manner. As of a mill a woman shall not be endowed by metes and bounds, nor in common with the heire, but either she may be endowed of the third tolle dish, or *de integro molendino per quemlibet* 3. *mensem.* And so of a villeine, [*h*] either the third dayes work, or everie third weeke or month. A woman shall be endowed of the third part of the profit of stallage, of the third part of the profits of a faire, of the third part of the profits of the office of the marshalsea, of the [*i*] third part of the profits of the keeping of a parke, of the third part of the profit of a dove-house, and likewise of the third part of a piscary, [*k*] *viz. tertium piscem vel jactum retis tertium;* of the third presentation to an advowson (2) A writ of dower lieth *de* 3. *parte exituum provenientium de custodiâ gaolæ Abathiæ Westm.* And herewith agreeth reverend antiquitie. *De* [*l*] *nullo, quod est suâ naturâ indivisibile et secationem sive divisionem non patitur, nullam partem habebit, sed satisfaciat ei ad valentiam.* Of the third part of profits of courts, [*m*] fines, heriots, &c. Also a woman shall be endowed of tithes; and the surest indowment of tithes is of the third sheafe; for what land shall be sowne is uncertaine (3).

(1 Ro. Abr. 682.)

[*g*] Bract. lib. 2. fo. 97. b. 23 H. 3. tit. Ass. 435. F. N. B. 149. 45 E. 3. Dower, 50. (Post. 165. a.)

[*h*] 2 H. 6. 11. Bract. lib. 2. fo. 97. Brit. 247. 11 E. 3. tit. Dower, 85. 15 E. 3. ibid. 81. 2 E. 3. 57. F. N. B. 8. K.

[*i*] 4 E. 2. Tr. 233. 26 E. 3. 58. 45 E. 3. Dower, 50. (Cro. Jam. 621.)

[*k*] Bract. 93. 208. Brit. 247. Flet. lib. 5. ca. 23. 17 E. 2. Dower, 104. 163. 19 E. 3.

But in some cases of lands and tenements, which are divisible,

Quar. Imp. 154. 7 E. 3. 7. [*l*] Bract. 97. Brit. 146, 147. Judgme. 18. fo. 230. 11 Co. 25, 26. Harper's case.

[*m*] Lib. Intr.

and

---

women. But this act did not extend to those married before, and therefore in Rot. Parl. 9 H. 5. n. 9, *there is a special act of parliament to enable Beatrice countess of Arundel born in Portugal to demand her dower.* Hal. MSS.—See acc. 1 Ro. Abr. 675.—[Note 187.]

(10) Yet Edmund the queen of Navarre's husband was only a subject, therefore *quære* the reason of the case.

(1) Nota placitum illud fuit coram justiciariis ad custodiam Judæorum assignatis. Hal. MSS.—See the record at length in Tov. Angl. Judaic. 230. See also Mol. de Jur. Marit. 8th ed. b. 3. c. 6. s. 11.

(2) See post. 32. b. n. 2.

(3) *But the assignment is good, though tithes of the third yard-land be assigned.* M. 9 Jac. C. B. *Kettleby's case.* Hal. MSS.—[Note 188.]

and which the heire of the husband shall inherit, yet the wife shall not be endowed. As if the husband [n] maketh a lease for life of certaine lands, reserving a rent to him and his heires, and he taketh wife and dieth, the wife shall not be endowed, neither of the reversion (albeit it is within this word tenements) because there was no seisin in deed or in law of the freehold nor of the rent, because the husband had but a particular estate therein, and no fee simple (4). But if the husband maketh a lease for yeares, reserving a rent, and taketh wife, the husband dieth, the wife shall be endowed of the third part of the reversion by metes and bounds, together with the third part of the rent, and execution shall not cease during the yeares (5). And herewith agreeth the common experince at this day. But if the husband maketh a gift in taile, reserving a rent to him and his heires, and after the donor taketh wife and dieth, the wife shall be endowed of this rent, because it is a rent in fee, and by possibilitie may continue for ever.

[n] 28 Ass. 3. 8 R. 2. 2. Dower, 184. 1 E. 6. Dow. 89.

Vid. 1 E. 6. Dow. B. 89. (Ante 30. a.)

(Cro. Cha. 300. Ante 30. b. 2 Ro. Abr. 675. Ante 29. b.)

Of a common certaine a woman shall be endowed, but of a common *sauns nomber en grosse* she shall not be endowed, as hath been said before. And so of a rent service, rent charge, and rent secke, she shall be endowed (6): but of an annuitie that chargeth onely the person, and issueth not out of any lands or tenements, she shall not be endowed. But if the freehold of the rents, common, &c. were suspended before the coverture, and so continue during the coverture, she shall not be endowed of them. If after the coverture the husband doth extinguish them by release or otherwise, yet she shall be endowed of them; for as to her dower they in the eye of the law have continuance.

7 Co. 38. Lillingston's case. 6 Co. 78. Seig. Aburganie's case. (Post. 56. a. 171. a. 179. a. Perk. sect. 328. contra (A).)

If the wife be entitled to have dower of three acres of marsh, every one of the value of twelve pence, the heire by his industry and charge maketh it good meadow, every acre of the value of ten shillings, the wife shall have her dower according to the improved value, and not according to the value as it was in her husband's time: for her title is to the quantitie of the land, vis. one just third part (7).

(F. N. B. 149. C.) V. 30 E. 1. Vouch. 298.

And the like law it is if the heire improve the value of the land by building: and on the other side, if the value be impaired in the time of the heire, she shall be endowed according to the value

---

(4) 25 *E.* 3. 46. *But she shall be endowed of rent reserved in tail so long as the tail continues.* 10 *E.* 3. 27. hic. *fol.* 30. Hal. MSS.—[Note 189.]

(5) P. 8. Jac. C. B. n. 23. *Fulgeam's case, Noy, n.* 280. *Whitley and Best, a proviso in the writ of seisin* quòd tenens non expellatur. *But see* 27 *H.* 8. *If tenant for years be received and his term is allowed,* cesset executio durante termino. *Yet the law vests the actual possession in him who recovers; and* nota *here she shall recover damages according to the value of the rent.* P. 22 Jac. C. B. *P.* 16 *E.* 3. Hal. MSS.—[Note 190.]

(6) *Yet demand of land and common* pro omnibus averiis, *without saying* eidem spectant', *is good after verdict, and shall not be intended common without number.* P. 9 Car. B. R. *Prewet and Drake, Crook, n.* 3. Hal. MSS. See Cro. Cha. 300. W. Jo. 315.—[Note 191.]

(A) In the case of feoffee of the husband, the case is not put of the heir; and in case of feoffee of the husband, n. 8, the reason stated below in n. 8 is material, and seems inapplicable to the heir.

(7) *But she shall not have emblements. Dy.* 316.—Hal. MSS.—[Note 192.]

value at the time of the assignment, and not according to the value as it was in the time of her husband (8).

"*Any time during the coverture.*" For the better understanding whereof it is to be knowne, that (as hath beene said) to dower three things doe belong, viz. marriage, seisin, and the death of the husband. Concerning the seisin it is not necessarie that the same should continue during the coverture, for albeit the husband alieneth the lands or tenements, or extinguisheth the rents or commons, &c. yet the woman shall be endowed. But it is necessary that the marriage doe continue, for if that be dissolved the dower ceases, *ubi nullum matrimonium, ibi nulla dos.* But this is to be understood when the husband and wife are divorced *à vinculo matrimonii*, as in case of precontract, consanguinity, affinity, &c. and not *à mensa et thoro* only, as for adulterie (9). And yet it is said, that if the assignment of dower *ad ostium ecclesiæ* be specified, viz. that notwithstanding any divorce shall happen yet that she shall hold it for life, that this is good.

Bract. 92. Brit. cap. 101. Brit. cap. eodem. (1 Ro. Abr. 681. Doctr. Plac. 148. Post. 33. b. 4 Co. 29. 5 Co. 9. b.)

If the wife clope [*o*] from her husband, that is, if the wife leave her husband, and goeth away and tarrieth with her adulterer (10), she shall lose her dower (B) until her [32. b.] husband willingly ☞ without coertion ecclesiasticall be reconciled unto her, and permit her to cohabit with him, all which is comprehended shortly in two hexameters,

[*o*] W. 2. ca. 34. Lib. Intr. 224. Fleta, lib. 5. c. 22. Br. c. 109. Mirror, ca. 5. sect. 5. F. N. B. 150. Perk. sect. 354. 1 Ro. Abr. 680. 1 Sid. 118.)

---

(8) Vid. 1 *H.* 5. 11. 17 *E.* 3. *If feoffee improves by buildings, yet dower shall be as it was in the seisin of the husband.* 17 *H.* 3. Dower, 192. 31. E. 1. Vouch. 288. *For the heir is not bound to warrant, except according to the value as it was at the time of the feoffment, and so the wife would recover more against the feoffee than he would recover in value, which is not reasonable.* Hal. MSS. See further Hugh. Comment. on Orig. Writs, 196.—[Note 193.]

(9) 18 *E.* 4. 29. Vid. *acc. Noy, n.* 433, *and n.* 467. *Powel and Weeks in case of divorce* causâ adulterii. *Yet dower lies.* Vid. *acc.* 10 *E.* 3. 15, *in case of divorce* ex voto castitatis. *Yet this in some cases dissolves the marriage* extunc. 45 E. 3. Hal. MSS. See Stowell's case acc. Godb. 145. But according to Rolle's report it was adjudged, that the divorce for adultery was a bar of dower. 1 Ro. Abr. 681.—[Note 194.]

(10) *Dy.* 107. *Where issue is joined on reconciliation after elopement, advantage shall not be had except of one elopement.* Vid. Lib. Parl. 30. *E.* 1. *John Comoy's grant of his wife.* Noveritis me tradidisse et demisisse spontaneâ meâ voluntate domino Willielmo Paynell militi Margaretam uxorem meam; et concedo, quòd Margareta cum prædicto Willielmo remaneat pro voluntate ipsius Willielmi. *Afterwards William and Mary lived together, and John died. Ruled* 1, *that this was a void grant;* 2, *that it did not amount to a licence, or at least was a void licence;* 3, *that after elopement there shall not be any averment,* quòd non fuit adulterium, *though William and Mary, after the death of John, intermarried. So she was barred of dower.* Nota, *they produced a sentence of purgation of adultery in the ecclesiastical court; yet not allowed against such presumption.* Hal. MSS. See Comoy's grant of his wife at length in 2 Inst. 435, and in marg. of Dy. ed. 1688, fol. 106. b. See S. C. cited in 1 Ro. Abr. 680. See further Vin. Abr. *Dower*, P. and R. Hugh. Comment. Orig. Writs, 190.—[Note 195.]

(B) So also she loses her right of being received and supported by him; nor will his having committed adultery vary the law. 6 Term R. 603.

ameters, *Sponte virum mulier fugiens, et adultera facta, Dote suâ careat, nisi sponsi sponte retracta.* And [*p*] if she goeth willingly with or to the avowtrer, this is a departure and a tarrying, albeit she remaineth not continually with the avowtrer, or if she tarryeth with him against her will, or if he turne her away, or if she cohabit with her husband, by the censures of the church, in all these cases she loseth her dowrie. But see notable matter hereof in the exposition upon the statute of *W.* 2. cap. 34.

[*p*] 3 E. 3. 2. 6 E. 3. 29. 9 E. 3. 29. 19 E. 3. Dower, 94. 43 E. 3. 19. Vid. Fits. N. B. 150. H. 8 E. 2. Dower, 153.

"*In severalty by metes and bounds.*" And yet in some cases where the husband was sole seised, the wife shall not be endowed in severalty by metes and bounds (1). As for example, [*q*] if a man seised of lands in fee took a wife, and enfeoffed eight persons, a writ of dower was brought against these eight persons, and two confesse the action, and the other six pleade in barre, and descend to issue, the demandant shall have judgement to recover the third part of two parts of the land, in eight parts to be divided, and after the issue being found for the demandant against the sixe, the demandant shall have judgement to recover against them the third part of sixe parts of the same land, in eight parts to be divided, which is worthie the observation. But of this more shall be afterwards said in this Chapter.

[*q*] M. 2 & 3 Eliz. Dier. 187. b. 10 Ass. p. 2. 17 E. 3. 4. Tr. 10 H. 5. Rot. 447.

But regularly *Littleton's* words are to be intended, where the husband was sole seised, for where he was seised in common, there she cannot be endowed by metes and bounds, as it appeareth in this Chapter, Sect. 44. *Nota*, the endowment by metes and bounds, according to the common right, is more beneficiall to the wife, than to be endowed against common right, for there she shall hold the land charged, in respect of a charge made after her title of dower (2).

26 E. 3. Dower, 133. 10 E. 3. 31. 17 E. 2. Dower, 164. 19 E. 3. Quar. Imp. 154. 12 E. 4. 2. 18 H. 6. 27. per Paston.

"*Whether*

(1) Nota, *if the sheriff doth not return* per metas et bundas, *it is ill, unless certain closes are assigned by name. M.* 44, 45 *El. C. B. Husband makes lease for years and dies, the heir says to the wife,* I endow you of the third part of all the lands whereof your husband was seised. *Ruled,* 1. *This is a good endowment, though not by metes and bounds. Otherwise where the sheriff assigns dower.* 2. *This assignment shall bind the lessee, and they shall hold in common. Tr.* 1651. *B. R. Coush and Lambert.* Hal. MSS. See further as to assignment of dower, post. 34. b.—[Note 196.]

(2) *Where the wife shall hold charged.* First, 19 *E.* 3. Quare Impedit, 154. *Husband seised of the manors of A. B. and C. to which several advowsons are appendant, grants the next avoidance of the three advowsons and dies. The heir assigns the manor of A. to the wife, with the advowson of A. which becomes void. The grantee shall present, for assignment of common right is of the third part of every manor, and the third presentment of every church. Otherwise if the dower had been assigned to her* ad ostium ecclesiæ. Secondly, *if the husband had granted a rent charge, then in the former case the wife shall hold it discharged, for she may distrain in the other two manors, and for the same reason the wife of the heir shall not have* dos de dote. *But* thirdly, *if he had granted a rent out of the manor of A. and this manor had been assigned, she should hold charged.* 5 *E.* 2. *Avowry,* 206. *Husband feoffee grants rent charge to the wife, the husband dies, the third part of the land charged is assigned in dower. The rent shall be apportioned, and shall not issue wholly out of the residue.* Hal. MSS. See further Vin. Abr. *Dower,* D. a.—[Note 197.]

"Whether she hath issue by her husband or no." Herein the tenant in dower, as in many other cases, is preferred before the tenant by the curtesie; but yet this great disadvantage the wife hath, that she cannot enter into her dower by the common law, but is driven to her writ of dower to recover the same, wherein sometimes great delayes are used, and therefore the well-advised friends of the wife will provide for a jointure to be made to her, as shall be said hereafter. For by the statute of [r] *Magna Charta*, cap. 7, she shall tarrie in the chiefe house of her husband but by the space of fortie dayes after the death of her husband, within which time dower shall be assigned unto her, unlesse it were formerly assigned, &c. but of little effect was that act, for that no penaltie was thereby provided if it were not done: which terme of 40 days is in law called *Quarentina*. But if she marry within the 40 dayes, she loseth her quarentine (3). But some have said that by the ancient law of *England* the woman should continue a whole yeare in her husband's house, within which time if dower were not assigned, she might recover it: and this certainly was the law of *England* before the Conquest [s], *Mulieres viduæ bis senos menses viduas exigunto, atque tum demum sui velint nubant sin quæ ante annum nupserit dote mulctata fortunis omnibus à priore marito relictis privatur*. But for the reliefe of the widow it was provided by the statute of *Merton*, made *Anno* 20 *H.* 3, cap. 1, (which by [t] *Bracton* is called *Nova constitutio*) that the wife shall recover damages in her writ of dower from the time of the death (c) of her husband (4).

[r] Magna Carta, cap. 7. Fleta, lib. 5. cap. 23. Bracton, lib. 2. fo. 96. Britton, ca. 103. (Post. 34. b.) 19 H. 6. 14. 6 E. 6. Dyer, 76. F. N. B. 161. Regist. Orig. 175. 1 Marie. Dower, 101. (2 Inst. 17. F. N. B. 161. A.)

[s] Lamb. Sect. 120. 71, and divers ancient manuscripts. See the 2d part of the Institutes, cap. 7.

[t] Bract. lib. 4. 312. & lib. 2. 96. Britt. cap. 103. Fleta, lib. 5. cap. 23.

But

(3) See further as to *Quarentine*, 2 Inst. 17. Barringt. Ant. Stat. 2d ed. p. 9, 10. Hugh. on Orig. Writs, 193; and Vin. Abr. *Dower*, I. a.

(c) See a mistake on this subject, 3 Atk. 131, not of lord Hardwicke, but of the reporter.

(4) Vid. quoad *damages in dower*. First, What shall be said to be a dying seised. *Husband makes feoffment to the use of himself for life, remainder to his son in tail, and dies seised: the wife shall not have damages, because he doth not die seised of the inheritance, which descends to the son. T.* 6 *Car. And therefore finding that the husband dies seised, without saying of what estate is ill. M.* 5 Car. *Bromley and Littleton.* Secondly, How the inquiry shall be of the dying seised and damages. *If judgment be by confession or default, a writ shall issue to deliver seisin and inquire of damages; but if it be by verdict, the same jury shall inquire of the dying seised and damages; but if it be omitted, it may be supplied by writ of inquiry.* Thirdly, what the damage shall be. Nota, *before the statute of Merton no damages in dower, and by that statute the wife shall have damages,* viz. *the value of the third part* de tempore mortis usque judicium, *and by the statute of Gloucester,* 6 *E.* 1. *c.* 1, *costs as well as damages. Therefore the judgment* quoad *the land may be affirmed in writ of error and the judgment for damages be reversed, because they are several in their nature,* 22 *E.* 4. 46, *and error lies after judgment for seisin and before judgment for damages. T.* 24 Car. B. R. *Dudney and Glyde. The damages in dower are,* 1, *the value* de tempore mortis: 2, damna occasione detentionis dotis, *which are usually assessed severally. But if they are mixed together by the verdict, yet it is good. T.* 5 Car. C. B. *Hawes's case. Judgment to recover seisin by default, and writ to inquire of the value; the jury assess the value to the taking of the inquisition, and judgment given for them; and affirmed good in writ of error; so that the judgment intended by the statute of Merton is not the*

But herein divers things are observable. First, in what kind of writ of dower she shall recover her damages. In a writ for a dower *ad ostium ecclesiæ*, or *ex assensu patris*, she shall recover no damages, because she may enter, and the words of the statute be, *et dotes suas habere non possunt sine placito*. Also I have read in an ancient and learned reading upon this statute, that it extendeth only to a writ of dower, *Unde nihil habet*, and not to a writ of right of dower, for in no writ of right damages are to be recovered. 2. She shall recover damages only when her husband dies seised, (that is) seised of the freehold and inheritance [*u*], for albeit the husband before the title of dower had made a lease for years reserving a rent, the wife shall recover the third part of the reversion with a third part of the rent and damages, for the words of the statute be, *de quibus viri sui obierunt seisiti* (5). 3. Some say that the demandant in a writ of dower, that delayeth herselfe, shall not recover damages, therefore let the demandant take heed thereof. 4. It is necessary for the wife after the decease of her husband as soon as she can to demand her dower before good testimony, for otherwise she may by her owne default lose the value after the decease of her husband and her damages for detaining of her dower. For if she bring a writ of dower (D) against the heire, and the heire cometh into the court upon the summons the first day, and plead that he hath been always ready and yet is to render dower, &c. if the wife hath not requested her dower, she shall lose the mean values and her damages; but if she hath requested her dower, she may plead it, and issue may be thereupon taken.

(Cro. Jam. 621. 1 Leon. 56.)

[*u*] Regist. Judic. 4. Origia. 173. Dyer, 11. El. 284. Rast. pl. fo. 226, &c. 16 E. 3. tit. Damages, 83. 8 E. 2. ibid. 1.

(Dr. and Stud. Dial. 2. c. 13.)

But it is holden in some bookes [*w*] that a request *in pays* is not sufficient, and that it is the folly of the wife that she brought not her writ of dower sooner. But the law and many [*x*] bookes be against it, and the words of the plea (that he hath beene always ready, &c.) prove the same, and the words of the statute also prove this, *et dotes suas habere non possunt sine placito*.

[*w*] 5 E. 3. 1. 41 E. 3. Dower, 46, and not in the booke at large. (Doctr. Plac. 152.)

[*x*] 16 E. 3. Dower, 59. 2 H. 4. 7. 9 H. 4. 4. tit. Issue, 133. 11 H. 4. 40. 13 E. 4. 7. 14 H. 8. 25. b.

(Doctr. Plac. 152.)

☞ And the reason why *tout temps prist* is a good plea in a writ of dower brought against the heire to barre her of the meane values and damages, is because the heire holdeth by title, and doth no wrong till a demand be made (1). But in a writ of aiel, cosinage, &c. where the land and

[33. a.]

---

the first judgment but the second. T. 1649. *Thynne and Thynne.* Hal. MSS. See in Barn. Not. 2d ed. p. 234, Penrice's case, according to which damages should be computed only to the *awarding* of the writ of inquisition. But Walker and Nevil, 1 Leon. 56, and the case cited by lord Hale, are *contra*.—[Note 198.]

(5) *Damages in such case according to the value, not of the land, but of the rent.* P. 22 Jac. C. B. Hall. MSS.

(D) As to remedy for dower in equity, see Mundy *v.* Mundy, 2 Ves. jun. 122. Olive *v.* Richardson, 9 Ves. 223.

(1) *If the tenant comes the first day and acknowledges the action, and avers that he was at all times ready to render dower, the demandant may take judgment immediately, and then there shall only be recovery of seisin* et nihil de misâ quia venit

and damages are to be recovered, there such a plea is not good; for there the tenant of the land hath no title, but holdeth the land by wrong, and the feoffee of the heire cannot at the first day plead *tout temps prist*, because he had not the land all the time, since the death of the ancestor. 5. It is to be observed, that the mean values and damages are to be recovered against the tenant in a writ of dower, as it appeareth in a notable record [*y*] between *Belfield* and *Rowse* (2). The tenant as to parcell pleaded non-tenure, and for the residue deteynment of charters, upon which pleas they were at issue, and both issues found by the jury against the tenant, and found further that the husband died seised such a day and yeare, and had issue a sonne, and that the demandant and the sonne by 6 yeares together after the decease of the husband tooke the profits of the land, and after the sonne such a day and yeare died without issue, after whose decease the land descended to the tenant as uncle and heire to him, by force whereof he entered and took the profits until the purchasing of the originall writ, and found the value of the land by the yeare, and assessed damages for the deteyning of the dower, and costs; and upon this verdict, after often debating, the demandant had judgment to recover her dammages for all the time from the death of her husband without any defalcation (3). In which case many things apparent therein are observable. Let the tenant therefore take heed how he plead false pleas. 6. That this statute of *Merton* doth extend to copiholds [*z*] where the custome is, that women be dowable (4). 7. That if the wife hath dower assigned unto her in chancery (A) she shall have no damages [*a*], for the words of the statute be, *et viduæ per placitum recuperaverint, &c.* So it is if the heire or his feoffee assigne dower, and the wife accepteth it, she loseth her damages.

(S. C. Mo. 80. N. Benl. 153. 4 Leon. 198. [y] Mich. 8 & 9 Eliz. Rot. 904. in Comm. Banc. [9 Co. 15. b. Bedingfield's case. 1 Ro. Abr. 679.)

[z] Tr. 37 Eliz. 4 Co. 30. b. Shawe's case. [a] 43 Ass. pl. 32. (F. N. B. 263.) 14 H. 8. 28.

A man seised of lands in fee taketh a wife and granteth a rent charge, and after maketh a feoffment in fee, and taketh backe an estate taile and dieth, the wife recovereth dower against the issue

---

venit primo die. *But if the demandant would have damages, she may aver that she requested her dower, and the tenant did not endow her, and then the judgment for damages and value shall wait till the issue is tried. N. Entries, Dower in Judgment*, 4. Hal. MSS.—[Note 199.]

(2) Mich. 8 and 9 Eliz. Belford and Rows, Moor and Bendl. Hal. MSS. See Mo. 80, and N. Bendl. 153.

(3) Ratio istius casus videtur, *because the wife ought to account to the heir for the whole. But if the heir be in ward in chivalry, and the wardship is granted to the wife, or if the wife has estate for years, and after the years expired or the full age she brings dowr, it seems that the heir shall not be charged* pro tempore, *because she has a good estate to her own use. The reason is, because the statute of Gloucester, that every one shall render for his time, doth not extend to this case.* H. 8 Jac. C. B. Casus Archiepisc. Ebor. Hal. MSS.—[Note 200.]

(4) Vid. Rot. Parl. 3 H. 6. n. 29, *special act of parliament for giving mesne values to the wife against the king*, in casu comitissæ Marche. Hal. MSS.

(A) See 2 Br. Ch. Ca. 630, where it is probably explained, that the assignment in chancery here meant is on a *de dote assignandâ*, and doth not apply where the widow is assisted by a decree of equity, for in such a case equity, when the title to dower is established at law, will decree accounts of mesne profits from husband's death.

issue in taile by reddition, the wife maketh a surmise that her husband died seised, and prayeth a writ to enquire of the damages, and that is granted to her. In this case she holds the land charged with the rent charge, for by her prayer she accepteth herselfe dowable of the second estate (5), for of the first estate, whereof she was dowable, her husband died not seised, and so she hath concluded herselfe; wherefore if the rent charge be more to her detriment than the damages beneficiall to her, it is good for her in that case to make no such prayer (6).

(1 Ro. Abr. 675. Doctr. Plac. 148.)

[b] 3 E. 1. Dower, 172. Itin. North. 8 E. 2. Dower, 112. 7 E. 2. Dower, 147. 12 E. 2. ib. 159. 21 E. 3. 28. 15 E. 3. Dower, 67. 12 R. 2. Dower, 54. 12 H. 4. 3. 35 H. 6. 40. 7 H. 6. 11, 12. 12 H. 4. Doctr. & Stud. Fitz. N. B. 149. B. 22 Eliz. Dower, 369. Bract. fol. 92. Fleta, lib. 5. ca. 21. Lib. Intrat. fo. 123. (Post. 37. a. Ante, 31. Cro. Jam. 539.)

"*Of what age soever the wife be, so as she be past the age of nine years* (7) *at the time of the death of her husband.*" *Wife.* Here *Littleton* speaketh of a wife generally, and generally it is to be understood as well of a wife *de facto*, as *de jure*. Therefore if the wife be past the age of 9 yeares [*b*] at the time of the death of her husband, she shall be endowed, of what age soever her husband be, albeit he were but 4 yeares old. *Quia junior non potest dotem promereri, neque virum sustinere; nec obstabit mulieri petenti minor ætas viri.* Wherein it is to be observed, that albeit *Consensus non concubitus facit matrimonium*, and that a woman cannot consent before 12, nor a man before 14, yet this inchoate and imperfect marriage (from the which either of the parties at the age of consent may disagree) after the death of the husband shall give dower to the wife, and therefore it is accounted in law after the death of the husband *legitimum matrimonium*, a lawfull marriage, *quoad dotem*. If a man taketh a wife of the age of 7 yeares, and after alien his land, and after the alienation the wife attaineth to the age of 9 yeares, and after the husband dieth, the wife shall be endowed: for albeit she was not absolutely dowable at the time of her marriage, yet she was conditionally dowable, viz. if she attained to the age of 9 yeares before the death of the husband, for so *Littleton* here saith, so that she passe the age of 9 yeares at the death of her husband, for by his death the possibility of dower is consummate.

And so it is if the husband alien his land, and then the wife is attainted of felony, now is she disabled, but if she be pardoned before the death of the husband, she shall be endowed. If the son indow his wife at the age of 7 yeares *ex assensu patris*, if she before the death of her husband attain to the age of 9 yeares the dower is good. But otherwise it is of an originall absolute disability; as if a man take an alien to wife, and

(5) Sic nota, *the wife has election to be endowed of the last seisin; and therefore if husband and wife levy fine and take back estate to the husband in fee, the wife shall have dower of the second seisin; but otherwise it is in the case of a husband entitled to be tenant by the curtesy*, ut videtur. Hic. fol. 30. a. Hal. MSS.—[Note 201.]

(6) See further as to damages in dower, Hugh. on Orig. Wr. 180. Treat. on Dow. in Gilb. Law of Uses, 375. 2 L. Raym. 1384. New Abr. *Dower* I. Vin. Abr. *Dower*, O. a. P. a. Say. Law of Dam. 16 and 17 Ch. 2. c. 6. sect. 3 and 4. Cas. B. R. temp. Hardw. 19. 50. 23.

(7) Vid. *Rast. Entr.* 228, novem annorum et dimid. *She ought to show how much more she is than 9 years.* Hal. MSS.

and after the husband alien the land, and after she is made denizen, the husband dieth, she shall not be indowed (8), because her capacity and possibility to be indowed came by the denization. Otherwise it is if she were naturalized by act of parliament, whereof see more in the Chapter of Villenage (9).

And the bishop upon an issue joyned in a writ of dower, *Quòd nunquam fuerunt copulati legitimo matrimonio*, ought to certifie that they were coupled in lawful marriage, albeit the man were under fourteene, or the wife above nine, and under twelve (10). So it is if a marriage *de facto* be voidable by divorce (11), in respect of consanguinity, affinity, precontract, or such like, whereby the marriage might have beene dissolved, and the parties freed *d vinculo matrimonij*, yet if the husband die before any divorce, then, for that it cannot now be avoyded, this wife *de facto* shall be endowed; [c] for this is *legitimum matrimonium* (as in the

(See 1 Salk. 120. 8. 3 Leo. 410.

(5 Co. 98. b. Berrie's case.)

[c] 10 E. 3. 35. Fleta, lib. 5. cap. 22. Brit. cap. 107. (7 Co. 41. b.)

---

(8) *Philips in his reading holds, that if the wife be attainted, and then the husband purchases land and aliens it again, and then the wife is pardoned, she shall have dower of the land which was purchased and aliened during the time she was not dowable. And he cited Mansfield's case adjudged 28 Elizabeth. In that case a jointure was conveyed to the wife before the coverture, and during the coverture the husband purchased other lands and aliened them again and died, the land which the wife had in jointure was evicted, and the wife had dower of the land which was purchased and aliened by her husband at the time when she was barred of her action of dower. So if wife elopes, and husband purchases lands and aliens them, and then the wife is reconciled, she shall have dower of those lands.* MS. Comment. on Litt. penes editorem, supposed to have been written before the publication of Lord Coke's Commentary.—See the list of readers of the Middle Temple in Dugd. Orig. Jurid. by which it appears that Mr. Philips was autumn reader in 38 Eliz.—See further Plowd. Quær. 181, and 204.—[Note 202.]

(9) Vid. supra. fol. 31. b. Hal. MSS. See Note 9, in 31. b.

(10) Vid. M. 9 and 10 E. 1, coram rege Rot. 24. Ebor. *A. contracts* per verba de præsenti *with B. and has issue by her, and afterwards marries C.* in facie ecclesiæ. *B. recovers A. for her husband by sentence of the ordinary, and for not performing the sentence he is excommunicated, and afterwards enfeoffs D. and then marries B.* in facie ecclesiæ, *and dies. She brings dower against D. and recovers because the feoffment was* per fraudem *mediate between the sentence and the solemn marriage*, sed reversatur coram rege et concilio quia præclictus A. non fuit seisitus *during the espousals between him and B.* Nota, *neither the contract nor the sentence was a marriage.* Quoad *marriage* infra annos nubiles, nota infra Sect. 104. *It is only* sponsalia de futuro quoad *other purposes. Dy.* 105. 313. 369. 47 *E.* 3. Action sur le statute, 37. *Whether husband shall have trespass* de tali uxore abducta. Hal. MSS.—[Note 203.]

(11) Nota obiter. *When A.* per judicium ecclesiæ recuperâsset aliquam in uxorem, vel in divortium celebratum inter A. & B. *his wife, and she is married to C.* et postea ad prosecutionem A. sententia divortii reversatur *by appeal, a writ directed to the sheriff shall issue out of chancery on the sentence there certified.* Claus. 19 H. 3. m. 1. pro. Willelmo de Treyor. Claus. 20 H. 3. m. 9. pro Willelmo de Dauntesy. Claus. 21 H. 3. m. 17. pro Roberto de Halsted. *And* vid. M. 9. and 10 E. 1, ubi supra. Et cum eundem Willelmum, si in militiâ suâ ulterius perseverâsset, ad executionem dictæ sententiæ regia potestas tenebatur compulisse, si a loci diocesano fuisset super hoc requisitus. Hal. MSS. —See also Harg. Law Tr. 478.—[Note 204.]

the other case ☞ when the wife is *infra annos nubiles*) *quoad dotem.* And so in a writ of dower the bishop ought to certifie, that they were *legitimo matrimonio copulati*, according to the words of the writ. And herewith agreeth 10 *E.* 3. 35. And [*d*] *Bracton: quamdiu duravit matrimonium, duravit dotis exactio, eo deficiente deficit dotis petitio, &c. poterit tamen replicare contra exceptionem illam, quòd si aliquando fuit matrimonium propter consanguinitatem, &c. inter eos accusatum, nunquam tamen fuit in vitâ viri sui solutum nec divortium celebratum.* But if they were divorced *à vinculo matrimonij* in the life of her husband, she loseth her dower; otherwise it is if they were divorced [*e*] *causâ adulterij* (1), which is but *à mensâ et thoro*, and not *à vinculo matrimonij*, as it was adjudged. But some doe hold that a wife *de facto* shall not have an appeale of the death of her husband, but only she that is a wife *de jure, in favorem vitæ* (2). *Vide* 50 *E.* 3. fol. 15. 28 *E.* 3. 92. 27 Ass. *Staunf. Pl. Cor.* 59, and that there *unques accouple in loyall matrimonie* shall be taken *de jure* strictly. And so in some cases a wife shall have dower where she cannot have an appeale, [*f*] and in other cases she shall have an appeale where she cannot have a writ of dower; as if she elope (3), &c. she is barred of her dower, but not of her appeale (4): and the reason is, for that the statute [*g*] barreth her of her dower, but not of her appeale. So if the husband be attainted of treason, &c. his wife shall not be endowed, and yet if any doe kill him, the wife shall have an appeale: the reason of the diversity shall appeare hereafter in this Chapter (5).

[33. b.]

[*d*] Bracton, lib. 4. fol. 304. Britton, ibidem. Fleta, lib. 5. cap. 23. 32 E. 1. Dier, 156. (5 Co. 98. b. Ante 32. a. 1 Ro. Abr. 341. 681. Noy, 108.)

[*e*] Tr. 2 Ja. Rot. 1815, in Communi Banco, inter Stowell and Wikes in Dower.

[*f*] 50 E. 3. 15. b.

[*g*] W. 2. cap. 34. (1 Mod. Rep. 130. 2 Inst. 68.)

"*After the decease of her husband.*" [*h*] *Mortuo viro hinc confirmatur dos.* This is intended of a naturall, not of a civill death. For if the husband entred in religion, [*i*] the wife shall not be endowed until he be naturally dead (6).

And in this Chapter *Littleton* divideth dower into five parts, viz. dower by the common law. Secondly, dower by the custome. Thirdly, dower *ad ostium ecclesiæ*. Fourthly, dower *ex assensu patris*. And fifthly, dower *de la pluis beale*. And all these dowers were instituted for a competent livelihood for the wife during her life: [*k*] *Propter onus matrimonij, et ad sustentationem uxoris et educationem liberorum, cùm fuerint procreati, si vir præmoriatur.*

[*h*] Britton, cap. 106. Bracton, lib. 4. fol. 301.

[*i*] 31 E. 3. tit. Collusion, 29.

[*k*] Bract. lib. 2. cap. 39. fol. 92, &c. Fleta, lib. 5. cap. 22. Britton, cap. 101.

---

(1) 10 E. 3. 15. Supra, 32. Hall. MSS. See n. 9. in 32. a.

(2) Acc. 2 Hawk. Pl. C. b. 2. c. 23. s. 36, and the authorities there cited.

(3) To the books cited ante 32. a. n. 10, as to the effect of elopement on dower, add New Abr. tit. Marriage, E. 1. Treat. on Dower in Gilb. Law of Uses, 402.

(4) Acc. Bro. *Appeal*, 17. Staunf. Pl. C. 59. But see contra 2 Inst. 317, and 1 Mod. 130, by judge Hide.

(5) See post. 37. a.

(6) *The reason is, because* post carnalem copulam *the husband cannot be professed without the consent of the wife.* Extrav. de conversione conjugatorum cap. 2, et per totum. Nec è converso. Hal. MSS. See New Abr. *Marriage, E.* 3. Vin. *Dower*, K. & Treat. on Dow. in Gilb. Law of Uses, 401.—[Note 205.]

Sect.

Sect. 37.

AND note, that by the common law the wife shall have for her dower but the third part of the tenements which were her husband's during the espousals; but by the custome of some county, she shall have the halfe, and by the custome in some towne or borough, she shall have the whole; and in all these cases she shall be called tenant in dower.

"*NOTE, by the common law the wife shall have for her dower but* [*l*] *the third part, &c.*" This third part is called *rationabilis dos*, or *dos legitima*, because it is the dower that the common law giveth. *Rationabilis autem dos est cujuslibet mulieris de quocunque tenemento tertia pars omnium terrarum et tenementorum quæ vir suus tenuit in dominico suo ut de feodo, &c.*

[*l*] Glan lib. 6. cap. 1. Bracton, ubi supra. Britton, ubi supra. Fleta, ubi supra. Mirror, cap. 1. sect. 3. Magna Carta, cap. 7.

"*But by the custome of some county* (7) *she shall have the halfe, and by the custome in some towne or borough, she shall have the whole.*" Such a [*m*] custome may extende to a county, city, or an ancient burgh without question; and so this custome, as here it appeareth by *Littleton*, may extend to upland townes, which are neither counties, cities, nor boroughs. But the surer pleading, in this and the like cases, is to lay the custome within a manor or seigniory, if the truth of the case will so beare it (8). By the custome of Gavelkind [*n*] the wife shall be indowed of the moiety, so long as she keepe herselfe sole, and without child, which she cannot waive and take her thirds for her life (9). For in that case, *Consuetudo tollit communem legem* (10).

And as custome may enlarge, (11) so may custome abridge dower, and restraine it to a fourth part, &c.

Fitz. N. B. 150. O. [*m*] 21 E. 4. 53, 54. 7 H. 6. 26. 22 H. 6. 14. 21 H. 7. 17. 40 Ass. 27. 41. 16 E. 2. Prescription, 53. 43 E. 3. 32. 45. Ass. 8. Dier, 363. 39 E. 3. 2. 10. 14 E. 3. Barre, 277. 13 E. 3. tit. Dower, 65. (1 Ro. Abr. 558. 563.) [*n*] Vide le statute de consuetud. Kanciæ, &c. Trin. 17 E. 3. coram rege Kan. in Thesaur. in which record Senentia signifieth Widowhood.

---

(7) Vid. 15 H. 3. *Prescription*, 57. *Custom of the town of Salop, that the wife shall have a moiety of socage, but if the husband has socage and chivalry, the wife shall have only a third part.* Hal. MSS. St. 662. Cowp. 807. Fortesc. 55. 2 Atk. 189.—[Note 206.]

(8) Vota, *the writ special.* Hal. MSS. Str. 662. Cowp. 807. 23 Ass. 110. pl. 12. Fort. Rep. 55. 2 Atk. 189.

(9) See acc. Robins. Gavelk. 159.

(10) *Accordingly adjudged that she cannot wave. H.* 24 *Eliz. Rot.* 1515. *C. B. P.* 43 *Eliz. Davers and Selby. T.* 30 *Eliz. C. B. Rot.* 157. *Hunt and Gilbert.* Hal. MSS.—See the former case in Cro. Eliz. 825, and the latter in Mo. 260. 1 Leon. 183. Gouldsb. 108. Cro. Eliz. 121, and Sav. 91. See further on the subject in Robins. Gavelk. 179, and Hugh. on Orig. Wr. 160. —[Note 207.]

(11) By the custom of some places the wife shall have the *whole* of her husband's lands in dower See Fitz. N. Br. 150 P.—[Note 208.]

☞Sect. 38. [34. a.]

ALSO, there be two other kinds of dower, viz. dower which is called dowment at the church doore, and dower called dowment by the father's assent.

This shall be explained by that which shall be said in the two Sections next ensuing.

Sect. 39.

DOWMENT at the church doore is, where a man of full age seised in fee simple, who shall be married to a woman, and when he commeth to the church doore to be married, there, after affiance and troth plighted betweene them, he endoweth the woman of his whole land, or of the halfe, or other lesser part thereof, and there openly doth declare the quantity and the certainty of the land which she shall have for her dower. In this case the wife, after the death of the husband, may enter into the said quantity of land of which her husband endowed her, without other assignment of any.

10 H. 3. Dower, 200. [o] Bracton, lib. 2. cap. 39. Mirror, cap. 1. sect. 3. and cap. 5. 10 H. 3. Dower, 201.

IF this dower be made *ad ostium castri sive mesuagii* it is not good, but ought to be made *ad ostium ecclesiæ sive monasterii. Et sciendum est, [o] quòd hæc constitutio fieri debet in facie ecclesiæ, et ad ostium ecclesiæ; non enim valet facto in lecto mortali*, vel in camerâ, vel alibi ubi clandestina fuêre conjugia.* For the law requires, that this and like matters be done publickly and solemnly.

F. N. B. 150. M. N. Fleta, lib. 5. cap. 22, &c. Britton, cap. 101. 108, &c. (Perk. sect. 306.)

9 H. 3. Dower, 197. (Post. 38. a. 1 Ro. Abr. 682.)

"Where a man of full age." That is of one and twenty yeares. *Anno* 9 *H.* 3. Dower, 197. A man of the age of eighteen yeares tooke a wife, and by assent of his guardian endowed her *ad ostium ecclesiæ*, and it was adjudged a good endowment, albeit the husband dyed before the age of one and twentie yeares; but I hold *Littleton's* opinion to be good law.

"There, after affiance betweene them."(1) *Affidare est fidem dare*, affiance or sponsalitie, and is derived of this word *spondeo*, because they contract themselves together; *et ideo sponsalia dicuntur*

---

* Quære, if this should not be read *lecto maritali.*

(1) Post affidationem et carnalem copulam sunt quasi *husband and wife and gift by him to the wife is void.* 16 *H.* 3. *Feoffments,* 117. 13 *E.* 1. ibid. 113. Hal. MSS.—[Note 209.]

dicuntur [*p*] *futurarum nuptiarum conventæ, et repromissio* (2). But this dower is ever after marriage solemnized (3), and therefore this dower is good without deed, because he cannot make a deed to his wife. For no assignement of dower *ad ostium ecclesiæ* can be made before marriage, for that before marriage the woman is not intituled to have dower.

[p] Glanvil. lib. 6. ca. 1. 40 E. 3. 43. Vide Vernon's case, 4 Co. 1, 2.

"*Of his whole land or of the halfe.*" (4) In ancient time [*q*] as it appeareth by ☞ *Glanvill*, lib. 6. cap. 1, it was taken that a man could not have endowed his wife *ad ostium ecclesiæ* of more than a third part, but of lesse he might. But at this day [*r*] the law is taken as *Littleton* here holdeth. An assignement of dower, [*s*] where the husband was sole seised, cannot be made of the third or fourth part in common, but ought to be in severaltie (1).

[34. b.]

[q] Glanvill. lib. 6. cap. 1. Bract. lib. 2. cap. 38, 39. and lib. 4. tract. 6. cap. 1. & 6. Britton, cap. 101, &c. Fleta, lib. 5. cap. 22, &c. (1 Ro. Abr. 682). [r] F. N. B. 150. [s] 20 E. 3. Barre, 132. 45 E. 3. 6. Fleta, lib. 5. 23.

"*And there openly* [*t*] *doth declare the quantity and the certainty of the land.*" Here be two things that the law doth delight in, viz. first to have this and the like openly and solemnly done. Secondly, to have certaintie, which is the mother of quiet and repose. And this word (moitie) abovesaid is to be entended of the halfe in certaintie, and not of the moitie in common, which cleerly [*u*] appeareth in that here *Littleton* saith, the quantitie and certaintie of the land.

[t] Britton, cap. 101. Bracton, lib. 2. cap. 18.

[u] Vide 14 H. 3. Dower, 189. 9 H. 3. Dower, 190. 8 H. 3. Dower, 195. F. N. B. 150. 40 E. 3. 43.

"*In*

---

(2) This explanation of *affiance* or *sponsalia* is conformable to the *strict* sense of the word amongst the civilians and canonists; but our law books, as Mr. Swinburne long ago observed, use *affiance* and *marriage* promiscuously for one and the same thing, and lord Coke apparently supposes Littleton by *affiance* to mean *marriage;* for lord Coke says that dower *ad ostium* ever is *after* marriage, without professing to contradict Littleton. See Swinb. on Spousals, 2. Perk. sect. 442.—[Note 210.]

(3) But though dower *ad ostium* cannot be till *after* marriage, yet it seems that such endowment cannot be made at any time after, but must be *immediately after*. See Perk. sect. 442, where the time of assigning dower *ex assensu patris* is so explained. But Mr. Perkins adds a case, in which, according to some ancient books, dower *ex assensu patris* made 8 weeks after the marriage was held good. Perk. sect. 443. See further Hugh. on Orig. Wr. 167, and note p. in 2 Blackst. Comment. 5th edit. 134.—[Note 211.]

(4) Vid. 9 H. 3. *Dower*, 190. *Dower* ad ostium ecclesiæ *of a moiety of all lands which he has or may have. He purchases lands afterwards, and the dower good for them.* Hal. MSS.—[Note 212.]

(1) Vide contra *adjudged* supra. Hal. MSS. See Lambert's case, ante 32. b. n. 1. See S. C. in 1 Ro. Abr. 682. X. pl. 3, and Sty. 276, in both of which books the case is so explained as to make it consistent with lord Coke's *general* doctrine as to the manner of assigning; for according to them the court held, that the assignment of the third part *in common* would have been bad, if the wife and heir had not by mutual assent waved the assignment by metes and bounds, and that it would have been error if the sheriff had so assigned.—Note also, that in *Couch* v. *Lambert*, the husband was seised in fee. See further Vin. Abr. X Y Z. tit. *Dower*.—[Note 213.]

"In this case the wife may enter into the said quantity of land." And afterwards, *Sectione* 43, he saith, *Note, that in all cases, where the certaintie appeareth what lands or tenements the wife shall have or her dower, the wife may enter after the death of her husband."* It was instituted in favour and reliefe of wives, that a man after marriage might assigne to his wife certaintie of dower, to the end that the widow should not be driven to a long and chargeable suit wherein delay might be used, and in the mean time her life spent, together with her money also. For albeit the [*w*] law hath provided, *quòd vidua post mortem mariti sui non det aliquid pro dote suâ, et maneat in capitali mesuagio mariti sui per quadraginta dies post obitum mariti sui, infra quos dies assignetur ei dos sua, nisi prius ei assignata fuerit, &c. et habeat rationabile estoverium suum interim in communi*, yet because there was no penaltie or punishment inflicted, the tenant of the land may drive her to sue for her dower. And this continuance of the widow in the capitall messuage, is in law called a quarentine, *quarentina*, for that it is by the space of fortie days, as is aforesaid (2). And if the heire or other tenant of the land put her out, she may have her writ *De quarentinâ habendâ*. If the wife marry within the fortie dayes she loseth her quarentine, for her habitation in the house is personall to her, and only given to her in judgment of law during her widowhood, albeit the words of the law be generall. And therefore to the end that widowes might have certaintie of estate, and that they might enter (3) and not be driven to suit, the law hath provided dower *ad ostium ecclesiæ*, and, as it shall appeare hereafter, dower *ex assensu patris*. And lastly, by making of a joynture, of which (being no dower but made in satisfaction of dower either before or after marriage) it is necessary that something should be said hereafter in his apt place, for that this now falleth out to be the surest way.

[*w*] Magna Carta, cap. 7. See the Second Part of the Institutes, cap. 7. Fleta, lib. 5. cap. 23. Britton, cap. 103. Bract. lib. 2. cap. 40. Regist. 175. Vide Dyer, 6 E. 6. 76. b. and 161. a. F. N. B. 161. 1 Marie, Br. 101. (Ante 32 b.)

Nota, surest way.

"In all cases where the certaintie appeareth, &c. the wife may enter after the death of her husband." This is to be intended where the certaintie appeareth upon an assignment of dower *ad ostium ecclesiæ*, or *ex assensu patris*. For if a woman bring a writ of dower of sixe pound rent charge, and she hath judgement to recover the third part, albeit it be certain that she shall have fortie shillings, yet she cannot [*x*] distreine for 40 shillings, before the sherife doe deliver the same unto her: (4) for wheresoever the writ demands land, rent or other things in certain, the demandant after judgement may enter or distrein before any seisin delivered to him by the sherife upon a writ of *habere facias seisinam*. But in dower where the writ demandeth nothing in certaine, there the demandant after the judgment cannot enter or distreine untill execution sued, by which execution the sherife is by the king's writ to deliver the third part in certaintie to the demandant.

(1 Ro. Abr. 681. 2 Inst. 678. 32 H. 8. cap. 5, of execution.)

[*x*] 45 E. 3. 26. 48 E. 3. 36. 22 Ass. 87. 39 E. 3. 12. 37 H. 6. 38. 39 H. 6. 25. 1 H. 5. 8. Brev. 199. 30 E. 3. 30. 21 E. 4. 3. Vide 1 Co. Shelley's case. 40 E. 3. 22.

---

(2) See further as to *quarentine*, ante 32. b. and n. 3, there, and Treat. on Dow. in Gilb. Law of Uses, 372.

(3) 24 *H.* 3. *Dower*, 189. *A man endowes his wife of all the lands which his mother then had in dower; the mother and husband die; the wife brings a writ of dower* ad ostium ecclesiæ *and recovers.* Sic nota, *that the wife may have action or enter.* MS. Comm. on Litt.—See acc. post 35. b.—[Note 214.]

(4) 20 *E.* 4. 14. Hal. MSS.

demandant. And so it is when the wife of one tenant in common demands a third part of a moitie, yet after judgment she cannot enter untill the sherife deliver to her the third part, albeit the deliverie of the sherife shall reduce it to no more certaintie than it was (5).

"*Without other assignment* (6) *of any.*" For as concerning dower at the common law, there must be assignement either by the sherife, (as hath been said) by the king's writ, or else by the heire or other tenant of the land by consent and agreement between them. To a perfect assignement of dower eight things are to be observed: [*a*] First, regularly the assignement must be certaine, as our author here saith (7).

Secondly, (8) it [*b*] must be either of some part of the land whereof she is dowable, or of a rent or some other profit issuing out of the same, either before judgment or after, which rent may be assigned to her by parol. But an assignement of other land whereof she is not dowable, or of a rent issuing out of the same, is no barre to her dower (9).

[a] 8 E. 2. Ent. 75. 40. E. 3. 22. 45 E. 3. 5, 6.
[b] 1 Mar. Dyer, 91. 1 E. 2. Dower, 146. 28 H. 6. 2. Dyer, 9. El. 263. 26 Ass. 41.

31 E. 3. Scir. fa. 99. 33 H. 6. 2. Vernon's case. 4 Co. 1. 5. E. 4. 22. (1 Ro. Abr. 628. 684. Cro. Eliz. 451. Noy, 55. Mo. 59. Post. 169.)

Thirdly, the assignement must be absolute, and not conditionall or subject to any limitation (10).

Fourthly, it must be made by him that is tenant of the land; but herein certain diversities are to be observed (11).

If two or more be jointenants of lands, [*c*] the one of them may assigne dower to the wife of a third part in certainty, and this shall binde his companions, because they were compellable to do the same by law (1). But if one of them assigne a rent out of the land to the wife,

[35. a.]

[c] 7 H. 6. 34. 10 E. 2. Dower, 169. 10 E. 3. 38. (2 Co. 67.)

---

(5) *If the sheriff reduces to certainty by metes and bounds, though the demandant refuses, yet she may afterwards enter.* 10 *Eliz. Dy.* 278. Hal. MSS. —[Note 215.]

(6) Nota *P.* 38 *Eliz. Wentworth's case. It ought to be pleaded by the word* assignavit, *not* dedit. Hal. MSS.—See Cro. Eliz. 452.

(7) Vid. ante 32 *b. Lambert's case.* Hal. MSS.—See n. 1. in 32. b. and *supra*, n. 1.

(8) 12 *H.* 4. 17. Hal. MSS.

(9) *But see* 2 *H.* 5. 12. *The heir assigns dower of lands of which the husband was seised; but the wife not dowable: she is tenant in dower,* 30 *E.* 1. *Briefe,* 884. *If wife be endowed, and afterwards exchanges with the heir for other lands which were the inheritance of the husband, she shall be said to be tenant in dower of the lands so taken in exchange, and her entry shall be said to be by the husband.* Per omnes justiciarios. Hal. MSS.—[Note 216.]

(10) *P.* 33. *Eliz. Wentworth's case. A conditional assignment of rent doth not bar dower.* Hal. MSS.—See Cro. Eliz. 452.—[Note 217.]

(11) *And this ought to be averred in pleading. Dy.* 261. Hal. MSS.—See S. C. in Cro. Eliz. 451, and Noy, 55.

(1) This case of assignment of dower by one of two or more jointenants must be understood to be, where the husband has been solely seised during the coverture, and afterwards conveys or devises the land to two jointly and dies; for the wife of a jointenant is not dowable. See post. Sect. 45.—[Note 218.]

wife, this shall not binde his companion because he was not compellable by the law thereunto (2). If the husband make several feoffments of severall parcells, and dyeth, and the one feoffee assigne dower to the wife of parcell of land in satisfaction of all the dower which she ought to have in the land of the other feoffees, the other feoffees shall take no benefit of this assignement, because they are strangers thereunto, and cannot plead the same (3). But in that case if the husband dyeth seised of other lands in fee simple, and the same descend to his heire, and the heir endoweth the wife of certaine of those lands in full satisfaction of all the dower that she ought to have as well in the lands of the feoffees as in his owne lands, this assignment is good, and the several feoffees shall take advantage of it (4). And therefore if the wife bring a writ of dower against any of them, they may vouch the heire, and he may pleade the assignement which he himselfe hath made in safety of himselfe, lest they should recover in value against him, [d] so as there is a privity in this respect betweene the heire and the feoffees, and by this means the same may be pleaded by the heire that made it (5). And so it is adjudged in our bookes, which is a notable case for many purposes.

(9 Co. 18. Mo. 26.)

[d] 33 E. 3. tit. Judgm. 254. 8 E. 3. 69. 17 E. 3. 58. b. 3 E. 3. tit. Dower, 76. 3 E. 3. Vouch. 196. See the Second Part of the Institut. W. 1. cap. 49.

Fifthly, if assignement be made [e] by any disseisor, abator, intrudor, or any wrong doer, of land or tenements, if they came to that estate by collusion and covin betweene the widow and them, albeit the widow hath just cause of action, and the assignment be indifferently made after judgment by the sherife of an equall third part, yet shall the disseisee, &c. avoyd it, for covin in this case shall suffocate the right that appertained to her, and so the wrongfull manner shall avoyd the matter that is lawful (6).

[e] 25 Ass. p. 1. 44 Ass. 29. 44 E. 3. 46. 27 Ass. 74. 11 H. 4. 60. 15 E. 4. 4. 19 H. 8. 12. Litt. 83. 151. (2 Co. 67. 1 Ro. Abr. 549. 1 Sid. 21. Post. 357. 3 Co. 78. 6 Co. 58. a. 5 Co. 30. b.)

Sixthly, An assignment by [f] (7) a disseisor, abator, intrudor, &c. if there be no covin, is good, unlesse it be prejudiciall to the disseisee, &c. As if the husband [g] infeoffeth the younger sonne with warranty, the eldest sonne disseise the youngest sonne, and endow the widow, in this case the younger sonne shall avoyd this assignment (8), for otherwise he shall lose his warrantie; but a disseisor, abator, intrudor, &c. cannot assigne

[f] 11 Ass. p. 20. 21 E. 3. 12. [g] 3 E. 3. tit. Dower, 77. 16 E. 2. tit. Dower, Statham. (Post. 357.)

---

(2) 9 *E.* 3. 38. *Husband and wife are jointenants of land of which the wife of I. S. is dowable: the husband alone assigns; it is good, and shall bind the wife.* 7 *H.* 6. 33. Hal. MSS.—See Perk. sect. 399, and Keilw. 128 b.—[Note 219.]

(3) Vid. *the statute of Westminster*, 1, *cap.* 48. 4 *E.* 3. 42. *M.* 8. Jac. C. B. n. 15, D. D., *adjudged accordingly in Throgmorton's case.* Hal. MSS. —However, Mr Perkins seems to think, that such an assignment by one feoffee may be pleaded in bar of dower of the other feoffees. Perk. sect. 402.

(4) 31 *E.* 3. *Scire facias*, 99. Hal. MSS.

(5) Vid *if the heir by receit shall have the plea. Keilw.* 128. Hal. MSS.

(6) See further on this subject Hugh. on Orig. Wr. 199.—1 Burr. 118. 1 Ves. 9.

(7) 3 *E.* 3. 1. 50 *E.* 3. 7, 8. Hal. MSS.—6 Vin. 473. pl. 23.

(8) 3 *E.* 3. 18. *By Herle, the assignment shall bar in such a case.* Hal. MSS.

assigne a rent out of the land to her for her dower, to bind the disseissee, &c.

Seventhly, No assignement can be made, but by such as have a freehold (9) as hathe beene said), or against whom a writ of dower doth lie, and therefore [h] an assignment by a gardian in socage is voyd (10); but a gardian in chivalry may assigne dower (11), as shall be said hereafter, because a writ of dower lieth against him, and not against a gardian in socage.

[h] 31 E. 1. Dower, 151. 29 Ass. 68. 15 E. 3. Dower, 69. (6 Co. 57.)

Eighthly, And before the gardian in chivalry enter (12), the heir within age [i] may assigne dower, for the gardian may waive the wardship. And so briefly have you heard, of what, by whom, and to whom the assignment must be made (13). But there needeth neither livery of seisin, nor writing, to any assignement of dower, because it is due of common right.

[i] 7 R. 2. Admesurement, 4. F. N. B. 148. F. (Post 38. b.)

Sect. 40.

DOWMENT by assent of the father is, where the father is seised of tenements in fee, and his sonne and heire apparent, when he is married, endoweth his wife at the monastery or church doore, of parcel of his father's lands or tenements with the assent of his father, and assignes the quantity and parcels. In this case after the death of the son, the wife shall enter into the same parcell without the assignment of any. But it hath been sayd in this case, that it behooveth the wife to have a deed of the father to proove his assent and consent to this endowment. M. 44 E. 3. f. 45. (1).

"*WHERE the father is seised of tenements in fee.*" Tenant for life of a carve of land, the reversion to the father in fee, the sonne and heire apparent of the father endoweth his wife of this carve, by the assent of the father, the tenant for life dieth, the husband dieth, the reversion was a tenement in the father, and yet this is no good endowment *ex assensu patris*, because the father at the time of the assent had but a reversion expectant upon a freehold, whereof he could not have endowed his owne wife (14); and albeit the tenant for life died, living the husband,

Brit. ca. 109. Fleta, lib. 5. ca. 22, 23. Bract. lib. 5. 305. 6 E. 3. 34. F. N. B. 150. (1 Ro. Abr. 677.)

---

(9) Acc. Perk. 404.

(10) A quære is made of this in 1 Ro. Abr. 682.—Ante 34. a.

(11) And yet guardian in chivalry had only a chattel interest. See post. 38. b. where it is explained why a writ of dower might be brought against him.

(12) *But not after entry of the guardian.* 9 *H.* 6. 6. Hal. MSS.

(13) See further as to assignment of dower, post. 39. b. Perk. sect. 393 to 423. Hugh. on Orig. Wr. 194 and 198. New Abr. *Dower*, D. and Vin. Abr. *Dower*, S. to A. a.

(1) No reference to the Year Book in L. and M. Roh. or P. It was first inserted in Redman's edition. See the observation on this addition to Littleton, post. 36. a.

(14) S. P. acc. Perk. 445.

(1 Sid. 3. Post. 36. b.)

band, yet, *quod initio non valet, tractu temporis non* ☞ *convalescet.* And for the most part, dower *ad ostium ecclesiæ*, and *ex assensu patris*, ensue the nature of a dower at the common law. And for these the wife may have a writ of dower, albeit they be certaine, as for the third part at the common law (2). [35. b.]

"And his sonne and heire apparent." It must be such a sonne and heire apparent, as must continue an heire apparent, and therefore the youngest sonne and heire apparent cannot endow his wife *ex assensu patris*, of lands whereof the father is seised in fee of the nature of Borough *English*, because the father may have another sonne, and then the husband is not heire apparent: and it is in respect of the constant and perpetuall appearance, that the sonne and heire apparent may endow his wife of his father's lands. And so it is of lands in Gavelkind: [*k*] and this is the reason that dower *ex assensu fratris*, or *consanguinei*, is not good, for that albeit he is heire apparent at that time, yet for the common possibility that he may have issue, and every issue that the brother or cosin should have afterwards shall exclude him, he is no such heire apparent as the law intendeth. [*l*] But an endowment *ex assensu matris*, is as good as *ex assensu patris*, because there is an appearance of a constant and perpetuall heire. And some have said, that if the father after his assent be attainted of treason or felony, that the wife in that case loseth her dower, because her husband doth not continue heire (3).

[*k*] 8 H. 3. Dower, 193. 9 H. 3. Dower, 191. 11 H. 3. Dower, 134. F. N. B. 150. L. 29 E. 3. Dow. 134. [*l*] F. N. B. 150. E. Flet. l. 5. cap. 22. Bract. lib. 4. 305. Ambr. Gorge's case, 6 Co. 22.

"When he is married, endoweth his wife." [*m*] In this case, albeit the freehold and inheritance is in the father, yet in respect (as hath been said) of the constant and perpetuall appearance of the heire, the heire apparent doth endow, and the father doth but assent. And therefore where the father did endow the wife of his sonne and heire apparent, that endowment was holden void, because the husband in that case must endow, and the father assent.

[*m*] 2 H. 3. Dower, 199. (Post. 38. a.) 6 E. 3. 34. 8 E. 2. Dower, 154.

And it is holden in 2 *H.* 3. Dower, 199 (4), That if the heire apparent be within age, yet the endowment *ex assensu patris* is good. Note, *Littleton* in the case of dower *ad ostium ecclesiæ*, doth put the husband of full age, but here of the dower *ex assensu patris*, he speaketh generally.

2 H. 3. Dower, 199.

"And assignes the quantity and parcels." So as both in dower *ad* [*n*] *ostium ecclesiæ, et ex assensu patris*, the certainty must be expressed. And therefore where books speake of a moiety, it is intended (as hathe beene said) of an halfe in certain (5).

[*n*] 9 H. 3. Dower, 190. F. N. B. 150. M. 8 E. 2. Dower, 154.

"After

---

(2) See acc. ante. 34. b. n. 3.

(3) See Plowd. Quær. 181.

(4) *This book is not to the purpose.* Hal. MSS.

(5) *Dower good of a moiety in common in the said book.* Vid. ante. Hal. MSS.—See acc. 9 H. 3. Dower, 190, which is the book meant by lord Hale. See also ante 34. b. n. 1.

"After the death of the son, the wife shall enter." In this case after the death of the husband the wife shall enter, or have a writ of dower albeit the father be alive.

"That it behooveth the wife to have a deed of the father to prove his assent to this endowment."

"A deed," factum. This word (deed) in the understanding of the common law is an instrument written in parchment or paper, [o] whereunto ten things are necessarily incident: viz. First, writing. Secondly, in parchment or paper. Thirdly, a person able to contract. Fourthly, by a sufficient name. Fifthly, a person able to be contracted with. Sixthly, by a sufficient name. Seventhly, a thing to be contracted for. Eighthly, apt words required by law. Ninthly, sealing. And tenthly, delivery. A deed cannot be written upon wood, leather, cloath, or the like, but onely upon parchment or paper, for the writing upon them can be least vitiated, altered, or corrupted.

If a deed [p] be alledged in *count* or *plea*, regularly it must be shewed to the court (6), to the end the court may judge whether there be apt words to make it a good contract according to the rule of law, whereof more shall be said in the Chapter of Conditions. But if *non est factum* be pleaded (7), because thereby the

[o] Bract. lib. 2. fo. 33, &c. & l. 5. fo. 396. Brit. fol. 34. 65, 66. 101. Flet. l. 3 ca. 14. & lib. 6. ca. 32. & lib. 3. c. 3, 4, 5, 6. (2 Co. 5. Post. 229. a. 2 Ro. Abr. 21.) (5 Co. 74. 76.)

[p] 4 E. 2. Fines, 116. 14 E. 2. Ley, 79. 4 E. a. Ley, 78. 27 H. 6. 10. 27 H. 8. 22. F. N. B. 122. I. (5 Co. 18.)

---

(6) Where a deed ought to be shown. *Vid.* 12 *H.* 7. 12. 9 *H.* 7. 15. 9 *E.* 4. 53. 4 *H.* 7. 10. 14 *H.* 8. 18. 18 *H.* 8. 9. *F. N. B.* 210. *E. in formedon. Dr. Leyfield's case,* 10 *Rep. Where a thing cannot pass without deed in respect of the nature of the things, as herbage common in gross, &c. one ought to show deed. So in respect of the quality of the lessor, as count or plea of demise of abbot with consent of convent, T.* 39 *Eliz. Goffe and Thurston, mayor and commonalty,* P. 5 Jac. B. R. *Garnons and Kenton, master and fellows of a college.* P. 9 Jac. *Lord Norris's case,* B. R. *But yet count in ejectment of demise by husband and wife is good without showing deed, though wife cannot demise without deed, as it seems. Dy.* 91. *when one declares on a deed, where it is not necessary. Count in* ejectione firmæ *on demise* per scriptum indentatum *without showing, and yet good.* M. 42, 43 El. B. R. *Hall and Mather; and it seems that defendant shall not have oyer. Count in debt for rent on demise of the reversion* in scriptis hic in curia prolatis, *yet the other shall not have oyer of the testament.* 1651, *Fitton's case. A. covenants with B. to stand seised to the use of C. his son: the son may plead this deed without showing it, because the estate is executed by the statute.* H. 11 Car. B. R. *Crook, n.* 12. *Stockman and Hampson.* M. 5 Jac. C. B. *So it seems, if it was with the party himself.* M. 6 Jac. C. B. *Debt on obligation by commissioners of bankrupt good without showing deed.* H. 6 Car. B. R. *Crook, n.* 5. *Gay and Fielder.* Hal. MSS.—See further *on showing of deeds* and *oyer* in Com. Dig. *Pleader,* O. P. Wils. vol. 1. part 1. page 121. vol. 2. page 1, and Sheph. Touchst. 73, but most fully in Vin. Abr. *Faits,* M. a. to M. a. 32.—[Note 220.]

(7) Where to plead *non est factum. Dy.* 112. *In case of* sigillum avulsum *before issue, one may plead* non est factum. 7 *H.* 6. 18. *If a deed be suspicious by rasure or avulsion of seal, the party on oyer of deed may demur, and put it into the judgment of the court, or plead* non est factum. T. 40. El. B. R. Rot. 202. *Obligation with condition to save harmless against Tracey with a blank: a stranger after delivery fills up the blank with a christian name by consent of the obligor; yet adjudged to avoid the deed, because material. But if the addition is not material,*

the sealing, delivery, or other matter of fact is denied, it shall be tried by the country. Of deeds some be indented, and some be deeds poll. Of indented, some be bipartite, some tripartite, some quadripartite, &c. whereof more shall be said in the Chapter of Conditions. Also of deeds, some be inrolled, and some [q] be not inrolled. If it be inrolled according to the statute of 27 *H.* 8. cap. 10. it must be inrolled in parchment for the strength and continuance thereof, and not in paper, and so was it resolved in parliament ☞ by the judges in *anno* 23 *Eliz.* Now for the rest of the parts of a deed, you shall read thereof plentifully in our bookes, and in my Reports; which by this short instruction you shall easily understand (1). [36. a.]

[q] Brit. fol. 101. Bract. l. 2. fol. 33. Fleta, lib. 3. ca. 14. (2 Inst. 673.)

"*A deed of feoffment.*" It is properly called *charta feoffamenti* (2), and yet if such a deed be denied, the plea is *non est factum.* So as of deeds some concerne the realtie, as here a deed of feoffement: some the personaltie, as a deed of gift of goods, obligations, bills, &c. And some mixt, whereof more shall be said in the Chapter of Releases.

(2 Rol. Abr. 26. 9 Co. 137. Noy, 50. 11 Cro. Jam. 85.) 35 Ass. pl. 11. Tr. 29 H. 8. Dyer, 95. (1 Cro. El. 835. Hob. 246. Dy. 34. b. N. Ben. 75. 1 And. 4. Cro. El. 884. 1 Raym. 197. Ow. 95. Dy. 192. b. Dal. 104.)

If a man deliver a writing sealed, to the partie to whom it is made, as an escrow to be his deed upon certaine conditions, &c. this is an absolute deliverie of the deed, being made to the partie himself, for the deliverie is sufficient without speaking of any words (otherwise a man that is mute could not deliver a deed), and tradition is onely requisite, and then when the words are contrarie to the act which is the deliverie, the words are of none effect, *non quod dictum est, sed quod factum est inspicitur.* And hereof though there hath been [r] variety of opinions, yet is the law now settled agreeable to judgements in former times, and so was it resolved by the whole court of common pleas (3). But it may be delivered to a stranger, as an escrowe, &c. because the bare act of deliverie to him without words worketh nothing (4.)

[r] Tr. 43 Eliz. inter Haukesby & Lacher in the King's Bench. Hill. 12 Ja. R. in the Common-place. (5 Co. 119. b.)

And

---

material, as the addition of a county, and it be by a stranger, it doth not avoid the deed, though if by the party himself it doth avoid it. Vid. H. 43 Eliz. Cam. Scacc. *the case of Fox and Markham.* Vid *Noy, fo.* 112. *n.* 487. *A. B. and C. are bound jointly and severally: the seal of A. is torn off; in debt against B. he may plead* non est factum. *But if A. B. and C. covenant severally, and the seal of A. is torn off, it will not avoid against the others.* 5 *Rep.* 23. *Vide* where by rasure of the deed the interest is lost. *Where a thing may pass without deed, as in case of feoffment or lease, though the deed be rased, the interest continues.* H. 10 Car. Br. *Crook, n.* 8. *Miller and Manwaring. But if lease by abbot and convent be interlined by lessee, the interest is destroyed.* H. 9. Eliz. rot. 1056. *Bendl. Arden and Mitchell.* Hal. MSS.—See further as to pleading *non est factum* to a deed, Shep. Touchst. 74, and Vin. Abr. *Faits*, N. a. and as to rasure and alteration of deeds and breaking off seals, Shep. Touchst. 68, 69. Vin. *Faits*, T. to Z. and Com. Dig. *Fait*, F.—[Note 221.]

(1) See further as to deeds, Perk. c. 2. ante 6. a. and n. 5, there. Shep. Touchst. c. 4. Vin. Abr. tit. *Deeds*, and also tit. *Faits.* Com. Dig. *Fait.*

(2) For the formal parts of a deed of feoffment, see ante 6. a.

(3) In Mo. 697, there is an opinion of some judges in 39 Eliz. to the contrary; but the authorities since are with lord Coke. See acc. Mo. 642. Noy, 6. Hob. 246. 9 Co. 137. Sty. 251. 6 Mod. 218.

(4) See Dy. 167. b.

and this is the ancient diversitie [s] in our bookes, the record whereof I have seene agreeable with the reason of our old bookes (5). And as a deed may be delivered to the partie without words, so may a deed be delivered by words without any act of deliverie (6), as if the writing sealed lyeth upon the table, and the feoffor or obligor saith to the feoffee or obligee, Goe and take up the said writing, it is sufficient for you, or it will serve the turne; or, Take it as my deed, or the like words, it is a sufficient delivery (7).

[s] 13 H. 8. 19 H. 8. 8. 4 E. 3. 18. 13 H. 4. 8. (3 Co. 26. b. 1 Leon. 140. 2 Ro. Abr. 24.)

Of deeds and their distinctions you shall reade excellent matter in antiquitie. [t] *Cartarum, alia regia, alia privatarum, et regiarum, alia privata, alia communis, et alia universitatis. Privatarum, alia de puro feoffamento et simplici, alia de feoffamento conditionali sive conventionali, alia de recognitione purâ, vel conditionali, alia de quiete clamantia, alia de confirmatione, &c. Verba intentioni, non è contra, debent inservire.*

[t] Bract. lib. 2. fol. 33. b. Fleta, lib. 3. cap. 14.

Carta non est [u] *nisi vestimentum donationis. Carta non est nisi vestimentum orationis. Nemo tenetur armare adversarium suum contra se. Scriptum est instrumentum ad instruendum quod mens vult. Carta est legatus mentis.* [w] *Benignæ sunt faciendæ interpretationes cartarum propter simplicitatem laicorum, ut res magis valeat quàm pereat. Nihil tam* [x] *conveniens est naturali æquitati, quàm voluntatem domini volentis rem suam in alium transferre ratam habere.*

[u] Fleta, lib. 6. ca. 28. Bracton, lib. 2. fo. 34.

[w] Bracton, lib. 2. fo. 94, 95.

[x] Idem, L. 2. fo. 18.

[y] *Re, verbis, scripto, consensu traditione,*
Junctura vestes sumere pacta solent.

[y] Pl. Com. in Throgmorton's case, fol. 161. b.

Verba cartarum fortius accipiuntur contra proferentem. Generale dictum generaliter est intelligendum. Verba debent intelligi secundum subjectam materiam. Carta de non ente non valet.

Note, the father may [a] make a deed to the wife of his sonne, and so is the law holden, for that the father's land by his assent is charged with a future freehold whereunto a deed is requisite; but to a dower *ad ostium ecclesiæ* no deed is requisite. And here it is not well done (of him that made the addition to our author) to vouche 44 *E.* 3. fol. 45, because the author himselfe vouched it not, for if he [b] meant to have vouched authorities, he would have vouched more than one in this

[a] 3 E. 2. Dower, 126. 8 E. 2. Dower, 154. 6 E. 3. 34. 40 E. 3. 43.

[b] 11 H. 3. Dower, 186. 14 H. 3. Dower.

---

(5) Nota, *if dean and chapter seal a deed, it is their deed immediately; but if at the same time they make letter of attorney to deliver it, this is not their deed till delivery.* T. 21 Jac. B. R. Rot. 662. *Hayward and Fulcher.* Hal. MSS. As to the former point, see acc. Dav. 44. 2 Leon. 97, and Cro. Eliz. 167; and as to the latter point, the case cited by lord Hale in W. Jo. 170, and Palm. 504, according to which the court was divided in opinion.—[Note 222.]

(6) *The obligor seals obligation, and throws it upon the table without other circumstances; this is not a delivery. But if he throws it towards the obligee, or if the obligee immediately takes it, and the obligor says nothing, it is a delivery.* M. 29 and 30 Eliz. Rot. 636. *Staunton and Chambers.* Hal. MSS.—See S. C. in Ow. 95. Cro. Eliz. 122. Dy. ed. 1688, fo. 192. b. in marg.—[Note 223.]

(7) Trin. 3. Eliz. *Gibeon* vers. *Tenant, Bendl. n.* 140. Hal. MSS.—See S. C. in N. Bendl. 92, and Dy. 192.—See further as to the delivery of deeds, Sheph. Touchst. 57. Com. Dig. *Fait*, A. 3 Vin. Abr. *Faits*, I. and K.

this case, and those that [c] he vouched he would have cited truly, but this case is mistaken both in the yeare and in the leafe, for whereas it is cited in 44 *E.* 3. it is in 40 *E.* 3. and whereas he saith it is fo. 45, it is fo. 43.

[c] 2 E. 2. Dower, 125. Vid. Stat. Wallie anno 12 E. 1. fol. 18. in veteri magna carta. 47 H. 3. Dower, 174.

An assignment of dower [d] either *ad ostium ecclesiæ*, or *ex assensu patris*, may be made of more than a third part. But the ancient law was that no greater assignment could be made in those cases but of a third part, but lesse might, as appeareth in *Glanvill.*

[d] F. N. B. 150. P. Glanvil. lib. 6. ca. 1, 2, 3.

Sect. 41.

AND if after the death of her husband she entreth, and agree to any such dower of the said dowers at the church doore, &c. then she is concluded to claim any other dower by the common law of any the lands or tenements which were her husband's. But if she will, she may refuse such dower at the church dore, &c. and then she may be endowed after the course of the common law.

"*SHE is concluded to claim any other dower by the common law.*" (8) Wherein a diversitie is to be observed between a dower *ad ostium ecclesiæ*, or *ex assensu patris*, and a ☞ joynture or estate made to the wife in satisfaction of her dower, for one of those dowers being assented unto is a barre of the dower at the common law, but a joynture was no barre of her dower at the common law. For a right or title that one hath to a freehold cannot be barred by acceptance of collaterall satisfaction (1). But a woman cannot have a double dower, viz. *ad ostium ecclesiæ, &c.* and at the common law, for the wife of one husband can have but one dower. But since *Littleton* wrote, by the statute of 27 *H.* 8, if a joynture (A) be made to [a] the wife, according to the purview of that statute, it is a barre of her dower, so as the woman shall not have both joynture and dower, and to the making of a perfect joynture within that statute sixe things are to be observed. First,

[36. b.]

(Doc. Pla. 149.) Vernon's case, 4 Co. 1. 1 Maria, Dyer, 91. 31 E. 3. Scire fac. 99. 20 E. 3. 4.

(Dy. 248. a. 317. a.)

27 H. 8. cap. 10.

[a] 12 E. 2. Dower, 158.

27 H. 8. cap. 10. versus finem.

---

(8) Vid. 32 *E.* 1. *Dower*, 126. 177. Hal. MSS.

(1) *Rent granted by parol out of the same land of which she is dowable, bars; not if out of other land.* 1 *Mar. Dy.* 91. *Sturge's case.* Hal. MSS.—See Cro. Eliz. 128. But though a collateral satisfaction is not pleadable at law in bar of dower, yet acceptance of a term of years, or of a sum of money, or of any other kind of collateral satisfaction, in lieu of dower, is a good bar in equity. See Lawrence and Lawrence, 2 Vern. 356, and note, that lord Somers's decree against the wife in that case, which was afterwards reversed by lord keeper Wright, and finally in the house of lords was objected to, not on account of any doubt of dower's being barrable in equity by a collateral satisfaction, but merely because the devise to the wife was not expressed to be in satisfaction of dower. See further as to bar of dower in equity by collateral satisfaction, 1 Eq. Cas. Abr. *Dower*, B. and 9 Mod. 152.—[Note 224.]

(A) What is a jointure within the st. 11 H. 7. c. 20. see Cro. Jam. 374, and 624.

First, her joynture by the first limitation is to take effect for her life in possession of profit presently after the decease of her husband. Secondly, that it be for the terme of her owne life, or greater estate. Thirdly, it must be made to herself, and to no other for her. Fourthly, it must be made in satisfaction of her whole dower, and not of part of her dower. Fifthly, (B) it must either be expressed or averred to be in satisfaction of her dower. And sixthly, it may be made either before or after marriage (C). (4 Co. 1. 3 Cro. Jam. 489.)

Concerning the first, if a man make a feoffment in fee of lands or tenements either before or after marriage to the use of the husband for life, and after to the use of *A.* for life, and then to the use of the wife for life in satisfaction of her dower, this is no joynture within the statute, because by the first limitation it was not to take effect in possession or profit presently after the death of her husband. And albeit in that case *A.* should die living the husband, and after the death of the husband the wife entreth, yet this is no barre of her dower, but she shall have her dower also (2), because it is not within the said statute, and (as it hath been said) by the common law it was no barre of her dower (3). 2. It must be either in fee taile, or for terme of her owne life, for an estate for life or lives of one or many other, or to her for a hundred or a thousand years, &c. if she lives so long, or without such limitation, is no barre of her dower, albeit they be expressly made in satisfaction of her dower, *causâ quâ super* (4). 3. If an estate be made to others in fee simple, or for her life upon trust, so as the estate remaine in them, albeit it be for her benefit, and by her assent, and by expresse words to be in full satisfaction of her dower, yet this is no barre of her dower (5). The fourth is (1 Sid. 3.) Leake & Randal's case, 4 Co. 4.

(B) Jointure alone held sufficient, without express words in bar of dower. See Cray *v.* Cray. So provision for maintenance of wife, in case of surviving her husband. Vizard v. Longdale, cited by Ld. Hardwicke, 1 Ves. 55. Walker *v.* Walker, 1 Ves. 154. Garshore v. Chalie, 10 Ves. 5. & 20. See also Ow. 32. 1 Leon. 311. 9 Mod. 52. R. temp. Finch 369. Dyer, 228. b. 3 Atk. 8. I wrote opinion, that the word "jointure," in a marriage agreement, was equivalent to a "jointure in bar of dower;" this opinion is sanctioned by the st. 27 H. 8. the statute making "jointure" a bar of dower, the statute not mentioning "jointure with express words barring dower."

(C) It is observable Ld. Coke doth not mention the wife being an assenting party to a jointure before marriage, as a requisite; yet *qu.* if she may not waive the jointure, if it is not made with her concurrence. See Ld. Macclesfield's words in 9 Mod. 152.

(2) T. 26 Jac. *Sherwell's case. Hutt.* 51. *accord.* Hal. MSS.

(3) But *quære* whether a court of equity will not confine her to one, and compel her to elect which she will have. See the references in note 1, *supra*, and the case of Visett and Longdon cited in Jordan and Savage, New Abr. *Jointure*, B. 6.—[Note 225.]

(4) Vid. M. 29 and 30 Eliz. C. B. Rot. 334. *Devise to the wife for 7 years* Hal. MSS.

(5) But though this may be true at law, yet it is now settled, that a trust estate, being equally certain and beneficial as what is required at law, or even an agreement to settle lands as a jointure, is a good equitable jointure in bar of dower. See the case of Jordan and Savage reported in New Abr. *Jointure*, B. 5.—10 Ves. 4; and Lord Rosslyn's words, 5 Ves. 395.—[Note 226.]

is so plaine as it needeth not any example. 5. A devise by will cannot be averred to be in satisfaction of her dower, unlesse it
(3 Co. 25. 27.) be so expressed in the will (6). 6. If the joynture be made before marriage, the wife cannot waive it and claime her dower at the common law; but if it be made after marriage, she may waive the same, and claime her dower (7). I have touched these

(6) 10 Eliz. *Dy.* 266. Hal. MSS.—But though a devise cannot at law be averred to be in satisfaction of dower, if the will is silent, yet sometimes our courts of equity have been induced by *special* circumstances to consider such devises as a satisfaction; and it has therefore been decreed, that the wife should make her election to wave her dower and accept under the will, or to wave the will and take her dower. In Lawrence and Lawrence, 1 Vern. 463, lord chancellor Somers made such a decree; because he inferred an intention to give in bar of dower, from the testator's having devised the residue of his *whole* estate to another. But this decree was reversed by lord keeper Wright, and the reversal was afterwards affirmed in the house of lords, and this is said to have settled the doctrine. 1 Eq. Cas. Abr. *Dower*, B. pl. 2, and see acc. Prec. in Chanc. 133. Vin. Abr. *Devise*, T. c. pl. 45. 2 Atk. 427. 3 Atk. 8. 436. See also the case of Broughton and Errington adjudged in Dom. Proc. 8th March 1773. However, notwithstanding the doctrine on which the case of Lawrence and Lawrence was finally decided, and the frequent recognition of that case, devises have been since frequently deemed a satisfaction of dower, on account of very strong and special circumstances; as where allowing the wife to take a double provision would have been quite inconsistent with the dispositions of the will. On this latter principle lord chancellor Northington is said to have decided for a satisfaction of dower in the case of Arnold and Kempstead, which was heard in July 1764, and lord chancellor Camden in the case of Villareal and lord Galway, which was heard soon after the former case.—[Note 227.]

(7) *Though she be within age* ut videtur *she cannot wave.* Hal. MSS.—The important question, whether a jointure on an infant before marriage may be waved, was not quite settled till the case of Drury and Drury, which was heard before lord chancellor Northington in Hilary 1 Geo. 3. The points (*a*) determined by lord Northington in that case were, 1, that the statute of 27 H. 8, which introduced jointures, extends to adult women only, infants not being particularly named; and therefore that notwithstanding a jointure on an infant, she may wave the jointure and elect to take dower: 2, that a covenant by the husband that his heirs, executors, or administrators shall pay the wife an annuity for her life in full for her *jointure* and in bar of dower, without expressing that it shall be charged on any *particular* lands, or be secured of lands *generally*, is not a good *equitable* jointure within the statute: 3, that a woman being an infant cannot by any contract previous to her marriage bar herself of a distributive share of her husband's personalty in case of his dying intestate. From this decree by lord Northington there was an appeal to the house of lords, and after hearing the judges *seriatim* on the question, whether a jointure on an infant could be waved, on which they were divided in opinion, the decree was *wholly* reversed. See the printed cases in the house of lords of the year 1762. Before *Drury* and *Drury*, the only *judicial* opinions as to the effect of a jointure on an infant were sir Joseph Jekyll's in *Cray* and *Willis* against its barring, and lord Hardwicke's in *Seys* and *Price*, and in *Harvey* and *Ashley* to the contrary. See Vin. *Dower*, Q. 4. pl. 18. Barnard. Ch. Rep. 117, and 3 Atk. 607.—[Note 228.]

(*a*) The reversal as to the three points here mentioned was in effect total, for the decree of

these points the more summarily, because they are resolved at large with the reasons thereof in *Vernon's* case *ubi supra*. So as to comprehend all in a few words, a joynture (which in common understanding extendeth as well to a sole estate as to a joynt estate with her husband) is a competent livelihood of freehold for the wife of lands or tenements, &c. to take effect presently in possession or profit after the decease of her husband for the life of the wife at the least, if she herselfe be not the cause of determination of forfeiture of it. Which see more at large in *Vernon's* case *ubi supra*. If a joynture be made to a wife of lands before the coverture, and after the husband and wife alien by fine those lands so conveyed for her joynture, she shall not be endowed of any of the other lands of her husband. But if the joynture had been made after marriage, notwithstanding the alienation by the husband and wife thereof by fine, yet seeing her estate was originally waivable, and the time of her election came not till after the decease of her husband, she may claim her dower in the residue of his lands. But in the other case, the joynture of the wife made before marriage was not waivable at all. Now as the dower *ad ostium ecclesiæ* and *ex assensu patris*, is better for the wife, because in respect of the certainty she may enter, than the dower at the common law, where she is driven to her reall action, and therefore, *Britton* calleth dower *ad ostium ecclesiæ*, and *ex assensu patris* establishment of dower by the husband and assignment of dower after his decease (for nothing that is uncertaine is established); so a joynture (that hath the force of a barre of dower by the said act of 27 *H.* 8.) is, as hath been said, more sure and safe for the wife than either dower *ad ostium ecclesiæ*, or *ex assensu patris*, for besides it is as certaine as those others, and she may enter into it, after the death of her husband, and not be driven to her action. She shall not be barred of her joynture albeit her husband commit treason or felonie, as she shall be both of her dower *ad ostium ecclesiæ* and *ex assensu patris* by the common law. But now at this day by the statutes of 1 *E.* 6. cap. 12, and 5 *E.* 6. cap. 11, a wife shall not lose any title of dower which to her was accrued, by the attainder of her husband by any manner of murder or other felony whatsoever. But [*a*] if the husband be attainted of high treason or petit treason, she shall be [*b*] barred of her dower at this day, so long as that attainder standeth in force.

Vide Vernon's case, ubi supra, fo. 2. b.

Dyer, 19 Eliz. 358.

Brit. cap. 102, 103.

[37. a.]

Bract. 311. lib. 4. Britton, ca. 15.

1 E. 6. ca. 12. 5 E. 6. ca. 11. (Post. 40. b.)

[*a*] Staunford, 195. b.

[*b*] Vid. in the Chapter of Garranty, Sect. †

"*Conèluded*," commeth of the [*c*] verbe *concludo*, which is derived of *con* and *claudo* to determine, to finish, to shut up, to estoppe or barre a man to plead or claime any other thing. *Vid.* Estoppel.

[*c*] Pl. Com. 276. b. per Walsh. Vide Sect. 693. 695. 667. 679.

† *Probably sect.* 747.

---

of the lords was, that lady Drury was bound by the agreement previous to her marriage with Thomas; and that she was barred of the dower and of her share of the personal estate under the statute of distributions.

Sect.

Sect. 42.

AND note, that no wife shall be endowed ex assensu patris *in forme aforesaid, but where her husband is sonne and heir apparent to his father.* Quære *of these two cases of dowment* ad ostium ecclesiæ, &c. *if the wife, at the time of the death of her husband, be not past the age of* 9 *yeares, whether she shall have dower or no.*

(Ante 33. a.) "*NO wife shall be endowed, &c.*" Of this sufficient hath beene said before.

"*Quære of these two cases of dowment ad ostium ecclesiæ, &c.*" And it seemeth, that these dowers being made by assent, &c. that the same are good albeit the wife be within the age of nine yeares, for *Consensus tollit errorem.* But without question, a joynture made to her under or above the age of nine yeares, is good.

Sect. 43.

AND note, that in all cases, where the certaintie appeareth what lands or tenements the wife shall have for her dower, there the wife may enter after the death of her husband without assignement of any. But where the certainty appeares not, as to be endowed of the third part, to have in severalty, or the moiety according, to the custom to hold in severaltie, in such cases it behoveth that her dower be assigned unto her after the death of her husband; because it doth not appeare before assignement, what part of the lands or tenements she shall have for her dower.

"*AND note, that in all cases, &c.*" In all cases, where the demand of the dower is certaine, as in case of dower *ad ostium ecclesiæ* or *ex assensu patris*, there the wife after the death of the husband may enter (1). But where the demand is uncertaine, as in writs of dower at the common law, there albeit the thing itselfe be certaine, yet shall she not take it without assignement. As if a woman bring a writ of dower of three shillings rent, albeit she ought to be endowed of one shilling, yet cannot she after judgment distrein for twelve pence before assignment (2), because the demand was ☞ uncertaine. And so it is if two tenants in common be, and the wife of one of them bring a writ of dower to be endowed of a third part of a moitie, and have judgement to recover, yet cannot she enter without assignement, albeit the assignement cannot give her any certainty, because her husband's state was incertaine. See more of this before Section 39.

40 E. 3. 22. 43. 45 E. 3. 4. 20 E. 3. Darre, 132. 8 E. 2. Entry, 75. (Ant. 34. b.)

[37. b.]

(1) *It seems, that though it be assigned, the freehold is not in her till entry.* 9 *E.* 3. 5. Hal. MSS.

(2) *But* videtur, *that after the third part set out by the sheriff she may enter immediately before the writ returned. Yet as to the damages, the writ ought to be returned, because another judgment is to be given.* M. 19 Jac. B. R. *Howard* versus *Cavendish.* Vid. 10 *Eliz. Dy.* 172. Hal. MSS.—[Note 229.]

Sect.

Sect. 44.

BUT if there be two joyntenants of certaine land in fee, and the one alieneth that which belongeth to him, to another in fee, who taketh a wife, and after dieth; in this case the wife for her dower shall have the third part of the moitie which her husband purchased, to hold in common (as her part amounteth) with the heire of her husband, and with the other jointenant, which did not alien, for that in this case her dower cannot be assigned by metes and bounds.

Of this sufficient hath beene said before, and that in this case the wife cannot enter without assignement.

Sect. 45.

AND it is to be understood, that the wife shall not be endowed of lands or tenements, which her husband holdeth joyntly with another at the time of his death; but where he holdeth in common, otherwise it is, as in the case next abovesaid.

THE reason of this diversity is, for that the jointenant, which surviveth, claimeth the land by the feoffment, and by survivorshippe, which is above the title of dower, and may plead the feoffment made to himselfe without naming of his compagnion that died, as shall be said hereafter in his proper place; but tenants in common have several freeholds and inheritances, and their moities shall descend to their several heires, and therefore their wives shall be indowed. (1 Ro. Abr. 676.)

[38. a.] ☞ Sect. 46.

AND it is to be understood, that if tenant in taile endoweth his wife at the church doore, as is aforesaid, this shall little or nothing at all availe the wife, for that after the decease of her husband, the issue in taile may enter upon her possession; and so may he in the reversion, if there be no issue in taile then alive.

THE reason of this is, for that tenant in taile is restrained by the sayd statute of 13 *E.* 1, *de donis conditionalibus.*

And so did our author take the law in his learned reading. Here our author's reason is *à fine*, and therefore such an endowment is not to be made because it is to no end. Vide Sect. 194.

Sect.

Sect. 47.

ALSO, if a man seised in fee simple, being within age, endoweth his wife at the monasterie or church doore, and dieth, and his wife enter, in this case the heire of the husband may out her. But otherwise it is (as it seemeth) where the father is seised in fee, and the sonne within age endoweth his wife ex assensu patris, *the father being then of full age.*

Vide 9 H. 3. tit. Dower, 197. (Ante 34. a.)

THE reason of this diversitie is, for that in the first case the husband within age is seised, and therefore he being within age cannot by a voluntary act bind himself: otherwise it is, where he doth an act whereunto he is compellable by law, but in the latter case the father which giveth the assent is seised of the freehold and inheritance, and the sonne therein hath nothing, and therefore his heire shall not avoide it in respect of his infancy.

Sect. 48.

ALSO, there is another dower, which is called doweent de la pluis beale. *And this is in case where a man is seised of forty acres of land, and he holdeth twenty acres of the said forty acres, of one by knights service, and the other twenty acres of another in socage, and taketh wife, and hath issue a sonne, and dieth, his sonne being within the age of fourteen yeeres, and the lord of whom the land is holden by knights service entreth into the twenty acres holden of him, and holdeth them as gardein in chivalrie during the nonage of the infant, and the mother of the infant entreth into the residue, and occupieth it as gardein in socage: if in this case the wife bringeth a writ of dower against the gardein in chivalry, to be endowed of the tenements holden by knights service, in the king's court, or other court, the gardein in chivalry may pleade in such case all this matter, and shew how the wife is gardein in socage, as aforesaid; and pray that it may be adjudged by the court, that the wife may endow her selfe* de la pluis beale, *i. e. of the most faire of the tenements which she hath as gardein in socage, after the value of the third part which she claimes by her writ of dower, to have the tenements holden by knights service. And if the wife cannot gainsay this, then the judgement shall be given, that the gardein in chivalry shall hold the lands holden of him during the nonage of the infant quit from the woman, &c.* (1).

"*AND the lord of whom the land is holden by knight's service entreth into the twenty acres holden of him.*" For he is not possessed as a gardein against whom a writ of dower lieth, untill he

(1) *And that the wife may endow herself of the fairest part of the lands which she hath as guardian in socage, after the value, &c.* L. and M.

[38. b.] he doth enter. Of the wardship of the body he is possessed before seisure, ☞ because it is transitory, but he is not possessed of the land untill he enter, because it is permanent. And therefore if he doth not enter, the heire within age may assigne dower, as hath been said, and as it appeareth afterwards. (Ante 35.) Vid. le statut. de bigamis, cap. 3.

"If in this case the wife bringeth a writ of dower against the gardein in chivalry." Albeit [a] the gardein in chivalrie or the grantee of the king of a wardship hath but a chattel during the minority of the heire, and the woman shall recover a freehold in her writ of dower, yet after the gardein as is aforesaid hath entered into the land, that writ lieth against him, and not against the heire who is tenant of the freehold, because the law hath trusted the gardein to plead for the heire within age, and that is in his custody, and also for his own particular interest, and by this diversity all the books be reconciled (1)†.

[a] 44 E. 3. 13. 4 H. 7. 6. 11. Staunf. Prær. 13. 6 E. 3. 15. 16 E. 3. Breve, 657. Temps E. 1. Breve, 863. 11 E. 3. Breve, 473. 45 E. 3. 5. 17 E. 3. 70.

1 H. 7. 17. 4 H. 7. 1. 4 H. 7. Aid le Roy, 33. 38 E. 3. 13. 9 H. 6. 6 b. 39 E. 3. 8. 8 E. 2. Dower, 169. 8 E. 2. Breve. 809. 22 E. 4. Dower, 16. (9 Co. 17.) 1 Ro. 287. Cro. Car. 307. Hob. 149. F. N. B. 150. B.

So likewise if the gardein die, the wife shall have a writ of dower against his executors; and if there be two executors, and one of them alone take the profits, the writ of dower shall be maintained against him only. If a man be possessed of the wardship of certaine land, either joyntly with his wife or in the right of his wife, yet the writ of dower lieth against the husband only. Gardein in socage shall not endowe herself *de la pluis beale* without judgment, as shall be said hereafter. 8 E. 3. 52. 8 E. 3. 15. & 31. 38 E. 337. 47 E. 3. 9. b.

"The gardein in chivalry may pleade." The authority of *Littleton* is direct that the gardein may plead this plea. But hereof ariseth two questions. First, whether if the heire be vouched by the tenant in the writ of dower in the gard of the gardein (2), whether

---

(1) † Nota Pasch. 1653, B. R. *Ruled* 1. *Grantee of wardship of the body cannot assign dower; but grantee or committee of wardship of land may, though it be by court of wards.*—2. *Yet court of wards cannot assign dower by commission, but it ought to be by writ* de dote assignanda *out of chancery.* Accord. M. 35, 36 Eliz. C. B. *case of viscountess Boudon.*—3. *But lessee for years of land by the guardian cannot assign dower.*—4. *But if the king lease the land during minority of the heir rendering rent, whether he be a committee to assign dower* dubitatur. Videtur quod non, *but there ought to be* dedimus vel committimus custodium: 2 *E.* 3. 13. *Husband of ward in right of his wife, and dower against the husband only.* Nota H. 8 Jac. C. B. *Nicholson and Gower.* 1. *After full age and before delivery, dower lies against the heir, and cannot be assigned by the king.* 2. *Judgment in dower against the heir in wardship shall bind the heir but not the guardian.* Hal. MSS.—[Note 230.]

(2) For voucher in wardship in dower.—1. *If the heir be in wardship of guardian in chivalry, though he be in wardship of many, there ought to be voucher of all having the heir in wardship, because every one may make defence, and every one shall lose proportionably. But several writs lie against several guardians* 16 *E.* 3. Briefe, 657.—2. *If the heir be in wardship of one or many guardians in socage, one may vouch the heir in wardship, or may vouch at large as it seems, and not as in wardship, because the guardian has the land only to the use of the infant.*—3. *If the heir be in wardship of the demandant in chivalry, he ought to vouch*

whether he coming in as vouchee may plead that plea. The second is, whether if the gardein in ☞ socage have not sufficient, as if the land holden by service of chivalry be twenty-five acres, and the lands holden in socage but five acres, whether she shall be endowed by parcels, viz. to recover five acres against the gardein in chivalry, and to retaine five acres. And as to the first, the gardein shall as well plead it, when he comes in as vouchee, as when he is tenant. And as to the second, some say that the demandant in the writ of dower must have assets in her hands to the value of her dower, so as she shall not be partly endowed against the gardein, and partly retaine in her own hands. And they say that the judgment should be in part, that is, as to the land in socage in severalty, and as to the land in chivalry to recover the third part, and compare it to the case in 8 E. 4. 8. that damages shall not be recovered, partly against the defendant in an appeale, and partly against the abettors, but entirely either against the one or the other. And *Littleton* here putteth this case, that the gardein in socage hath assets in value, and seeing it is a dower against common right, they hold that she must be entirely endowed either by herselfe against common right or against the gardein according to common right. But [a] yet by the booke in 25 *E.* 3. 52. b. and others, it appeareth, that she may in this very case retaine for part, and recover against the gardein for part (2).

[39. a.]

5. E. 3. 60. 2 E. 3. 3. Lib. Intrat. Dower, fol. 225. a. 18 E. 3. 4. b. 14 H. 7. 26. Keble. (12 Co. 125, 126.) [a] 25 E. 3. 52. b. 4 E. 2. tit. Disseisin, 10. Regist. Judic. 26. Lib. Intrat. 22. 16 E. 3. Breve, 657. 20 E. 3. Judgment, 175. [b] 7 E. 3. 57. 8 E. 3. 71. Doc. Pla. 149. [c] 17 E. 3. 58. [d] 10 E. 3. 50. 6 El. Dy. 230. (F. N. B. 148, 149.

Gardein in chivalry [b] shall plead in barre of her dower, detainment, or eloigning of the body of the ward, because his marriage doth appertaine unto him: and if the heire come in [c] as vouchee, he shall plead the same plea. But he shall not plead detainment of the charters [d] because the charters concerning the inheritance of the heire belong not to the gardein (3). The gardein in chivalry [e] may assigne dower of the lands and tenements he hath in ward, or if he assigne a rent out of those lands

[e] 3 E. 3. Dow. 75. 8 E. 2. Dower, 155. W. 2. cap. 7. 2 Inst. 367.)

in

---

vouch in wardship of the demandant; but if he be in wardship of the demandant in socage, there it is in the election of the feoffee to vouch in wardship of the demandant. Registr. Judicial. 54. *But he may plead in bar, and pray that she shall be endowed* de pluis beale *as well as guardian in chivalry.* 21 *E.* 3. 28. 25 *E.* 3. 21.—4. *But if A. having* 4 *acres in socage and* 2 *acres in chivalry, makes feoffment of two acres of socage with warranty and dies, the heir within age, and dower is brought by the wife of A. against the feoffee,* dubitatur *if he may vouch the heir in wardship of the guardian in chivalry only, or ought to vouch in wardship of the demandant and of guardian in chivalry, or if he shall only plead in bar that she may endow herself* de pluis beale. *But whether the voucher be in wardship of guardian in chivalry only, or of guardian in chivalry and demandant guardian in socage, the guardian shall turn all the loss on the demandant as it seems.* Reg. Judic. 54. 21 *E.* 3. 28. 25 *E.* 3. 51. Hal. MSS.—There is an obscurity in the third part of this annotation by lord Hale, which the editor on translating found himself unable to remove. See further on the subject in Hugh. on Orig. Wr. 166.—[Note 231.]

(2) Vid. 2 *E.* 3. *Vouch.* 213. 13 *E.* 3. *Judgment,* 165. Hal. MSS.

(3) Vid. 9 *Rep.* 15 b. *Ann Bedingfield's case.* Hal. MSS.—See further as to pleading detainment of charters, Hugh. Orig. Wr. 183. Vin. Abr. *Dower* L. M. and N.

in allowance of her dower, it is good. If the gardein in chivalrie assigne too much for her dower, the heire shall have a writ of admesurement by the common law (4). And so [*f*] if the heire within age assigne, before the gardein enter, to the wife too much in the dower, the gardein shall have a writ of admesurement by the statute of *West.* 2. cap. 7. And if the heire within age, before the gardein enter into the land, assigne too much in dower, he himselfe shall have a writ of admesurement at full age: and some have said, that in that case he may have it within age. [*g*] But if the heire, (before the gardein enter) endow the wife of more than she ought, and the gardein assigne over his estate, his assignee shall have no writ of admesurement, because it was a thing in action. Also, the heire shall have an [*h*] admesurement for the assignment in the life of his ancestor by the common law, [*i*] and a writ of admesurement lyeth upon an assignment in chancery.

[*f*] Bract. li. 4. 314. Reg. origin. 171. Flet. li. 5. ca. 22. 7 E. 2. tit. Admes. 13. F. N. B. 149.

[*g*] 7 R. 2. Admes. 4. F. N. B. 148. I.

[*h*] 7 R. 2. ubi. sup. F. N. B. 149. A.

[*i*] 7 R. 2. Sub. sup. 12 H. 6. Admes. 9. F. N. B. 149. 25 E. 3. 51.

"Then the judgment shall be given, that the gardein in chivalry shall hold the lands holden of him during the nonage of the infant quit from the woman, &c."

"Judgement." *Judicium, quasi juris dictum,* the very voyce of law and right, and therefore *Judicium semper pro veritate accipitur.* The ancient words of judgment are very significant, *Consideratum est, &c.* because that judgment is ever given by the court upon due consideration had of the record before them: and in every judgment there ought to be three persons, *actor, reus,* and *judex.* Of judgements some be finall, and some not final, whereof you shall read more hereafter.* And now to returne to our author, it is materiall that these words (*et cætera*) be explained at large, viz. *Et quòd prædicta A.* (the demandant) *capiat de terris hæred' prædicti in custodiâ suâ existen' ad valentiam præd'* 3. *partis cum pertinen' tenend' nomine dotis suæ pro præd'* 3. *parte superius per eam petit* (5). Now some are of opinion, that upon this judgment the demandant may not in any sort endow herselfe of the land, because she cannot do an act to herselfe, but she shall recoupe the third part of the profits upon her account, and be endowed against the heire at his full age (6). But

(1 Ro. Abr. 201. Cro. Cha. 422. Post. 168. a.)

* 288 b.

22 E. 4. Dow. 16. 16 E. 3. Waste. 100. 45 E. 3. 6.

---

(4) See further as to admeasurement of dower, Vin. Abr. *Dower,* Q. a. and as to assignment in chancery, Hugh. Orig. Wr. 171. New Abr. *Dower,* D. 3.

(5) 15 *E.* 3. *Dower,* 69. Hal. MSS.

(6) Where judgment shall be against heir and where against vouchee.—1. *Where the heir of the husband is vouched as having assets in the same county, and the demandant acknowledges it, judgment shall be for the demandant against the heir, and that the tenant shall go in peace if he has assets in the same county, and if not judgment against the tenant, and for him over in value. But if it is agreed that he has not assets in the same county, but only in a foreign county, then judgment shall be against the tenant, and for him over in value.* 6 *E.* 3. 11. —2. *If he has assets for part in the same county,* vide *conditional judgment for that part,* 2 *E.* 3. *Vouch.* 213. 25 *E.* 52.—3. *If the tenant vouches the heir of the husband having assets in the same county, and the voucher is counterpleaded, or if the demandant* dedit *the assets, &c. then it seems judgment shall be for demandant immediately against the tenant, and for him over*

in

But observe what *Littleton* saith in the next Section: but before you come to that, observe what priviledge the common law ☞ giveth to the land holden by knights service, viz. that it shall not be dismembered, but the whole dower taken of the lands holden in socage; and the reason is, for that knights service is for the defence of the realm, which is *pro bono publico*, and therefore to be favoured. [39. b.]

Sect. 49.

AND note, that after such a judgment given, the wife may take her neighbours, and in their presence endow herselfe by metes and bounds of the fairest part of the tenements which she hath as gardein in socage, (1) *to have and to hold to her for terme of her life; and this dower is called* de la pluis beale.

And the judgment, viz. *tenend' nomine dotis*, proveth, that she may have it for terme of her life, for every dower is for terme of life.

Sect. 50.

AND note, that such endowment cannot be, but where a judgment is given in the king's court, or in some other court, &c. (2), *and this is for the preservation of the estate of the gardein in chivalrie during the nonage of the infant.*

15 E. 3. Dower, 69. 16 E. 3. tit. Wast. 100.

"*WHERE a judgment is given, &c.*" For without such a judgement, as appeareth before, gardein in socage cannot endow herselfe, as likewise hath bin said before (3).

Bract. lib. 5. 329. F. N. B. 7, 8.

"*Or in some other court.*" That is, by writ of right of dower in the court of the heire, if he have any, or of the lord of whom the land is holden.

"*And*

---

in value. But it seems, that the demandant may pray conditional judgment, if the heir counterpleads the assets with warranty. Quere *and* vide 16 *E.* 3. *Vouch.* 85. 3 *E.* 3. *Judgment*, 165. 18 *E.* 3. 38. 55.—4. *But if tenant vouch I. S. who vouches the heir of the husband having assets in the same county, still no judgment conditional shall be given.* 18 *E.* 3. 36. Contra 2 *E.* 3. *Vouch.* 218. Hall. MSS. See further Hugh. Orig. Wr. 163.—[Note 232.]

(1) *Of the value of the third part of the tenements, which the guardian in chivalry has, &c.* L. and M.—Roh.—P. and Red.

(2) *That the wife can do this*, L. and M.—Roh.—[See also Fearne on Remainders, 28. 378.]

(3) Dower *de la pluis beale*, being merely a consequence of tenures by knights service, is virtually abolished by the statute which converts such tenures into socage. See 12 Ch. 2. c. 24.—[Note 233.]

"And this is for the preservation of the estate of the gardein in chivalry during the nonage of the infant." For the heire (before the entery of the gardein) cannot plead the same plea, that the demandant should endow herselfe *de la pluis beale*. And the reason of this dower *de la pluis beale* to be all of the socage land, was for advancement of chivalrie for the defence of the realme (4).

Sect. 51.

AND so you may see five kinds of dower, viz. dower by the common law, dower by the custome (5), *dower* ad ostium ecclesiæ, *dower* ex assensu patris, *and dower* de la pluis beale.

This is manifest of itselfe, and therefore needeth no explanation.

[40. a.] ☞ Sect. 52.

AND memorandum, *that in every case where a man taketh a wife seised of such an estate of tenements, &c. as the issue, which he hath by his wife, may by possibility inherit the same tenements of such an estate as the wife hath, as heire to the wife; in this case, after the decease of the wife, he shall have the same tenements by the curtesie of England, but otherwise not.*

"MEMORANDUM." This word doth ever betoken some excellent points of learning, which our author hath used in other places, as appeareth in the margent. Sect. 234. 301. 335.

The matter hereof hath bin partly explained in the Chapter of Tenant by the Curtesie. If a man [a] taketh a wife seised of lands or tenements in fee, and hath issue, and after the wife is attainted of felony so as the issue cannot inherit to her, yet he shall be tenant by the curtesie, in respect of the issue which he had before the felonie, and which by possibility might then have inherited. But if the wife had been attainted of felonie before the issue, albeit he hath issue afterward, he shall not be tenant by the curtesie (1). Ante 29. b. [a] 21 E. 3. 9. 11 H. 7. 3 H. 7. 17. Staunf. 195. 27 E. 3. 77. 46 E. 3. Petit. 20. 26 Ass. p. 2. 13 H. 4. 8.

"As heire to the wife." This doth implie [b] a secret of law, for except the wife be actually seised, the heire shall not (as hath [b] 8 Co. 34, in Paine's case.

---

[4] Vid. 16 *E.* 3. 88. *She may recoup the third part of the profits on her own account*, ut videtur, *without judgment*. Hal. MSS.

(5) Besides the books cited ante 33 b. as to dower by custom, see Hugh. Orig. Wr. 160. Robins. Gavelk. cap. 2. New Abr. *Dower*, K. Vin. Abr. *Copyhold*, H. e. Com. Dig. *Copyhold*, K. 2.

(1) See ante 29. b. n. 4, and Vin. Abr. *Curtesy*, H.

hath been said) make himselfe heire to the wife (2): and this is the reason that a man shall not be tenant by the curtesie of a seisin in law.

Sect. 53.

AND also, in every case where a woman taketh a husband seised of such an estate in tenements, &c. so as by possibilitie it may happen that the wife may have issue by her husband, and that the same issue may by possibilitie inherit the same tenements of such an estate as the husband hath, as heire to the husband, of such tenements she shall have her dower, and otherwise not. For if tenements be given to a man, and to the heires which he shall beget of the bodie of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate but as donee in special taile. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife dyeth, living her husband, and after the husband taketh another wife, and dieth, his 2. wife shall not be indowed in this case, for the reason aforesaid.

12 H. 4. 2.
7 H. 6. 11, 12.

"*SO as by possibility it may happen that the wife may have issue by her husband.*" Albeit the wife be a hundred yeares old, or that the husband at his death was but foure or seven years old (3), so as she had no possibilitie to have issue by him, yet seeing the law saith, that if the wife be above the age of nine years at the death of her husband, she shall be endowed, and that women in ancient times have had children at that age, whereunto no woman doth now attaine, the law cannot judge that impossible, which by nature was possible. And in my time, a woman above threescore yeares old hath had a child, and *ideò non definitur* ☞ *in jure*. And for the husband's being of such tender yeares, he hath *habitum*, though he hath not *potentiam* at that time, and therefore his wife shall be endowed.

(1 Rob. Abr. 675.)

[40. b.]

"*And that the same issue may by possibilitie inherit the same tenements.*" A man seised of land in generall taile, taketh wife, and after is attainted of felony, before the said statute of 1 *E.* 6. the issue should have inherited, and yet the wife should not have bin endowed; for the statute of *W.* 2. ca. 1. relieveth the issue in taile, but not the wife in that case (1). But at this day, if the

(2) See 8 Co. 36. a. where 11 H. 4. 11. and 40 E. 3. 9. are cited to prove this doctrine. See also ante 11. b. where it is advanced as a general rule, that he who claims by descent, must make himself heir to the person last *actually* seised. See further ante 14. b. 15. b. and n. 3. in 11 b. W. Jo. 361, and Blackst. Law Tr. 8vo. ed. vol. 1. p. 180.

(3) See ante 33. a.

(1) 12 *H.* 4. 3, *by Hankford.* Hal. MSS.—See further as to loss of dower by the husband's offences, ante 37. a. post. 392. b. Hugh. Orig. Wr. 156, and Vin. Abr. *Dower*, Q. 6.

the husband be attainted of felony, the wife shall be endowed, and yet the issue shall not inherit the lands which the father had in fee simple. If the wife elope from her husband, &c. she shall be barred of her dower as hath beene said (2), and yet the issue shall inherit (3).

(Ante 37. a.)

(F. N. B.) 150. H. Ante 32. a.)

Sect. 54.

You may easily perceive by the context that this shaft came never out of *Littleton's* quiver of choice arrowes (4), and therefore I will leave it. Onely for students sake I will referre them to 5 *E.* 3. Voucher, 249. 8 *E.* 3. *Ass.* 293. 4 *H.* 6. 24. *F. N. B.* 149.

5 E. 3. Voucher, 249. 8 E. 3. Ass. 293. 4 H. 6. 24. F. N. B. 149.

NOTE, if a man be seised of certaine lands, and taketh wife, and after alieneth the same land with warrantie, and after the feoffor and feoffee dye, and the wife of the feoffor bring an action of dower against the issue of the feoffee, and he vouch the heire of the feoffor, and hanging the voucher and undetermined, the wife of the feoffee [41. a.] *brings her action of dower against the heire of the* ☞ *feoffee, and demand the third part of that whereof her husband was seised, and will not demand the third part of these two parts of which her husband was seised; it was adjudged, that she should have no judgment until such time as the other plea were determined.*

Sect. 55. (1) †.

AND note Vavisor *saith, that if a man be seised of land and committeth felony, and after alieneth, and after is attaint, the wife shall have a good action of dower against the feoffee: but if it be escheated to the king, or to the lord, she shall not have a writ of dower. And so see the difference, and inquire what the law is herein.*

THIS is also of the new addition, *et explosa est hæc opinio;* for it is cleare in law, that the wife at the common law should not have been endowed against the feoffee. For to deterre and restraine men from committing of treason or felony, the law hath inflicted five punishments upon him that is attainted of treason or felony. 1, He shall lose his life, and that by an infamous death

Vide Sect. 746. Vide Britton, cap. 109. l. 1. Bracton, title Evidens, l. 4. fo. 397. 30. 311. Staunf. Pl. Cor. 194, 195. Britton, fol. 15. cap. 5.

(2) See ante 32. a.

(3) See another instance, where the issue shall inherit and yet the wife shall not be endowed, in Perk. sect. 317.

(4) Section 54 is neither in the edition by L. and M. nor in the Roh. edition. It appears to have been first added in the edition by P.

(1) † Section 55 is not in L. and M. nor in Roh. but is in P. and the subsequent editions.

death of hanging betweene heaven and the earth, as unworthy in respect of his offence of either. 2, His wife that is part of himselfe, (*et erunt animæ duæ in carne una*) shall lose her dower. 3, His blood is corrupted, and his children cannot be heires to him, and if he be noble or gentle before, he and all his posterity are by this attainder made ignoble. 4, He shall forfeit all his lands and tenements; and 5, all his goods and chattels; and all this is included by the law in the judgement, *quòd suspendatur per collum*. But this is not intended of all felonies, but of felony by stealing of goods above the value of xii. pence and not of *petit larceny* under the value (2). So as the woman shall lose her dower as well against the feoffee as against the lord by escheat. And so it was resolved in a writ of dower brought by *Mary Gates*, late wife of *John Gates*, who after the coverture had infeoffed *Wiseman* in fee, and after committed high treason, and was thereof attainted, that the wife should not be indowed against the feoffee, and in that case it was resolved, that so it was at the common law in case of felony (3). And it is to be understood, that the wife shall not only lose her reasonable dower at the common law for the felony of her husband, but also her dower *ad ostium ecclesiæ*, and *ex assensu patris* (4), for felony done after the dower assigned, and dower by custome also (5). And the reason of all this is yeelded by *Littleton* himselfe

(Post. 392. b.)

Vide Sect. 746.

(1 Leon. 3)

M. 3 & 4 Ph. & Mar. Ro. 760. in com. banco. 8 E. 3. 20. 12 H. 4. 30.

Bracton, lib. 4. fol. 311.

---

(2) *But outlawry in trespass doth not bar.* 3 *E.* 3. 7. 41. Hal. MSS.

(3) S. C. acc. Dy. 140. b. and N. Bendl. 55. But Dyer observes, *yet* nota *that the land alienedbefore the treason committed was not subject to any forfeiture or escheat;* and adds, that Brown serjeant *fuit valde iratus propter judicium prædictum*. Also in Sav. 54, there is a case of attainder of the husband for treason, in which two judges for the reason mentioned in Dyer were inclined to Vavisour's opinion; but the case of sir John Gate's wife being cited, the court held that the demandant was not entitled to dower. In this latter case the wife afterwards had dower; but then it was allowed to her on account of the reversal of her husband's attainder. See 3 Inst. 315.—[Note 234.]

(4) Here lord Coke expressly makes dower *ex assensu patris*, as well as the dowess at common law and *od ostium ecclesiæ*, liable to be defeated at common law by the husband's treason or felony. Ante 37. a. But some have inclined to think, that the 5 and 6 E. 6. c. 11. which so far repeals the 1 E. 6. c. 2. and revives the common law as to take away the wife's dower in case of treason by the husband, doth not extend to dower *ex assensu partris*. This will appear from the following extract from a valuable manuscript, which has been already cited. —*It seems that dowe* ex assensu patris *shall not be lost by the statute of* 5 *E.* 6, by *attainder of the husband for treason; for the wife is in by the father and not by the husband, and if action be brought for the land, it shall be against the husband and wife.* Contra *of dower* ad ostium ecclesiæ. Quære tamen *of the former case* ex assensu patris. MS. Comment. on Littl *Pen. edit.*—In Plowden's Queries, 181, a like question is started as to the effect of the husband's attainder of felony on dower *ex assensu patris* before the 1 E. 6. c. 2. changed the common law, and saved the wife's dower; but Mr. Plowden argues against the wife. See further ante 35. b. where lord Coke mentions, that according to some opinions the wife lost dower *ex assensu patris*, if after assent the father was attainted of treason or felony.—[Note 235.]

(5) In Winch. 27, there is a loose note of a case, in which, notwithstanding the 1 E. 6. c. 2. for preserving dower in cases of treason or felony by the husband, Winch inclined to think, that attainder of the husband for felony prevented

himselfe in the Chapter of Warranties, Section 746, to the end that men should be afraid to commit felony. But at this day the wife of a man attainted of felony (as often hath been said) shall be endowed by force of the statutes in that case provided.

Vide Sect. 746. Britton, cap. de Homicide, fo. 15. Bracton, lib. 4. fol. 308, & Fleta, ubi supra; & Britton, ubi supra.

And it appeareth by *Britton, que fem de homicide ne teigne nul dower de tenants que lour fait assigne per lour barons*, so as the wife of a felon attainted by the common law was disabled to recover dower *ad ostium ecclesiæ*, and *ex assensu patris*, as well as her reasonable dower which the common law gave her. See in *Bracton* many barres of dower as the law was then held.

[41. b.] ☞CHAP. 6. *Tenant for term of life*. Sect. 56.

TENANT for terme of life is, where a man letteth lands or tenements to another for terme of the life of the lessee, or for terme of the life of another man. In this case the lessee is tenant for terme of life. But by common speech he which holdeth for terme of his owne life, is called tenant for terme of his life, and he which holdeth for terme of another's life, is called tenant for terme of another man's life (tenant pur terme d'autre vie.)

"*OR for terme of the life of another man.*" Now it is to be understood, that if the lessee in that case dieth living *cesty que vie* (that is he for whose life the lease was made), he that first entereth shall hold the land during that other man's life, and he that so entereth is within *Littleton's* words, viz. *tenant pur autre vie*, and it shall be [*a*] punished for waste as tenant *pur auter vie*, and subject to the payment of the rent reserved, and is in law called an *occupant* (A) (1) (*occupans*), because his title

(Cro. Ja. 200. 554.) Bract. lib. 2. ca. 5, & ca. 9. fol. 26. Fleta, lib. 3. ca. 12. Britton, fol. 83. Bracton, lib. 4. fo. 170. Vide Sect. 381.

[*a*] Vide le Deane de Worcest. case, 6 Co. 37. 27 Ass. 31. 39 E. 3. 1. 27 H. 6. Recognisance. Statham pl. ultimo. 38 H. 6. 27. Bracton lib. 2 fo. 9. Britton, fo. 84, 85. Vaugh. 189, 190. (Cro. El. 407.)

is

---

prevented the wife's dower, where the wife of a copyholder for life was dowable by custom. But the reasons of this opinion, which seems strange, do not appear.—[Note 236.]

(A) Concerning special occupancy, as it is termed, see the bottom. Vaugh. 201; 4 Bridg. MSS. R. 67. (in Mus. Brit.); 3 Wms. 133. 368.

(1) Who shall be occupant.—*A. makes lease to B. for one hundred years, and afterwards ousts him and makes lease to C. for the life of D. B. re-enters, C. dies: B. shall not be occupant against his will, for so his term would be drowned.* H. 6. Jac. C. B. *Rawlin's case. Lessee for another's life makes lessee at will, who continues in possession after the death of his lessor: he is an occupant. If A. lessee for another's life makes lessee for years, who is possessed, and A. dies, it seems that lessee for years shall be occupant against his own will, though he doth not enter; but if the lessee for years makes lease at will, and then A. dies, lessee at will shall be occupant, though he claims to the use of the lessee*

is by his first occupation. And so if tenant for his owne life grant over his estate to another, if the grantee dyeth there shall be an *occupant*. In like manner it is of an estate created by law [*b*]; for if tenant by the curtesie or tenant in dower grant over his or her estate, and the grantee dieth, there shall be an *occupant*. (2) But against the king there shall be no *occupant*, because *nullum tempus occurrit regi*. And therefore no man shall gain the king's land by priority of entry. There can be no *occupant* of anything that lyeth in grant (3), and that cannot passe without deed, because every *occupant* must claim by a *que estate* and averre the life of *cesty que vie* (4). It were(*c*) good

[*b*] 27 Ass. p. 31. & Pl. Com. fo. 28. b. in Colthorst's case, tit, Barre, 303. (Cro. Jam. 201. Mo. 394. Cro. Eliz. 57. Mo. 664. Cro. Jam. 282.)

[*c*] Littleton, 167. 11 H. 42. 17 E. 3. 48. 39 E. 3. 25. 7 H. 4. 46. 8 H. 4. 15. Dier. 8 Eliz. 253. (2 Ro. Abr. 150, 151. 1 Ro. Abr. 844. 1 Leon. 126. Post. 239. a.)

to

---

for years, or though lessee for years enters on lessee at will and claims to be occupant. But riding over the ground to hunt or hawk doth not make an occupant. Vid. *Dy.* 328. H. 15 Jac. B R. Rot. 356. *Stellicorn and Hayes, and* M. 10 Jac. *Bulstr. n.* 6. *Chamberlain and Ewer. A. lessee for life of B. makes lease to C. for* 20 *years, rendering* 5*l. C. makes lease to D. for* 10 *years, rendering* 3*l. A. dies: D. is occupant, yet he shall pay the rent of* 3*l. to C. and C. shall pay the rent of* 5*l. to D. for D.'s term is prevented from merging by the intervenient reversion in C. but D. has the freehold in reversion expectant on C.'s term and the rent incident to it.* Hal. MSS.—See *Stellicorn and Hayes* in 2 Ro. Rep. 123, and Cro. Jam. 554, and *Chamberlain and Ewer* in 2 Bulstr. 11. 2 Ro. Abr. 151. E. pl. 3, 4, and Palm. 42.—[Sanders' Uses, vol. 2. p. 1.]—[Note 237.]

(2) In some books it is asserted, that there cannot be an occupant of estates created by law, without distinguishing between a *general* and a *special* occupant. Cro. Eliz. 58. 1 Bulstr. 135. 2 Ro. Rep. 123. Probably the assertion was meant to be confined to the former, for as to the latter the authorities seem decisive in favour of the heir's taking as special occupant if named in granting over curtesy or any other estate created by law. See 27 Ass. pl. 31. Plowd. 28, and 556, and Palm. 321. But even the doctrine against *general* occupancy of estates created by law comes merely from persons arguing as counsel, who neither explain why it should not be, nor cite any authorities except 15 E. 3. Fitzh. Abr. *Scire facias*, pl. 17. which appears foreign to the purpose.—[Note 238.]

(3) Lord Hale adds, *nor of a copyhold.* Hal. MSS.—See acc. 2 L. Raym. 1000, and the reason why in 6 Mod. 66. As to things lying in grant, lord Coke in mentioning them must be understood to mean *general* occupancy only; for he writes in another place, that if *heirs* are named in the grant of a rent *pur auter vie*, they shall take, though formerly this was doubted. See post. 388. Dy. 186. ed. 1689, in marg. 1 Bulstr. 155. Mo. 625. 664, and Godb. 172.—[Note 239.]

(4) Vid. M. 44, 45 Eliz. B. R. *Salter's case. Rent granted to one, his executors and administrators* pur auter vie, *and the grantee dies; it shall not go to the administrator as special occupant, but determines by the death unless there has been an assignment.* Hal. MSS.—See S. C. in Cro. Eliz. 901. Noy, 46. Yelv. 9, and Mo. 664. See also S. P. acc. 2 Ro. Abr. 151. G. pl. 3. However, some have thought that executors and administrators if named in the grant might take an estate *pur auter vie*, though a *freehold*, even before the 29 Ch. 2. c. 3. and 14 G. 2. c. 20. by which they are now entitled. See 3 Atk. 466. The authority relied on is Dy. 328. b.—[Note 240.] See Campbell *v.* Sanders, Sch. & Lefroy, Rep. 2 Bl. C. 258; 1 Wms. 554; 2 Ves. 681; 2 Vern. 320, and Sir J. Mitford's opinion in 2 Pow. con. 235.

See

to prevent the incertainty of the estate of the *occupant* to adde these words (to have and to hold to him and his heires during the life of *cesty que vie*) and this shall prevent the *occupant*, and yet the lessee may assign it to whom he will; or if he hath already an estate for another man's life without these words, then it were good for him to assign his estate to divers men and their heires during the life of *cesty que vie* (5).

Note, that [*d*] to every tenant for life, the law as incident to his estate without provision of the party giveth him three kinde of *estovers*, (that is) *housbote* which is twofold, viz. *estoverium ædificandi et ardendi, ploughbote*, that is *estoverium arandi*, and lastly *haybote*, and that is *estoverium claudendi*, and these estovers must be reasonable, *estoveria rationabilia*. And these the lessee may take upon the land demised without any assignement, unlesse he be restrayned by speciall covenant (6), for *modus et conventio vincunt legem*. *Bote* in the *Saxon* tongue, and *estovers* in the *French*, in this case are all of one signification, that is, to have compensation or satisfaction for these purposes. *Estovers* commeth of the *French* word *estover*. And the same estovers that tenant for life may have, tenant for years shall have.

[*d*] Bract. lib. 4. fo. 222. 231, 232. & vid. fo. 136, 137. Fleta, lib. 4. ca. 19. 25, 26, 27. 8 E. 3. 54, 55. 21 E. 3. 41. 48 E. 3. 31. 7 E. 4. 28. 21 H. 6. 46. 10 E. 4. 3. F. N. B. 180. 4 Co. 86, 87. in Luttrel's case. (11 Co. 46.)

You have perceived, that our author divides tenant for life into two branches, viz. into tenant for terme of his own life, and into tenant for terme of another man's life: to this may be added a third, viz. into an estate both for terme of his owne life, and for terme of another man's life (B).

Vide Sect. 381.

As if a lease may be made to *A.* to have to him for terme of his owne life, and the lives of *B.* and *C.* for the lessee in this case

Rosse's case, 5 Co. 13. (c). (5 Co. 9. b.)

See also Ripley *v.* Waterhouse, 7 Ves. 425. See further Carth. 376; 2 Vern. 719; 2 Wms. 381. Withers *v.* Withers, Index to Cases. Sewell MSS. Trevor MSS. 23. Ambl. 151.

(5) The title by *general* occupancy is now universally prevented by the 29 Ch. 2. c. 3. s. 12. and the 14 G. 2. c. 20. s. 9. The first statute enacts, that estates *pur auter vie* shall be devisable, and if not devised, chargeable in the hands of the heir as assets by descent, as in case of lands in fee simple, where the estate falls on him as special occupant; and if he is not entitled as such, shall go to the grantee's executors or administrators, and be assets. On this statute a doubt arose, whether it operated further than by making such estates devisable and assets for debts; and in one case it was adjudged, that the administrator took the surplus of such estates after payment of debts, if not devised, for his own benefit, as in the place of a *general* occupant. See 12 Mod. 103. This gave occasion to the second statute, which expressly makes the surplus in case of intestacy distributable as personal estate. See further as to occupancy 2 Blackst. Comment. 258, an elaborate argument by lord chief justice Vaughan, Vaugh. 187. Vin. Abr. *Occupancy* and *Estates*, R. a. 3 Com. Dig. *Estates*, F. and New Abr. *Estate for life*, B.—[Note 241.]

(6) *But affirmative covenants do not restrain.* 28 *H.* 8. *Dy.* 19. Hal. MSS.

(B) See Vin. Abr. *Merger*, F. 4. 11. *Surrender*.

(c) The case put is lease to *A.* during the life of *B.* and *C.* It was argued that the two lives being a bare limitation of the estate, there can be no survivorship, and therefore the estate determining on the dropping of either of the two lives; but the court held contra. So in Utty Dale's case, Cro. Eliz. 182. See further Mo. 8. pl. 32.

case hath but one freehold, which hath this limitation, during his owne life, and during the lives of two others. And herein is a diversity to be observed betweene several estates in several degrees, and one estate with several limitations. For in the first, an estate for a man's own life is higher than for another man's life, but in the second it is not. As if *A.* be tenant for life, the remainder or reversion to *B.* for life, *A.* may surrender to *B.* ☞ for the estate of *B.* for terme of his own life is higher than an estate for another man's life: and therefore if tenant for life infeoffe him in remainder for life, this is a surrender, and no forfeiture. And albeit an estate for terme of a man's own life be but one freehold, yet may severall freeholds in certaine cases be derived out of the same, whereof our bookes are very plentiful, and whereof you may disport yourselves for a time. As if tenant for life maketh a lease by deed, or without deed, to him in the remainder, or reversion, in taile or in fee, for the terme of the life of him in the remainder or reversion, and after he in the remainder taketh wife and dieth, his wife shall not be endowed, for tenant for life shall enjoy the land again; for forfeiture it cannot be, for he in the remainder was party; and surrender it cannot be, for that his whole estate was not given (1).

[42. a.]

(Ante 31. b. Post. 273. b.) 24 E. 3. 32. & 68.

30 Ass. p. 47. 19 E. 3. Sur. 8. (1 Co. 76. b.)

13 R. 2. Dow. 95. 7 H. 6. 3. per Cur. 18 E. 3. 48. (2 Ro. Abr. 497. Post. 335. a)

7 H. 5. 4. The heire maketh a lease for life, reserving a rent, against whom the wife recovereth her dower and dieth, the lessee shall have the land againe for life, and the rent is revived.

29 Ass. p. 64. So it is, if tenant for life take husband and by deed indented they make a lease to him in the reversion for the life of the husband, reserving a rent, this is neither forfeiture, nor absolute surrender, for the cause aforesaid, and the reservation is good.

8 E. 2. Ass. 393. 45 E. 3. 13. *B.* seised of lands in fee, taketh to wife *Is.* and infeoffes *C.* in fee, who takes *Alice* to wife; *C.* dieth, *Alice* is endowed; *B.* dieth, *Is.* recovereth dower against *Alice* and dieth, *Alice* shall enjoy the land againe during her life (2).

[a] 2 H. 5. 7. 13 H. 7. 15. 18 E. 2. Br. 835. F. N. B. 59. F. *A.* and [*a*] *B.* joyntenants, *A.* for life, and *B.* in fee, joyne in a lease for life (3), *A.* hath a reversion, and shall joyne in an action of wast (4).

[b] 27 H. 8. 13. 13 H. 7. 15. 22 H. 6. 24. 17 E. 3. 9. b. Tenant for [*b*] life and he in the reversion joyne in a lease for life, it is said, that they shall joyne in an action of wast, and that the lessee for life shall recover the place wasted, and he in reversion, damages (5).

[c] 37 H. 6. 27. 26 E. 3. 69. 14 E. 2. Grant, 92. 3 E. 3. 15. 14 H. 8. 13. If a man grant [*c*] an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay xl. &c. or untill the grantee

(1) 1 *E.* 3. 15. Vid. 41 *Ass.* 2. *A tenant for life, remainder to B. in tail, remainder to C. in fee; A. enfeoffs B. and his wife and their heirs; B. dies without issue; now there is a forfeiture and C. may enter.* Hal. MSS.—[Note 242.]

(2) Hic *fol.* 21. Hal. MSS.

(3) 13 *E.* 4. 4. *Dy.* 237. *So of a gift in tail.* 38 *E.* 3. 7. Hal. MSS.

(4) *And the writ ought to be* ad exhæredationem *B.* 13 *E.* 2. *Brief*, 835. Hal. MSS.

(5) 3 H. 7. 9. *P.* 43 Eliz. C. B. *D. D. n.* 4. *But if the lease be without deed it is a surrender.* 10 *H.* 7. 8. 1 *Rep. Bredon's case.* Hal. MSS.

grantee be promoted to a benefice, or for any like incertaine time, which time, as *Bracton* saith, is *tempus indeterminatum*: in all these cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable, if livery be made (A); and if it be of rents, advowsons, or any other thing that lie in grant, he hath a like estate for life by the delivery of the deed, and in count or pleading he shall alledge the lease, and conclude, that by force thereof he was seised generally for terme of his life (6). Bracton, lib. 4. fo. 207. Fleta, lib. 3. ca. 12. (1 Ro. Abr. 845.)

If a man make lease of a manor, that at the time of the lease made is worth xxl. *per annum*, to another until cl. be paid, in this case because the annuall profits of the manor are incertain, he hath an estate for life, if livery be made determinable upon the levying of the cl. (7). But if a man grant a rent of xxl. *per annum* until cl. be paid, there he hath an estate for five yeares, for there it is certaine, and depends upon no incertainty. And yet in some cases a man shall have an incertaine interest in lands or tenements, and yet neither an estate for life, for yeares, or at will (8). As if a man by his will in writing, devise his lands to his executors for payment of debts, and until his debts be paid; in this case the executors have but a chattell, and an incertaine interest in the land until his debts be paid; for if they should have it for their lives, then by their death their estate should cease, and the debts unpaid; but being a chattell, it shall go to the executors of executors for the payment of his debts; and so note a diversity betweene a devise and a conveyance at the common law in his life time. And tenant by statute merchant, by statute staple, and by *elegit*, have incertaine interests in lands or tenements, and yet they have but chattells, and no freehold, whose estates are created by divers acts of parliament, whereof more shall be said hereafter. And so have gardians in chivalry which hold over for single or double value incertaine interests, and yet but chattells. (6 Co. 35. b.) 33 Ass. p. 2. (Plow. 273.) 8 Co. 94. b. Manning's case. 3 H. 7. 13. 27 H. 8. 5. 14 H. 8. 13. 21 Ass. p. 8.

If one grant lands or tenements, reversions, remainders, rents, advowsons, commons, or the like, and express or limit no estate, the lessee or grantee (due ceremonies requisite by law being performed) hath an estate for life (9). The same law is of a declaration of a use (10). A man may have an estate for terme of life determinable at will; as if the king doth grant an office to one Vid. Sect. 381. 7 Ass. pl. 1. 13 El. Dyer, 300. 7 E. 4. 23. (8 Co. 65. b. Post. 233. a.)

(A) 4 Co. 3. a. acc.

(6) *A. leases to B. till A. makes I. S. baily of his manor: adjudged a freehold. H.* 37 *El. Butler and Ridgely.* Vid. 1 *Rep. Bredon's case. Rent granted to A. for life, if B. or C. shall so long live. But if there be an estate with such conditional limitation, it ought to be pleaded with the limitation, and continuance shall be averred; for otherwise it fails.* Vid. *Dy.* 192. Hal. MSS.—[Note 243.]

(7) *But feoffment to the use of A. for life, remainder to the use of B. his executors and assigns, till ten pounds shall be levied out of the profits, ruled to be a chattel.* Hal. MSS.—[Note 244.]

(8) *Plowd. Comment.* 273. Hal. MSS.

(9) Hic *sect.* 283. *But if termor for years devises his house generally without showing what estate, the whole term passes.* 14 *Eliz. Dy.* 307. Hal. MSS. —[Note 245.]

(10) 21 *H.* 8. 5. *by Shelly.* Hal. MSS.

one at will, and grant a rent to him for the exercise of his office for terme of his life, this is determinable upon the determination of the office.

Vide Sect. 381. (1 Ro. Abr. 846.)

A. tenant in fee simple, makes a lease of lands to *B.* to have and to hold to *B.* for terme of life, without mentioning for whose life it shall be, it shall be deemed for terme of the life of the lessee, for it shall be taken most strongly against the lessor, and as hath beene said an estate for a man's own life is higher than for the life of another (11). But if tenant in taile make such a lease without expressing for whose life, this shall be taken but for the life of the lessor, for two reasons.

(Post. 183.)

First, when the construction of any act is left to the law, the law which abhorreth injury and wrong, will never so construe it as it shall work a wrong: and in this case, if by construction it should be for the life of the lessee, then should the estate taile be discontinued, and a new reversion gained by wrong: but if it be construed for the life of the tenant in taile, then no wrong is wrought. And it is a generall rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongfull and against law, the intendment that standeth with law shall be taken. [42. b.]

4 E. 2. Wast. 11. 17 E. 3. 7. (Mo. 258. 363. Post. 276. a.)

Secondly, The law more respecteth a lesser estate by right, than a larger estate by wrong; as if tenant for life in remainder disseise tenant for life, now he hath a fee simple, but if tenant for life die, now is his wrongfull estate in fee by judgment in law changed to a rightfull estate for life.

19 H. 6. 7 H. 4. 32. 6 E. 3. 17. 7 E. 3. 66. 18 E. 3. 60. 23 E. 3. c. 1, &c. 11 H. 4. 44. 38 E. 3. 23, 24.

If a man retaine a servant generally without expressing any time, the law shall construe it to be for one yeare, for that retainer is according to law. *Vid.* 23 *E.* 3. cap. 1, &c. (1). To shut up this point it hath been adjudged, that where tenant in taile made a lease to another for terme of life generally, and after released to the lessee and his heires, albeit betweene the tenant in taile and him a fee simple passed, yet after the death of the lessee† the entry of the issue in taille was lawfull; which could not be, if it had been a lease for the life of the lessee, for then by the release it had beene a discontinuance executed (2). But let us now returne to *Littleton*.

† *It seems that* lessee *is here inserted for* lessor.

Sect.

(11) Vid. 8 *E.* 3. 3. *A. lessee for life makes lease to B. and C. on condition that if they die leaving A. then the land shall revert to A. without determining any estate certain in the grant. All the estate passes under the condition, for in* præcipe *A. was not received on default of B. and C.* Hal. MSS.—[Note 246.]

(1) Mr. Barrington calls this a *supposed* statute, because the intervention of the commons is not mentioned; and the introductory part seems to justify the observation; for the style is like that of an ordinance of the king in council: the words being that the king *cum prælatis nobilibus et peritis et aliis sibi assistentibus deliberationem habuit et tractatum; de quorum unanimi consilio ordinavit.* See Observat. on Ant. Stat. 2d ed. 206. However, the 23 E. 3. appears to have beene always treated as a statute, and Fitzherbert, in his commentary upon the writ founded upon it, calls it by that name. Fitzh. Nat. Br. 167. B.—[Note 247.]

(2) That is, if the lease was for the life of the lessee it would be a discontinuance for life, and the tenant in tail would thereby raise in himself a new reversion

Sect. 57.

AND it is to be understood, that there is feoffor and feoffee, donor and donee, lessor and lessee. Feoffor is properly where a man infeoffes another in any lands or tenements in fee simple, he which maketh the enfeoffment is called the feoffor, and he to whom the feoffment is made is called the feoffee. And the donor is properly where a man giveth certaine lands or tenements to another in taile, he which maketh the gift is called the donor, and he to whom the gift is made is called the donee. And the lessor is properly where a man letteth to another lands or tenements for term of life, or for term of years, or to hold at will, he which maketh the lease is called lessor, and he to whom the lease is made is called lessee. And every one which hath an estate in any lands or tenements for term of his owne or another man's life, is called tenant of freehold, and none other of a lesser estate can have a freehold; but they of a greater estate have a freehold; for he in fee simple hath a freehold, and tenant in taile hath a freehold, &c.

THIS and the rest that follow in this Chapter concerning the description of feoffor and feoffee, donor and donee, and lessor and lessee, are evident.

"*And it is to be understood that there is feoffer and feoffee, &c.*" *Vide* Sect 2, where a light touch is given who may purchase. Now somewhat is to be said, who have ability to enfeoffe, &c. and may be a feoffor, donor, lessor, &c. Whosoever is disabled by the common law to take, is disabled to infeoffs, &c. But many that have capacitie to take, have no abilitie to infeoffe, &c. as men attainted of treason, felony, or of a *præmunire*, aliens borne, the king's villaines, traitors, felons, &c. he that hath offended against the statutes of *præmunire*, after the offences committed (3) if attainders ensue, ideots, madmen, a man deafe dumbe and blinde (A) from his nativity, a feme covert, and infant (4), a man by dures; for

Bracton, lib. 5. fo. 415. Britton, fo. 88. Fleta, lib. 3. ca. 3. and lib. 6. ca. 39, 40.

---

reversion in fee, and the release by passing such new reversion in fee to the discontinuee, would merge his estate for life and make it a fee executed; which enlargement of the estate for life would proportionably enlarge the discontinuance for life, and so make it a discontinuance in fee as much as if the first conveyance by the tenant in tail had been for that estate. See further on this subject, post. Sect. 620.—[Note 248.]

(3) As to conveyances made by felons or by offenders against the statutes of *præmunire* between indictment and attainder, see W. Jo. 217. Cro. Cha. 172, and Wils. vol. 1. part 2. page 219.

(A) See the authorities in tit. *Deaf, Dumb, and Blind*, 7 Vin. 323, and 1 Hale Hist. P. C. 34.

(4) There is an important difference between the deeds of femes covert and infants. Those of the former are always void; but those of the latter are sometimes void, and sometimes only voidable. As to the distinction between *void* and *voidable* in the case of deeds by infants, see a case in Burr. 4. part 3. fol. 1794, in which the court held a conveyance by lease and release by an infant to be voidable only. See further post. Sect. 259.—[Note 249.]

for the feoffments, &c. of these may be avoyded. But an hereticke, though he be convicted of heresie, a leper removed by the king's writ from the society of men, bastards, a man deafe dumbe or blinde, so that he hath understanding and sound memory, albeit he expresses his intention by signs, villaine of a common ☞ person before entrie, or the like, may infeoffe, &c. [43. a.]

2 H. 5. ca. 7. which is repealed. Doct. and Stud. lib. 2. ca. 29.

[a] All feoffments, gifts, grants, and leases by bishops, albeit they be confirmed by the deane and chapter, by any of the colledges or halls in either of the Universities, or elsewhere, deans and chapters, master or gardian of any hospital, parson, vicar, or any other having spirituall or ecclesiastical living, are also to be avoyded; [b] and all the said bodies politique or corporate are by the statutes of the realm disabled to make any conveiance to the king, or to any other, as it hath been adjudged: which statutes have been made since *Littleton* wrote (1).

[a] 32 H. 8. cap. 28. 1 El. not printed. 14 El. ca. 10. 13 El. ca. 11. 18 El. ca. 20. 1 Ja. cap. 3.

[b] 4 Co. 76. 120. 5 Co. 6. 14. 6 Co. 37. 11 Co. 67. Magdalen Colledge case. Vide Lest. de W. 2 ca. 41.

It is provided [c] by the statute of *Magna Charta, quòd nullus liber homo det de cætero amplius alicui de terrâ suâ quàm ut de residuo terræ suæ posset sufficienter fieri domino feodi servitum ei debitum quòd pertinet ad feodum illud.* Upon which act I have heard great question [d] made, whether the feoffments made against that statute were voydable or no; and some have said that the statute intended not to avoyd the feoffment, but implicite to direct the tenure, viz. that the tenant should not infeoff another of parcell to hold of the chief lord (that is of the next lord) but to hold of himselfe, and then the lord may distreine in everie part for his whole service without any prejudice unto him. But this opinion is against [e] the authoritie of our bookes, and against the said statute of *Magna Charta*. For first it is agreed in 10 H. 7, that as well before the statute as after, a tenant which held two acres might have aliened one of the acres to hold of him, and notwithstanding the lord might have distrained in which of the acres he would for his whole services; and reason teacheth that before that statute a tenant could not have aliened parcell to hold of the chiefe lord; for the seignory of the lord was entire, for the which the lord might distraine in the whole or in any part, and which the tenant by his own act cannot divide to the prejudice of the lord to barre him to distraine in any part, for his services, as he should doe, if he should enfeoffe another of parcell to holde of the chiefe lord. But the tenant might have made a feoffment of the whole to hold of the chiefe lord, for there no prejudice ensued to the lord (2). Others have

[c] Magna Charta, cap. 32. Mirror, cap. 5. sect. 2. Glanvil. lib. 7. ca. 1. Bract. lib. 1. Brit. 88, &c. Fleta, lib. 3. cap. 3.

[d] Vide an excellent declaration hereof inter adjudicat' coram Rege, Trin. E. 1. fol 2. in Thesaur. Nott. & Derb.

[e] Bract. lib. 1. 10 H. 7. fol. 10. b. 33 E. 3. Avowry, 255. Staunf. Prær. fo. 29. 8 E. 4. 12.

---

(1) *And in case of corporation aggreate, as dean and chapter, the lease is void against the dean who makes the lease.* M. 13 Car. B. R. *Lloyd and Gregory. But it is othewise in the case of a sole corporation, for there it is void only against the successor.* M. 44 Eliz. C. B. *Saunders's case.* Hal. MSS.—See the observation on the case of Lloyd and Gregory, post. 45. a. As to conveyances by corporations before the restraining statutes, see post. 44. a. and 103. a—[Note 250.]

(2) This assertion has been controverted, as repugnant to the feudal notions of alienation, and inconsistent with any reasonable construction of the statute *quia emptores terrarum.* Wright's Ten. 155. Dalrympl. Hist. Feud, Prop. 80. and Sulliv. Lect. 418. In fact the history of our law with respect to the powers of alienation before the statute of *quia emptores terrarum* is very much involved

have said, and they said truly, that the intention of the statute was, that the tenant could not alien parcell (which might turn to the prejudice of the lord) without his assent, and this appeareth cleerly by the *Mirror*. And by this statute the king tooke benefit to have a fine for his licence, before which statute no fine for alienation was due to the king. For it is [*f*] adjudged that for an alienation in time of *Henry* the second, no fine was due; and it appeareth in our bookes, that if an alienation had beene made before 20 *H.* 3, no fine was due to the king for alienation (3). Now it is to be observed, that oftentimes for the better understanding of our bookes, the advised reader must take light from historie and chronicles, especially for distinction of times. And therefore *Matthew Paris* (who in his Chronicle reciteth *Magna Charta*) (4) testifieth that King *Henry* the third by evill counsell (and especially, as the truth was, of *Hubert de Burgo* then chief justice) sought to avoyde the Great Charter first granted

Mirror cap. 5. sect. 2.
Fleta, lib. 3. cap. 3.
[*f*] 26 Ass. p. 37.
20 Ass. p. 17.
20 E. 3. Avowry, 126.
34 E. 3. c. 15.
Vide Staunf. 29, 30.
Matt. Paris. Walsingham, 37. 39.
Vide 5 H. 3. Mordanc. 53.

Magna Charta there vouched, which was the charter of King John, for it was cited before 9 H. 3.

---

involved in obscurity. See Bract. *lib.* 2. *cap.* 19. where the author inquires, *si ille, cui datum est, rem datam ulterius dare posset.* See also Bract. *lib.* 2. *cap.* 5. and Staunf. Prærog. cap. 7.—[Note 251.]

(3) Nota, *for seizure of serjeanties aliened without license, it seems that it was the ancient law.* Vid. Roger Hovedon, 783. *It was one of the articles* inter capitula coronæ R. 1, de serjantiis alienatis, *and so it still continues.* Claus. 7 Johann. m. 11. *precept to seize* serjantias theinagia et dengagia tent. de honore Lancaster alienat. post. primam coronation. H. 2. Vid. T. 7 E. 1. Coram rege Gilbertus de la Clare comes Gloucester *impeached for alienation made to his father.* Vid. 24 E. 3. 71. *special custom to alienate without license.* Videtur per Rot. Parl. 29 E. 3. n. 18. quod *other tenures than serjanties the prerogative began in the time of Edward the first.* Nota, *it seems that the statute of* quia emptores *takes away licenses and pardons of alienations in case of tenure of a subject. Yet see* 14 *H.* 4. 4. recordare longum *for custom of the honour of Gloucester, and* Rot. Parl. 38 H. 6. n. 29 pro ducatu Cornubiæ ubi *such a custom* Rot. Parl. 8 E. 2. m. 7. in scedula pendente dorso. "Accord est et "assensu per archevesques evesques abbes priores countes et barons et autres "du realme in parliament le roy summons a Westminster octab. Hil. 8 E. 2. "que eux desornes nul fine demandront ne prendront des frankhomes, pur "entrer terres et tenements que sont de leur fee, issint totes voyes que per "tiel feoffments ils ne soient pas eloignes de leur services ne leur services "dedits." Hal. MSS.—From lord Hale's observing, that the crown's right of seizure for alienation of serjanties without license *still continues*, it seems, that his note on the subject was written before the 12 Cha. 2. c. 24, which converts tenures by knight service into socage, and takes away fines of alienation. See post. 43 b. n. 2.—[Note 252.]

(4) Note pro carta de libertatibus.—Carta regis Johann. proclamata 19 Junii 17 Johann. apud Runimede, Pat. 17 Johann. m. 33. dorso. Carta de libertatibus sub H. 3. magna scilicet de libertatibus, et minor sive de foresta, proclamantur 8 Maii 9 H. 3, prima pars claus. 9 H. 3. m. 14. dorso interrupt. et cancell. Matth. Paris sub anno 1227, p. 336, *but afterwards confirmed by H.* 3. Rex confirmat "omnes libertates, &c. contentas in cartis quas fecimus "cum minoris ætatis essemus tam in magna carta quam in carta de foresta." Cart. 21 H. 3. n. 4. confirmatur per stat. Marlbr. cap. 5. et tunc primum devenit statutum, viz. 52 H. 4. Hal. MSS.—See a most accurate history of the *magna charta* of king John and that of Hen. 3, in the introductory discourse to Mr. justice Blackstone's valuable edition of the charters.—[Note 253.]

granted by his father king *John*, and afterwards granted and confirmed by himselfe in the ninth of *Henry* the third, for that as he the said king *John* did grant it by dures, and that he himself was within age when he granted and confirmed it. But forasmuch as afterwards the said king *Henry* the third, in the twentieth yeare of his raigne, at what time he was nine and twentie yeares old, did grant and confirme the said Great Charter; for that cause, to put out all scruples, is the twentieth yeare of *Henry* the third named, albeit in law the king's charter granted in the ninth yeare of *Henry* the third was of force and validitie, notwithstanding his nonage (A), for that in judgment of law the king, as king, cannot be said to be a minor; [43. b.] for when the royall bodie politique of the king doth meete with the naturall capacity in one person, the whole bodie shall have the qualitie of the royall politique, which is the greater and more worthy, and wherein is no minoritie (1). For, *omne majus trahit ad sed quod est minus.* And it is to be observed, that no record can be found, that either a license of alienation was sued, or pardon for alienation was obtained for an alienation without licence at any time before the twentieth yeare of *Henry* the third, and it is holden in the twentieth of *Edward* the third, that a licence for alienation grew by this statute.

20 Ass. pl. 17. by Skipwith.

Now in the case of a common person it was the common opinion, that if the tenant had aliened any parcell contrary to the said act, that he himselfe was bound by his owne act, but that his heire might have avoyded it; and in the king's case many held the same opinion. For *Britton* saith, *ne counts, ne barons, ne chivaler, ne serjants, que teignont en chiefe de nous ne purr' my dismember nous fees sauns licence: que nous ne puissent per droit engettre les purchasors, &c.* And herewith agreeth *Fleta*, and our bookes. But now by the statute 1 *E.* 3. c. 12. & 34 *E.* 3. c. 15, although the king's tenant in chiefe or by grand serjantie doe alien all or any part without licence, yet is there not any forfeiture of the same, but a reasonable fine therefore to be paid. And note, it appeareth by the preamble in 1 *E.* 3, that complaint was made that land holden of the king *in capite*, being aliened without licence, was seized as forfeited. And in the case of a common person, the statute of 18 *E.* 1, *De quia emptores terrarum* hath made it cleare, for this hath in effect as to the common persons taken away the said statute of *Magna Charta*, cap. 32, for thereby it is provided, *quòd liceat unicuique libero homini terras suas seu tenementa sua, seu partem inde ad voluntatem suam vendere, ita quòd feoffatus teneat, &c. de capitali domino.* And herein are divers notable points to be observed. First, that this word *liceat* proveth that the tenant could not, or at least wayes was in danger to alien parcell of his tenancy, &c. upon the said act of *Magna Charta*. Secondly, that upon the feoffment of the whole, the tenant shall hold of the chiefe lord. Thirdly, that the tenant might

Brit. fo. 28. 88. 186, 187. 245. 247. Prær. Regis, ca. 7. Fleta, lib. 6. cap. 29. acc. 20 E. 3. Ass. 122. 29 Ass. pl. 19. 14 E. 3. Quare imp. 45. 14 H. 4. 2, 3. 9 E. 3. fo. 26. 1 E. 3. ca. 12. 34 E. 3. ca. 15. 2 Co. 81, 82. in Seignior Cromwell's case.

Regist. Inst. les breves de onerand' pro rata portione.

(A) 2 Inst. and case. E. 3. Keilw. 138. 4 Inst. 209. Case of Dutchy of Lancaster, Plow. 212. where the subject is fully discussed.

(1) See this subject considered at large in the case of the dutchy of Lancaster, Plowd. 214, and in *Willion* and *Berkley*, Plowd. 234.

might infeoffe one of part to hold *pro particula* of the chiefe lord. But this act the (the king being not named) doth not take away the king's fine due to him by the statute of *Magna Charta* (2).

"*Freehold.*" Here it appeareth that tenant in taile, and tenant for life, are said to have a franktenement, a freehold so called, because it doth distinguish it from termes of yeares, chattels upon incertaine interests, lands in villenage, or customary or copyhold lands. *Liberum autem tenementum dicitur ad differentiam villenagii, et villanorum qui tenent villenagium, quia non habent actionem nec assisam, &c. item quod sit suum et non alienum, hoc est, si teneat nomine alieno ut firmarius et ad terminum vel sicut creditor ad vadium.* And note that tenant by statute merchant, statute staple, or *elegit*, are said to hold land *ut liberum tenementum* until their debt be paid; and yet in troth they (as hath beene said) have no freehold, but a chattel, which shall go to the executors, and the executors also if they be ousted shall have an assise. But (*ut*) is similitudinary, because they shall by the statutes have an assise as tenant of the freehold shall have, and to that respect hath a similitude of a freehold, but *nullum simile est idem* (3).

(Plowd. 561. b. 562.) Bracton, lib. 4. fo. 224. Brit. cap. 32. & 47. Bracton, lib. 4. fo. 22. Regist. Judic. 68. 73.

28 Ass. p. 7. W. 2 ca. 18. Stat. de mercatoribus, an. 13 E. 1. 27 E. 3. ca. 9. 23 E. 3. ca. 6. F. N. B. 178. (Ante 42. a.)

Chap. 7. Tenant for terme of yeares. Sect. 58.

TENANT for term of yeares is where a man letteth (lou home lessa) *lands or tenements to another for terme of certaine yeares, after the number of yeares that is accorded between the lesser and the lessee. And when the lessee entreth by force of the lease, then is he tenant for tearme of yeares; and if the lessor in such case reserve to him a yearly rent upon such lease, he may chuse for to distraine for the rent in the tenements letten, or else he may have an action of debt for the arrerages against the lessee. But in such case it behooveth, that the lessor be seised in the same temements at the time of his lease; for it is a good plee for the lessee to say, that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plee lieth not for the lessee to plead.*

"*WHERE a man letteth* (lou home lessa) *lands, &c.*" Lessa and lease is [*a*] derived of the Saxon word *leapum*, or *leasum*, for that the lessee commeth in by lawfull means; [*b*] and *dimittere* is in *French laysser*, to depart with or forgoe.

[*a*] Mirror, cap. 2. sect. 17. Bracton, lib. 2. cap. 26. & lib. 4. fol. 220. Fleta, lib. 3. cap. 12. & lib. 5. cap. 34. see Sect. 531.

[*b*] For the word (dimitto)

When

---

(2) Fines for alienation are taken away as well from the king as from all others by the 12 Cha. 2. chap. 24. But the statute saves fines for alienation due by the customs of particular manors, other than fines for alienation of lands holden of the king *in capite*.—See further on the subject of alienation 2 Inst. 65. 501. Vin. Abr. tit. *Alienation*. Sulliv. Lect. page 159, and 418, and the book cited in fol. 43. a. note 2.—[Note 254.]

(3) See 3 Preston's Convey, 168.

When *Littleton* wrote, many persons might make leases for yeares, or for life or lives at their will and pleasure, which now cannot make them firme in law. And some persons may now make leases for yeares, or for life or lives (observing due incidents), firme and good in law, who of themselves could not so doe when *Littleton* wrote, and this by force of divers acts of parliament [c]; as namely 32 *H.* 8. 1 *Eliz.* 13 *Eliz.* 18 *Eliz.* and 1 *Jac. Regis*, of which statutes one is enabling, and the rest are disabling. When *Littleton* wrote, bishoppes with the confirmation of the deane and chapter, master and fellowes of any colledge, deanes and chapters, master or guardian of any hospitall, and his brethren, parson or vicar with the consent of the patrone and ordinary, archdeacon, prebend, or any other body politique spirituall and ecclesiasticall (*concurrentibus hiis quæ in jure requiruntur*) might have made leases for lives or yeares without limitation or stint. And so might they have made gifts in taile or states in fee at their will and pleasure, whereupon not onely great decay of divine service, but dilapidations and other inconveniences ensued, and therefore they were disabled and restrained by the sayd acts of 1 *Eliz.* 13 *Eliz.* and 3 *Jac. Regis* to make any state or conveyance to the king at all, or to the subject; but there is excepted out of the restraint or disability, leases for three lives, or one and twenty yeares, with such reservation of rent, and with such other provisions and limitations, as hereafter shall appeare. Also, they may make grants of ancient offices of necessity with ancient fees, *concurrentibus hiis quæ in jure requiruntur*, for those grants are not within the statute of 32 *H.* 8, but by construction, they are not restained by the statutes of 1 *Eliz.* or 13 *Eliz.* because these ancient offices be of necessity, and with the ancient fees, and so no diminution of revenue (1).

[44. a.]

[c] 32 H. 8. ca. 28. 1 Eliz. ch. 19, not printed but in the abridgement. 18 Eliz. cap. 11. 18 Eliz. cap. 6. 1 Jac. cap. 3.

5 Co. 14. case de ecclesiastical persons. 11 Co. 66. Magdalen Colledge case. Levesque de Sarum's case, 10 Co. 60, 61. (1 Sid. 162.)

(Cro. Cha. 16. 47. 50. 10 Co. 58. Pollexf. 134. 4 Mod. 16. Finch, 191, 192, 193. Cro. Cha. 48. Cro. Jac. 173.)

There

(1) Vid. 29 Eliz. *Case of the bishop of Chester, who had anciently used to have a counsel who had a fee. This grantable by the bishop with consent of dean and chapter.* Nota, *though it be not an office of time which, &c. yet grantable, if of necessity, as in the case of the bishop of Gloucester founded within time of memory.* M. 1 Car. C. B. *Crook, n.* 8. *Cook and Young.* Vide *that it is holden, that though it be a new office, yet if necessary, and the fee is reasonable, being confirmed it shall bind the successor; and* vide *the grant of ancient office and fee, with the addition of a new fee, which notwithstanding seems good, because the office is ancient.* M. 2 Car. C. B. *Crook, n.* 7. *Gee's case. If it had been usual to grant an ancient office to one only, a grant to two is not good. But if it has been once granted to two, or granted in reversion before the statute* 1 Eliz. *then it shall be intended to have been usually so granted, and such grant to two or in reversion shall bind the successor.* T. 8. Car. B. R. *Crook, n.* 2. *Walker and Lamb.* M. 8 Car. B. R. *Crook, n.* 19. *Young and Steele, concerning the official and commissary of the bishop of Lincoln and the register of the bishop of Rochester.* Hal. MSS.—Ley, 75, is contrary to Gee's case cited by lord Hale. —See further as to the grant of offices by ecclesiastical persons, New. Abr. *Offices*, D. See also in Burr. part 4. vol. 1. page 219, the case of sir John Trelawney and the bishop of Winchester, in which the court held, that an office and fee which existed before the 1st of Eliz. are not within the restraint of that statute, but that they may be granted as before the statute, and that the utility or necessity of the office is not more material since than it was before.—[Note 255.]

There be three kinds of persons that at this day may make leases for three lives, &c. in such sort as is hereafter expressed, which could not so doe when *Littleton* wrote, viz. First, any person seised of an estate taile in his owne right. Secondly, any person seised of an estate in fee simple in the right of his church. Thirdly, any husband and wife seised of any estate of inheritance in fee simple or fee taile in the right of his wife, or jointly with his wife before the coverture or after, viz. the tenant in taile, by deed to bind his issues (A) in taile, but not the reversion or remainder, the bishop, &c. by deed without the deane and chapter to bind his successors, the husband and wife by deed to bind the wife and her and their heires (2), and these are made good by the statute of 32 *H.* 8. c. 28, which inableth them thereunto. But to the making good of such leases by the said statute, there are nine things necessarily to be observed belonging to them all, and some other to some of them in particular.

5 Co. 6. Seig. Mountjoye's case. (3 Lev. 438. Cro. Ja. 94. 458.)

First, the lease must be made by deed indented, and not by deed poll, or by paroll (3).

Secondly, it must be made to begin from the day of the making thereof, or from the making thereof (4).

[44. b.] ☞Thirdly, if there be an old lease in being, it must be surrendred (1) or expired, or ended within a yeare of the making of the lease, and the surrender must be absolute and not conditionall.

5 Co. 2. Elmer's case.

Fourthly, there must not be a double lease in being at one time; as if a lease for yeares be made according to the statute, he in the reversion cannot expulse the lessee, and make a lease, for life or lives according to the statute, nor *è converso;* for the words of the statute be, to make a lease for three lives, or one and twenty yeares, so as one or the other may be made, and not both (2).

Fifthly,

(A) The word in the statute is "kin," which, as applied to tenants in tail, is constructively heirs of the body; or, as lord Coke expresses it, issue.

(2) Quoad *leases by husband and wife. Husband and wife seised to them and the heirs of the body of the husband make lease for three lives, rendering the antient rent; husband dies: this shall not bind the wife. Adjudged, because the statute speaks of the wife's inheritance.* H. 14 Eliz. C. B. n. 5. D. D. *Husband and wife jointly seised by purchase to them and their heirs; the husband alone during the coverture makes lease, rendering the antient rent:* dubitatur *if it shall bind the wife, because the proviso, which requires the wife's joining, speaks only of husband seised in right of his wife,* finitur per compositionem. M. 1 Car. C. B. Crook, n. 15. *Smith and Trinden.* Hal. MSS.—[Note 256.]

(3) See New Abr. *Leases,* E. 2. 3 Danv. 249. Str. 1201.

(4) Vid. 7 Eliz. *Dy.* 246. *Lease for* 20 *years to begin at next Michaelmas seems good.* Hal. MSS.—See further as to the time when such leases should begin, and the difference between *from the day of making* and *from the making,* New Abr. *Leases,* E. rule 2, and post. 47. b.—1 Bl. Rep. 626.—1 Leon. 148. —[Note 257.]

(1) *Feme covert tenant for life; reversion in tail; husband surrenders; tenant in tail leases for three lives; the wife dies. Adjudged, that this is a good lease to bind the issue. Sydenham and Cops cited by Popham. Mo.* 783. Hal. MSS.—[Note 258.]

(2) M. 29, 30 Eliz. *Clench,* 138. *Grindal's case.* Hal. MSS.—See S. C. 4 Leon.

(Cro. Cha. 95. Cro. Ja. 112. 173.)

Fifthly, it must not exceed three lives, or one and twenty yeares, from the making of it, but it may be for a lesser terme or fewer lives.

Sixthly, it must be of lands, tenements, or hereditaments, manurable or corporeall, which are necessary to be letten, and whereout a rent by law may be reserved, and not [d] of things that lye in grant, as advowsons, faires, markets, franchises, and the like, whereout a rent cannot be reserved (3).

[d] 5 Co. 3. Jewel's case. 17 E. 3. 75. 9 Ass. 24. 14 E. 3. Scire facias, 22. 10 H. 6. 2. 3 H. 6. 21. (1 Sid. 316, 317. 416. Cro. Eliz. 708. 1 Lev. 212.)

Seventhly, it must be of lands or tenements which have most commonly beene letten to farme, or occupied by the farmers, thereof by the space of 20 yeares next before the lease made, so as if it be letten for 11 yeares at one or severall times within those 20 years it is sufficient. A grant [e] by copy of court roll in fee for life or yeares is a sufficient letting to farme within this statute, for he is but tenant at will according to the custome, and so it is of a lease at will by the common law; but those lettings to farme must be made by some seised of an estate of inheritance, and not by a gardian in chivalry, tenant by the curtesie, tenant in dower, or the like (4).

[e] 6 Co. 37. Deane and Chapter of Worcester's case.

5 Co. 6. Seignior Mountjoye's case.

Eightly, that upon every such lease there be reserved yearly during the same lease due and payable to the lessors, their heires and successors, &c. so much yearly farme or rent, or more, as hath beene most accustomably yielded or paid for the lands, &c. within twenty yeares next before such lease made (5). Hereby first it appeareth (as hath beene said) that nothing can be demised by authority of this act, but that whereout a rent may be lawfully reserved. Secondly, that where not onely a yearly rent was formerly reserved, but things not annuall, as heriots, or any fine or other profit at or upon the death of the farmor, yet if the yearly rent be reserved upon a lease made by force of this statute, it sufficeth by the expresse words of the act. Thirdly, if he reserve more than the accustomable rent, it is good also by the expresse letter of the act; but if twenty acres of land have beene accustomably letten, and a lease is made of those twenty, and of one acre which was not accustomably letten, reserving the accustomable yearely rent and so much

(Cro. Jam. 76.)

6 Co. 37, 38. Deane and Chapter of Worcester's case.

---

4 Leon. 78. 1, and 65, and Mo. 107, and the observations upon it New Abr. *Leases*, E. rule 3.

(3) *But if tithes have been usually let to farm, they cannot be leased for life to bind the successor; but they may be leased for* 21 *yeares, rendering the antient rent, and it shall bind the successor.* *Mo.* 778. T. 2 Jac. B. R. *Adjudged in Denny's case, and the rent goes with the reversion.* Nota, *it was the case of the precentor of Paul's.* Hal. MSS.—See New. Abr. *Leases*, E. rule 5, where many authorities are cited to prove this difference between leasing tithes for life and for years, and that in the latter case the lease will bind the successor because he may have debt for the rent, which will not lie for him on a freehold lease. But the distinction is no longer of any importance; for the 5 *G.* 3. c. 17. makes leases of tithes and other incorporeal hereditaments by ecclesiastical persons, whether for lives or for years, as good as if the leases were of corporeal hereditaments, and gives action of debt to the successor, for rent reserved on freehold leases.—[Note 259.]

(4) *Lease by the king during vacancy of bishopric will not enable.* P. 19. Jac. B. R. *Denny's case.* Vid. *Dy.* 271. Hal. MSS.—[Note 260.]

(5) 6 Rep. 37. T. 3. Jac. *Crook, n.* 6. Hal. MSS.—See Cro. Jam. 76.

much more as exceeds the value of the other acre, this lease is not warranted by the act, for that the accustomable rent is not reserved, seeing part was not accustomably letten, and the rent issueth out of the whole. Fourthly, if tenant in taile let part (A) of the land accustomably letten, and reserve a rent *pro rata*, or more, this is good, for that is in substance the accustomable rent. Fifthly, if two coparceners be tenants in taile of twenty acres, every one of equall value, and accustomably letten, and they make partition, so as each have ten acres, they may make leases of their severall parts each of them, reserving the halfe of the accustomable rent. Sixthly, if the accustomable rent had beene payable at four daies or feasts of the yeare, yet if it be reserved yearely payable at one feast, it is sufficient, for the words of the statute be, reserved yearely.

5 Co. 5. Seignior Mountjoye's case. 6 Co. 37.

Lord Mountjoye's case, ubi supra.

(Cro. Cha. 16, 17.)

Ninthly, nor to any lease to be made without impeachment of wast. Therefore if a lease be made for life, the remainder for life, &c. this is not warranted by the statute, because it is dispunishable of waste. But if a lease be made to one during three lives, this is good, for the occupant, if any happen, shall be punished for waste (6). The words of the statute be (seised in the right of his church), yet a bishop that is seised *jure episcopatûs*, a deane of his sole possessions in *jure decanatûs*, an arch-deacon in *jure archidiaconatûs*, a prebendary and the like are within the statute, for every of them generally is seised in *jure ecclesiæ* (7).

Deane and Chapter of Worcester's case, ubi supra.

But

(A) As to consolidating by one lease and by one reservation, what has been before letten severally at two several rents, it is bad according to 5 Co. 5. b. though the new rent be equal to the old rents, and ld. ch. bar. Gilbert lays down a like rule in Bac. Ab. tit. Lease, Gwillim's edit. See also Derby *v.* Hunter, Prec. Ch. 257, and 1 Burr. 122. See further Cro. Car. 23; 1 Freem. 179, *et seq.* See also 1 Co. 139, what was said *arguendo* in Chudleigh's case. See further a short case in 1 Freem. 187. See 39 & 40 G. 3. c. 41; and Fearne, P. W. 247.

(6) *Prebend makes lease for years, reserving the running of a colt, rendering rent. A new lease rendering the same rent, without reserving the running of a colt, adjudged good; because* quoad *this is neither reservation nor exception. But if lease be of a manor except the woods rendering rent, and after the expiration of it there is a new lease rendering the same rent without such exception, the second lease is bad.* T. 18 Jac. B. R. *case of precentor of Paul's.* Hal. MSS. —See also Gwillim's Bac. Abr. tit. Leases.—[Note 261.]

(7) Vid. *for leases by bishop tenant in tail, &c.—A. seised in tail of a manor, of which three acres parcel of the demesnes had been usually demised at* 5*s. rent and the residue not, demises the three acres and also the manor* habendum *for* 21 *years, rendering for the three acres and all other the premises therewith demised* 5*s. and for the manor* 5*l. This is good to bind the issue for the three acres. but not for the residue.* H. 37 Eliz. *Tanfield and Rogers.—The bishop of G. seised of a manor, of which one tenant was usually demised for life at* 5*s. rent and the manor usually at* 10*s. rent, makes lease of the tenement for three lives, rendering* 5*s. and afterwards leases the whole manor for three lives to another rendering rent, and dies. Ruled,* 1. *That the reversion of the tenement passes by the lease of the manor.* 2. *And therefore that the lease of the manor* quoad *the tenement shall not bind the successor, because then there would be six lives in being for the tenement, and the lessee would be dispunishable of waste.* 3. *It seems, that the lease of the manor is also voidable, because the rent issues also out*

3 E. 6. 1 Mar. tit. Leases. Bro. 62. (Finch. 191.)

But a parson and vicar are excepted out of the statute of 32 *H.* 8, and therefore, if either of them make a lease for three lives, &c. of lands accustomably letten, reserving the accustomed rent, it must be also confirmed by the patron and ordinary, because it is excepted out of 32 *H.* 8. (8), and not restrained by the statutes of *primo* or 13 *Eliz.* And what hath beene said concerning a lease for three lives, doth hold for a lease for one and twenty yeares.

Thus much shall suffice to have spoken of the inabling statute of 32 *H.* 8, the better to inable the reader to understand both this and that which followes. Now to speak somewhat of the disabling statutes of 1 *Eliz.* and 13 *Eliz.* (9), the words of the exception out of the restraint and disability of 1 *Eliz.* are, *other than for the terme of twenty-one yeares, or three lives, from such time as any such grant or assurance shall be given, whereupon the old and accustomed yearely rent, or more shall be reserved:* and to that effect is the exception in the statute of 13 *Eliz.* First it is to be understood that neither of these disabling acts, nor any other, do in any sort alter or change the inabling statute of 32 *H.* 8, but leaveth it for a pattern in many things for leases to be made by others. Secondly, it is to be knowne, that no lease made according to the exception of 1 *Eliz.* or 13 *Eliz.* and not warranted by the statute of 32 H. 8, if it be made ☞ by a bishop, or any sole corporation, but it must [45. a.] (Cro. Eliz. 874.) be confirmed by the deanes and chapters, or others that have interest, as hath been said in the case of the (1 And. 65.) parson and vicar, but examples doe illustrate. If a bishop make a lease for 21 yeares, and all those yeares being spent saving three or more, yet may the bishop make a new lease to another for twenty-one yeares, to begin from the making, according to the exception of the statute, but not a lease for life or lives, as hath beene said; and this concurrent lease hath been resolved to be good (1), as well upon the exception of 1 *Eliz.* in the case of

---

out of the tenement. (Quære *of this, for here the rent as well for the tenement as for the manor is reserved on the second lease, so that though the tenement should be evicted the entire rent of the manor would continue.*) 4. *But it was agreed, that the lease of a copyhold manor usually demised, or of a manor consisting of demesnes, copyholds and services usually demised, is good to bind the successor.* 5. *The lease is only voidable by the successor; and therefore if he accepts the rent, it is good against him. M.* 20 Jac. C. B. *Bishop of Gloucester against Wood. M.* 5 Car C. B. *Sheir and Penter on lease by the bishop of Exeter.* Hal. MSS.—[Note 262].

(8) *Prebend simple or prebend with office, as is precentor, is enabled by the statute* 32 *H.* 8. *Adjudged Bro. Leases,* 62. *M.* 36, 37 Eliz. *Watson and Major.* T. 18 Jac. *case of precentor of Paul's.* Hal. MSS.—[Note 263.]

See as to prebendaries having only a qualified fee, 300. b. 341. b. as to parsons. Plowd. 499, post. 341. Hob. 7.

(9) Nota, *these disabling statutes extend only to their own possessions. The archdeacon of Ely,* 12 *Eliz. makes lease for* 50 *yeares, which after the statute* 13 *Eliz. is confirmed by the bishop and dean and chapter. Ruled, that this is a good lease to bind the successor, though after the statute* 1 *Eliz. and though confirmed after the statute* 13 *Eliz. H.* 37 Eliz. Rot. 882, *sir Edward Dennye's case.* Hal. MSS.—[Note 264.]

(1) *Accordingly adjudged, though the concurrent lease was to commence a datu indenturæ.* T. 21 Eliz. Rot. 124. *Fox and Collier.* M. 22, 23 Eliz. C. B.

of bishops, as upon 13 *Eliz.* (2) which extend to spirituall and ecclesiasticall corporations, aggregate of many, as deanes and chapters, &c which 32 *H.* 8. did not: but in the case of the concurrent lease, in the case of the bishop it must be confirmed. Also the exception of 1 *Eliz.* and 13 *Eliz.* doth differ from the statute of 32 *H.* 8. for the leases for yeares to be made according to the exceptions of the statutes of 1 and 13 *Eliz.* must begin from the making, and not from the day of the making, but by force 32 *H.* 8. from the day of the making. And although the statutes of the first or thirteenth *Eliz.* doe not appoint the lease to be made by writing, yet must it therein and in the other eight properties or qualities before mentioned and required by 32 *H.* 8. follow the patterne thereof (the concurrent lease only except). (3) Although the exception in 1 and 13 *Eliz.* concerning the accustomed rent is more generall than that of 32 *H.* 8. and there is not any provision for leases made dispunishable of waste, &c. yet must the patterne of 32 *H.* 8. be followed: for leases without impeachment of waste made by such spiritual and ecclesiasticall persons are unreasonable and causes of dilapidations. Thus much have I thought good to lead the studious reader by the hand, and to conduct him in the right way, and to put all these things together upon consideration had of all the statutes, which otherwise might have *primâ facie* seemed to him a diffused and dark labyrinth. And albeit it be provided by the said acts of 1 and 13 *Eliz.* that all grants, &c. leases, &c. made, &c. (other than leases for three lives or one and twenty yeares according to those acts) should be utterly voyd and of none effect, to all intents, constructions, and purposes, yet grants, or leases, &c. not warranted by those acts are not voyd, but good against the lessor, if it be a sole corporation; or so long as the deane or other head of the corporation remaine, if it be a corporation aggregate of many (4): for the statute

(1 Leon. 59.)

3 Co. 59, 60. Lincolne Colledge case, P. 39 Eliz. inter Hunt and Singleton, ibidem.

C. B. Rot. 2409. *Scott and Brewster.* H. 22 Jac. B. R. Rot. 11. *Evans and Ascu adjudged.* T. 3 Car. P. 33 Eliz. W. 14. *Southcot's case.* Hal. MSS.

(2) Nota, *the statute* 13 *Eliz. chap.* 10. quoad *tenements in cities, is altered by the statute* 14 *Eliz. chap.* 11. *which permits leases of them for* 40 *years; and therefore it has been ruled, that covenants for renewing leases of messuages in cities are not prohibited by the statute* 18 *Eliz. chap.* 11, *which only restrains leases against the statute of* 13 *Eliz. Hob. case,* 352. *Crane and Taylor.* Hal. MSS.—See Hob. 269.—[Note 265.]

(3) *H.* 44 Eliz. C. B. n. 14. D. D. *Bishop of Hereford against Scory. Adjudged accordingly, where the land had not been usually demised.* Hal. MSS.

(4) Nota, *lease for three lives by bishop, not warraned by the statute, is not voidable against himself, but shall bind him.* M. 44, 45 Eliz. C. B. D. D. *n.* 32. *Saunders's case. And it is not void, but only voidable against the successor, for if he accepts the rent the lease is good against him.* M. 8 Car. C. B. *Crook, n.* 21. *Owen and App-Rees. But lease by A. dean of B. and his chapter not warranted is void immediately against A. himself. Adjudged so, because the corporation is aggregate.* M. 13 Car. B. R. *Lloyd and Gregory.* Hal. MSS.—The case of Lloyd and Gregory is reported in Cro. Cha. 502. W. Jo. 405. 1 Ro. Abr. 728, and 2 Ro. Abr. 495. But none of these books mention the point to which lord Hale cites the case. See New Abr. *Leases,* H. where several authorities besides that of lord Coke are cited to show, that a lease by a corporation aggregate, though not warranted by the statutes, is good for the time

statute was made in benefit of the successor (5). But let us now return to our author.

(2 Ro. Ab. 64.) Vide Sect. 246. 11 H. 4. 1. 5 E. 4. 4. a, 27 H. 8. 16.

"*A man letteth.*" Here *Littleton* putteth this case where one letteth, &c. It is therefore necessary to be seen what the law is where divers joyne in a lease. If the tenant of the land and a stranger which hath nothing in the land joyne in a lease for yeares by deed indented of one and the self same land, this is the lease of the tenant onely and the confirmation of the stranger, and yet the lease as to the stranger workes by conclusion (6).

(1 Ro. Abr. 877. Mo. 72. 1 Leon. 177. Cro. El. 701. 6 Co. 15. Treport's case. Doc. Pl. 93.) Post. 147. b. a. 221. Raym. 403. 2 Saund. 97.

If two severall tenants of severall lands joyne in a lease for yeares by deed indented, these be severall leases, and severall confirmations of each of them, from whom no interest passeth, and worke not by way of conclusion in any sort, because severall interests pass from them (7). *B.* tenant for life of *C.* and he in the remainder or reversion in fee having severall estates in the one and the same land, joyne in a lease for yeares by deed indented, the demise shall worke in this sort; during the life of *C.* it is the lease of *B.* and confirmation of him in the reversion or remainder, and after the decease of *C.* it is the lease of him in the reversion or remainder, and the confirmation of *B.*; for seeing the leasors have severall estates, the law shall construe the lease to move out of both their estates respectively, and every one to let that which he lawfully may let, and not to be the lease onely of tenant for life, and the confirmation of him in the remainder or reversion, neither is there any conclusion in this case, as shall be said hereafter. Tenant for life and he in the remainder in fee made a lease for yeares by deed indented, the lessee was ejected, and brought an *ejectione firmæ*, and declared upon a demise made by tenant for life and him in remainder, and upon not guilty pleaded, this speciall matter was found, and that tenant for life was living and it was adjudged [*a*] against the pl', for during the life of the tenant (as hath been said) it is the lease of the tenant for life, and therefore during his life he ought to have declared of a lease made by him, and after his decease he ought to declare of a lease made by him, in remainder (8). [*b*] And the deed indented could be no estoppel in this case, because there passed an interest from them both. And whensoever

[*a*] 27 H. 8. f. 13. a. 13 H. 7. 14. 2 H. 5. 7. 1 Co. 76. Bredon's case. (Post. 302. b.)

[*b*] Mich. 36 & 37 Eliz. in the King's Bench. Vide Mich. 6 & 7 Eliz. Dyer 234, 235.

---

of the person who was head of the corporation when the lease was made. See also ante 43. a. n. 1.—6 East, 98. 103.—[Note 266.]

(5) See further as to leases by tenants in tail, husband and wife, and ecclesiastical persons, in Vin. Abr. tit. *Estates*, and tit. *Confirmation*, and New Abr. tit. *Leases*: which title in the latter book is generally attributed to lord chief baron Gilbert, and comprises a most copious and excellent treatise on a very difficult and extensive subject.

(6) 2 *H.* 5. 7. *by Asht.* Hal. MSS.

(7) *And therefore where the declaration in ejectment was of a joint demise of A. and B. and on the evidence it appeared that they were tenants in common, the plaintiff failed.* M. 3. Jac. *Blakasper's case. Noy, n.* 43. Hal. MSS.—See Noy, 13.—[Note 267.]

(8) Intratur H. 34 Eliz. Rot. 72. *King and Beny.*—Hal. MSS.

soever any interest passeth from the party, there can be no estoppel against him, and [c] so it was adjudged. Hereby you shall understand your bookes the better which treat of those matters, and accordingly it was adjudged that where tenant in taile and he in the remainder in fee joyned in a grant of a rent charge by deed in fee, and after tenant in taile died without issue, the grantee distrained and avowed by force of a graunt from him in the remainder, and upon *non concessit*, the jury found the speciall matter, and it was adjudged for the avowant: for every one granted according to his estate and interest.

[c] Hill. 44 Eliz. Rot. 1459, in Communi Banco, inter Ellice & Cowen. 3 Wms. 372. Post. 476. Pollex. 67. Carth. 247. Vent. 358. Jenk. Cent. 255.

Leases for lives or yeares are of three natures: some be good in law; some be voydable by ☞ entry, and some voyd without entry. Of such as be good in law, some be good at the common law as made by tenant in fee, whereof *Littleton* here putteth his case: some by act of parliament; as tenant in taile, a bishop seised in fee in the right of his church alone without his chapter, a man seised in fee simple or fee taile in the right of his wife together with his wife (as hath beene said) may by deed indented make leases for 21 yeares or three lives in such manner and forme as hath been said and by the statute [d] is limited, all which were voydable by the common law when *Littleton* wrote, and now are made good by parliament.

[45. b.]

(3 Co. 64. b.)

[d] 32 H. 8. cap. 28.

An infant seised of land holden in socage, may by custom make a lease at his age of 15 yeares, and shall binde him, which lease was voydable by the common law; (1) voydable, some by the common law, after the death of the leasor, as of tenant in taile, a bishop, &c. or after the death of the husband (intended of leases not warranted by the said statute of 32 *H.* 8.); some voydable by act of parliament, as by a bishop though it be confirmed by deane and chapter, if it be not warranted by the statute of 32 *H.* 8, and so of a deane and chapter after the death of the deane; some voydable at times by the lessor himselfe or his heires, as by an infant and the like. Some voyde *in futuro*, and some voyde *in præsenti*. *In futuro*, as if a tenant in taile make a lease for yeares and die without issue, it is voyde, as to them in reversion or remainder, though it be made [e] according to the said statute. If a prebend, parson or vicar make a lease for yeares, it is voide by death, if it be not according to the statutes. Otherwise it is of a lease for life, for that is voydable, *et sic de similibus*.

(Plow. 264. b. Cro. J. 173.)

[e] 33 H. 8. Bier. 3 Co. 59. 60. in Lincolne College case. Hunt's case vouched. (1 Ro. Abr. 848.)

Some voide *in præsenti*; as if one make a lease for so many yeares as he shall live, this is voide *in præsenti* for the incertainty. *Et sic in similibus*, whereof *Littleton* himselfe will teach you next and immediately, and I know you would now gladly heare him.

"*For*

(1) Heretofore some made a difference between leases by infants with reservation of rent and those without, and thought that the former were only voidable, but that the latter were absolutely void. New Abr. *Leases*, B. But in a late case this distinction was denied, and it was said, that leases whether with or without rent, if made by *deed*, are voidable only. Burr. part 4. v. 3 page 1806.—[Note 268.]

Pl. Com. Wortesl. 198. 33 H. 8. tit. Exposition des parols, 44. 8 Co. 145, in Davenport's case. (5 Co. 7. 1 Co. 154. 274. 1 Ro. Abr. 849.)

"For terme." *Pro termino.* *Terminus* in the understanding of the law doth not onely signify the limits and limitation of time, but also the estate and interest that passeth for that time. As if a man make a lease for twenty-one yeares, and after make a lease to begin *à fine et expiratione prædicti termini* 21 *annorum dimiss.* and after the first lease is surrendered, yet the second lease shall begin presently; but if it had been to begin *post finem et expirationem prædict'* 21 *annorum*, in that case although the first terme had been surrendered, yet the second lease should not begin till after the 21 yeares be ended by effluxion of time; and so note the diversitie betweene the terme for 21 yeares, and 21 yeares; and [*f*] herewith agreeth the lord *Paget's* case.

[*f*] 1 Co. 154. in the Rector of Chedington's case.

[*g*] Words to make a lease be, demise, grant, to fearme let, betake; and whatsoever word amounteth to a grant may serve to make a lease. In the king's case [*h*] this word *Committo* doth amount sometime to a grant, as when he saith *Commissimus W. de B. officium seneschalsiæ, &c. quamdiu nobis placuerit*, and by that word also he may make a lease: and [*i*] therefore *à fortiori* a common person by that word may doe the same.

[*g*] Vide Sect. 531.

[*h*] Register. F. N. B. 270. E.

[*i*] 8 H. 6 34.

"Of certaine yeares." For regularly in every lease for yeares the terme must have a certaine beginning and a certaine end; and herewith [*k*] agreeth *Bracton, terminus annorum certus debet esse et determinatus.* And *Littleton* is here to be understood, first, that the years must be certain when the lease is to take effect in interest or possession. For before it takes effect in possession or interest, it may depend upon an incertainty, viz. upon a possible contingent before it begin in possession or interest, or upon a limitation or condition subsequent. Secondly, albeit there appeare no certainty of yeares in the lease, yet if by reference to a certainty it may be made certaine it sufficeth, *Quia id certum est quod certum reddi potest.* For example of the first. If *A.* seised of lands in fee grant to *B.* that when *B.* pays to *A.* xx. shillings, that from thenceforth he shall have and occupie the land for 21 years, and after *B.* payes the xx. shillings, this is a good lease for 21 years from thenceforth. For the second, if *A.* leaseth his land to *B.* for so many yeares as *B.* hath in the manor of *Dale*, and *B.* hath then a terme in the mannor of *Dale* for 10 yeares, this is a good lease by *A.* to *B.* of the land of *A.* for 10 years. If the parson of *D.* make a lease of his glebe for so many yeares as he shall be parson there, this cannot be made certaine by any meanes, for nothing is more uncertaine than the the time of death, *Terminus vitæ est incertus, et licèt nihil certius sit morte, nihil tamen incertius est horâ mortis* (2). But if he make a lease for three yeares, and so from three yeares to three yeares, so long as he shall be parson, this is a good lease for six yeares, if he continue parson so long, first for three yeares, and after that for three yeares; and for the residue uncertaine (A) (3)

[*k*] 14 H. 8. 14. 3 Mar. Leases. Br. 67. 2 Mar. ibid. 67. Say and Fuller's case, Pl. Com. 273, and Welden's case, ibid. 4 H. 6. 12. 21 H. 7. 38. Vid. le case del evesque de Bathe. 6 Co. 34. 35. Bract lib. 2. cap. 9. Vid. 1 Co. 155. 156. Rector de Chedington's case. (1 Ro. Abr. 848, 849.) Bract. lib. 2. cap. 9. So resolved Hill, 26 Eliz. Rot. 935. in Com. Banc 3 Durn. 462.

If

(2) But if livery is made on such a lease, perhaps it may be sufficient to pass a freehold to the lessee during the life or incumbency of the lessor. See New Abr. tit. *Leases*, L. 2.—[Note 269.]

(A) See further as to what is a chattel interest, ante, 42. a 43. b. 2 Inst. 296. 3 New Abr. 424.

(3) *But* vid. *Noy. fol.* 143, *n.* 635. *Lease from three years to three years till*

If a man maketh a lease to *I. S.* for so many yeares as *I. N.* shall name, this at the beginning is uncertaine; but when *I. N.* hath named the yeares, then it is a good lease for so many yeares.

A man maketh a lease for 21 yeares if *I. S.* live so long; this is a good lease for yeares, and yet is certaine in incertainty, for the life of *I. S.* is incertaine. See many excellent cases concerning this matter put in the said case of the bishop of *Bath* and *Wells*. By the ancient law of *England* for many respects a man could not have made a lease above 40 yeares at the most, for ☞ then it was said that by long leases many were prejudiced, and many times men disherited, but that ancient law is antiquated (1). Pl. Com. Say and Fuller's case. Mirror, ca. 2. sect. 17. & cap. 5. sect. 1.

[46. a.]

In the eye of the law any estate for life being, as *Littleton* hath said, an estate of freehold, against whom a *præcipe quòd reddat* doth lye, is an higher and greater estate than a lease for yeares, though it be a for a thousand or more, which never are without suspicion of fraud; and they were the lesse valuable, for that at the common law they were subject unto, and under the power of the tenant of the freehold, the learning whereof standeth thus, and is worthy to be knowne. When *Littleton* wrote, if a man had made a lease for yeares by writing, and he that had the freehold had suffered himselfe to be impleaded in a reall action by collusion to bar the lessee of his terme, and made default, &c. the statute of *Glouc'* gave the lessee for yeares some remedy by way of receipt, and a triall whether the demandant did move the plea by good right or collusion; and if it were found by collusion, then the termor should enjoy his tearme, and the execution of the judgement should stay untill after the tearme ended (2). But this statute extended not to five cases. First, if the lease were without writing, for the words of this act are (so that the termor may have recovery by writ of covenant). 2. It extended not but to a recovery by default (3). 3. The termor could not be relieved by this statute, unlesse he knew of the recovery, and were received, &c. 4. By the better opinion of bookes, it extended not to tenants by statute merchant, statute staple, or *elegit*. 5. Not to gardian. [*l*] But now the statute of 21 *H.* 8. doth give remedy in all the said cases, saving the case of the gardian, and giveth them power to falsifie all manner of recoveries had against the 11 Co. 33. [*l*] 21 H. 8. cap. 15.

---

till the expiration of ten years shall be a lease for nine years, and the law rejects the last year, because not computed by three. Hal. MSS.—See New Abr. tit. *Leases*, L. 3, page 433. Salk. 413. 10 Vin. 329.—[Note 270.]

(1) See 2 Blackst. Comment. 5th edit. p. 142. It is there observed, that it appears by Mr. Madox's collection of ancient instruments in his *Formulare Anglicanum*, that the law against leases for more than forty years, if it ever existed, was soon antiquated; and several instances of leases for a longer term, as early as the reign of Richard the second, are referred to.—[Note 271.]

(2) *Yet* videtur, *that the recoverer shall have waste.* 27 *H.* 8. 7. *Keilw.* 108. *But reversioner being received in default of tenant for life, no judgment against tenant for life, if a good bar pleaded.* Hal. MSS.—[Note 272.]

(3) *Or reddition.* 16 *H.* 7. 5. 21 *H.* 7. 25. 5 *H.* 7. 39. 8 *H.* 7. 6. 12 *H.* 8. 7. 27 *H.* 8. 7. 11 *E.* 4. 10. *or on* nihil dicit, *or disclaimer.* 9 *E.* 4. 37. *by Danby, or on default of the vouchee at the* grand cape *or* sequatur sub periculo. 9 *E.* 4. 38. Hal. MSS.

the tenants of the freehold upon fained and untrue titles, &c. Now the [m] statute saith, that it was a doubt before that statute whether a termor for yeares might falsifie or no: but yet it seemeth by the better opinion of books in so great variety, that he having but a chattell, was not able by the commmon law to falsifie a covenous recovery of the freehold, because he could not have the thing that was recovered (4). [n] And *Thirning* and *Hankford* doe hold that a gardian is not within the statute of *Glouc'*.

[m] That a termor might falsifie a the Common Law, vid. 19 H. 3. Ass. 82. 21 E. 3. 1. 7 H. 7. 11. b. 1 H. 7. 2. b. Pl. Com. 83. 10 E. 3. 46. 19 E. 3. Reseeit, 112. That he could not, 30 H. 6. Fauxer recovery, 9. 43 Ass. pl. 1. 26 H. 8. 2. 9 E. 4. 38. F. N. B. 198, E. 14 H. 8. 4. 9 Co. fo. 135. Ascoughe's case. [n] 7 H. 4. 12. 33 H. 8. Dier. 32.

If two coparceners be, and one of them let her part to another for yeares, and after upon a writ of partition brought against the lessor too little is allotted to the lessor, it is holden by some that the lessee cannot avoid it, for that it is made by the oath of men, and judgement is thereupon given that the partition shall remaine firme and stable. But if there be two coparceneers of three acres of land, every one of equal value, and the one coparcener letteth her part, and after make partition, and one acre is allotted onely to the lessor, the lessee is not bound hereby, but he may enter and take the profits of another half acre, for that of right belongs unto him (5). Thus much have I thought good to set downe, for it sufficeth not to know what the law is in these cases, unlesse he understand the reason and cause thereof.

And albeit (as hath beene said) a lease for yeares must have a certaine beginning and a certaine end, yet the continuance thereof may be incertaine, for the same may cease and revive againe in divers cases (6). As if tenant in taile make a lease for yeares reserving xx. shillings, and after take a wife and dye without issue, now as to him in the reversion the lease is meerly void: but if he indow the wife of tenant in taille of the land, (as she may be though the estate taile be determined) now is the lease as to the tenant in dower (who is in of the state of her husband) [a] revived againe as against her, for as to her the estate taile continueth, for she shall be attendant for the third part of the rent services, and yet they were extinct by act in law. So it is if tenant in taile make a lease for yeares *ut supra*, and dyeth without issue, his wife enseint with a sonne, he in the reverson enter, against him the lease is void, but after the sonne be borne the lease is good, if it be made according to the [b] statute, and otherwise is voydable.

(7 Co. 9. a. 1 Ro. Abr. 842.) [a] 10 H. 3. 26. 34 Ass. 15. 23 E. 3. Dower, 130. (7 Co. 8. b.)

[b] 32 H. 8. ca. 28.

The king made a gift in taile of the manor of *Eastfarleigh* in *Kent*, to *W.* to hold by knights service; *W.* made a lease to *A.* for thirty-sixe yeares, reserving thirteene pound rent; *W.* died his sonne and heire of full age. All this was found by office. As to the king this lease is not of force, for he shall have his *primer seisin* as of lands in possession, but after livery, the lessee may enter; and if the issue in taile accept the rent, the lease shall binde him, for the king's *primer seisin* shall not take away

(1 Ro. Abr. 842.)

---

(4) Vid. 27 *H.* 8. 7. 21 *H.* 7. 25. *Grantee of rent charge for years might falsify recovery against terre-tenant.* Hal. MSS.—[Note 278.]

(5) Vid. 24 *E.* 54. *If parceners be of two acres, and one leases one acre, which on writ of partition is allotted to the other, the lease is wholly avoided.* Hal. MSS.—[Note 274.]

(6) Vid. 7 *Rep. the earl of Bedford's case.* Hal. MSS.

away the election of the issue in taile, for it may be that the rent was better than the land: [c] and so it was adjudged in *Austen's* case, as I had it of the report of master *Edmond Plowden*, a grave and learned apprentice of law.

[c] Pasch. 2 & 3 Ph. & Mar. in an information of Intrusion in the Exchequer against Austen. Vid. Dier. Pasch. 2 & 3 Ph. & Mar. 115. 13 Eliz. ca. 10.

If tenant in fee take wife, and make a lease for yeares, and dieth, the wife is endowed, he shall avoid the lease, but after her decease the lease shall be in force againe. But if the patron grant the next avoydance, and after parson, patron and ordinary, before the statute, [d] had made a lease of the glebe for yeares, and after the parson dieth, and the grantee of the next avoydance had presented a clerke to the church, who is admitted, instituted, and inducted, and dieth within the terme; the patron presents a new clerke, and he is admitted, instituted and inducted, albeit he commeth in under the patron that was party to the lease, yet because the last incumbent, who had the whole state in him, avoyded the lease, it shall not revive againe, no more than if a feme covert levy a fine alone, if the husband enter and avoyd the fine, and dye, the whole estate is so avoyded as it shall not binde the wife after his death (7).

[d] 6 E. 6. Dier, 72. (Cro. Car. 552.) 17 E. 3. 52. 17 Ass. p. 17. 2 R. 3. 20. 9 H. 6. 33. (Hob. 7.)

(Hob. 225. 10 Co. 43.

[46. b.] ☞ If a woman be endowed of an advowson which is appropriated, and she present, and her incumbent is admitted, instituted, and inducted, albeit the incumbent die, yet is the appropriation wholly dissolved, because the incumbent, which came in by presentation, had the whole state in him; and so it was adjudged, as the case is to be intended (1).

2 E. 3. 8. per Scroope. (1 Ro. Abr. 240, 241.)

Tenant in taile make a lease for forty years, reserving a rent, to commence ten yeares after; tenant in taile dye; the issue enter and enfeoffe *A.*; ten yeares expire, the lessee enter: if *A.* accept the rent, the lease is good, for he shall have the same election that the issue in taile had, either to make it good, or to avoid it, so as it could not be precisely affirmed, whether by the entry of the issue this executory lease was avoided, but it dependeth incertainly upon the will of the feoffee (2). But now I know you are desirous to heare *Littleton*, who is speaking to you.

Pl. Com. 437. a. (1 Ro. Abr. 831. 842, 843. 1 Sid. 260, 261.)

"*And when the lessee entreth by force of the lease, then is he tenant for terme of yeares.*" And true it is, that to many purposes he is not tenant for yeares until he enter: as a release made to him is not good to him to increase his estate, before entry; but he may release the rent reserved before entry, in respect of the privity. Neither can the lessor grant away the reversion by the name of the reversion, before entry. *Vide* Sect. 567. But the lessee before entry hath an interest, *interesse termini*,

(2 Ro. Abr. 463. Cro. Car. 110. 400.)

V. Sect. 454, 455. (Cro. Ja. 60. 5 Co. 124.)

---

(7) *Adjudged accordingly* Cro. Cha. *Plowden* v. *Oldford*, 582. *But in* Hill. 10 Eliz. C. B. E. 238, *adjudged that the lease revived. Polydore Virgil's case.* Hal. MSS.—Vin. *Fine* (T) 4.

(1) Vid. 21 *E.* 3. *Grants*, 58. *Appropriation without license, and* eâ de causâ it seems a *disappropriation.* Hal. MSS.—[Note 275.]

(2) *But if it was lease* in præsenti *by tenant in tail, and the issue before entry levies fines, the conusee shall not avoid the lease, for the lease was only voidable and the land passes in degree of reversion.* Vid. *Dy.* 51. 7 *Rep.* 9, *earl of Bedford's case.* Hal. MSS.—[Note 276.]

termini, grantable (A) to another. *Vide* Sect. 319. And albeit the lessor dye before the lessee enters, yet the lessee may enter into the lands, as our author himselfe holdeth in this Chapter. And so if the lessee dyeth before he entered, yet his executors or administrators may enter, because he presently by the lease hath an interest in him; and if it be made to two, and one dye before entry, his interest shall survive. *Vide* Sect. 281.

V. Sect. 665. more fully of this matter. (Hob. 3.)

He that hath a lease for yeares, hath it either in his owne right, whereof *Littleton* hath here spoken, or in another's right, and that in divers manners; as a man may have a terme for yeares in the right of his wife, whereof the husband hath power to dispose at any time during his life, and if he surviveth his wife, the law doth give the lease to him. But if he make no disposition thereof, and his wife survive him, it remaineth with the wife: but of this in another place more fully.

(1 Ro. Abr. 344, 345. Plow. 191.)

If a man be possessed of a terme of forty yeares in the right of his wife, and maketh a lease for twenty yeares, reserving a rent, and die, the wife shall have the residue of the terme, but the executors of the husband shall have the rent, for it was not incident to the reversion, for that the wife was not party to the lease (3). So note, a disposition of part of the terme is no disposition of the whole. But if the husband grant the whole terme, upon condition that the grantee shall pay a summe of money to his executors, &c. the husband die, the condition is broken, the executors enter, this is a disposition of the terme, and the wife is barred thereof, for the whole interest was passed away (4).

Hil. 17 El. in the King's Bench. (Post. 351. 10 Co. 51. Hutt. 17.)

If a lease be made to a baron and feme for terme of their lives, the remainder to the executors of the survivor of them, the husband grant away this terme and dieth, this shall not bar the wife, for that the wife had but a possibility, and no interest.

37 Ass. p. 11. Pl. Com. 418. b. (1 Ro. Rep. 359.)

If the husband and wife be ejected of a terme in the right of his wife, and the husband bring an *ejectione firmæ* in his owne name (5), and have judgment to recover, this is an alteration of the terme, and vesteth it in the husband (6).

If

(A) See however Godb. 2. 1 Show. 221. Indeed the doctrine of lord Coke I take to be now settled, but it seems a deviation from the strict principle of our law; a future or reversionary term is also assignable. 1 Show. 379, post. 54. b.

(3) Vid. tamen *one Evans's case, in which it was adjudged that the wife shall have the rent. Cited by Houghton.* 16 Jac. Quære, and vid. 7 H. 6. 2. T. 16 Jac. *Blaxton and Heath.* 2 *Poph. n.* 88. Hal. MSS.—By 2 Poph. lord Hale means the additional cases at the end of Popham's Reports. See Poph. 125. For Blaxton and Heath, see Poph. 145.—[Note 277.]

(4) *If part of a term be granted by husband on condition, it seems that the condition is gone by his death.* Quære. *A ward changes the property of such a term. Dy.* 183. Hal. MSS.—See the case in Marg. Dy. 183.—[Note 278.]

(5) Vide *Husband of wife termor may have petition of right alone.* 37 *Ass. pl.* 11. *If husband is guardian in right of his wife, dower lies against the husband alone; for there can be no voucher there against the ward's right.* 2 *E.* 3. 13. 15. 47 *E.* 3. 9. Hal. MSS.—[Note 279.]

(6) Vid. 50 *E.* 3. *Judgment for husband in* quare impedit *for the wife's advowson; the husband dies; the wife presents.* Hal. MSS.—[Note 280.]

If a lease for yeares be made to a bishop and his successors, yet his executors or administrators shall have it *in auter droit*, for regularly no chattell can goe in succession in a case of a sole corporation, no more than if a lease be made to a man and his heires it can go to his heires. But let us returne to *Littleton* (7).

Touching the time of the beginning of a lease for yeares, it is to be observed, that if a lease be made by indenture, bearing date 26 *Maii*, &c. to have and to hold for twenty-one yeares, from the date, or from the day of the date (8), it shall begin on the twenty-seventh day of *May* (9). If the lease beare date the twenty-sixth day of *May*, &c. to have and to hold from the making hereof, or from henceforth, it shall begin on the day on which it is delivered, for the words of the indenture are not of any effect till the delivery, and thereby from the making, or from henceforth, take their first effect. But if it be *à die confectionis*, then it shall begin on the next day after the deliverie. If the *habendum* be for the terme of twenty-one yeares, without mentioning when it shall begin, it shall begin from the deliverie, for there the words take effect, as is aforesaid. If an indenture of lease beare date which is void or impossible, as the thirtieth day of *Februarie*, or the fortieth of *March*, if in this case the terme be limited to begin from the date, it shall begin from the delivery, as if there had been no date at all. [a] And so it is,

5 Co. 1. Clayton's case. 12 Eliz. Dyer, 286. (2 Ro. Abr. 520 Cro. Ja. 135. Post. 255. a.) 14 El. Dy. 307. 5 El. Dy. 218. (1 Ro. Abr. 849, 850. Cro. Cha. 78.)

2 Co. 3. Goddard's case.

[a] Pl. Com. 148. 3. E. 6. tit. Leases, Br. 62. 3 El. Dy. 195. 1 Mar. Dyer, 116. (Cro. Car. 400. 2 Ro. Abr. 52. 1 Ro. Abr. 849. 1 Sid. 460.)

if

---

(7) Hic. *fol. a.* Hal. MSS.

(8) Vid. *for* date *and* day of the date hic *fol.* 6. *a. and the note there.* Hal. MSS.—In fol. 6. a. lord Hale gives the following note. Date *and* day of the date *the same in point of computation*, 5 *Rep. But in point of interest date is taken* inclusive, *day of the date* exclusive *in many cases.* T. 9 Jac. B. R. *Bulstr. n.* 177. *A. on the second of August* 1 Jam. *makes an obligation to B. and afterwards on the same day B. releases all actions* usque datum scripti; *the obligation is discharged, because* date *is* delivery. *Otherwise, if it had been to the* day of the date. T. 9 Car. B. R. *Rooke and Richards. Condition of obligation to stand to an award, so that it be made within four days after the* date: *a good award may be made the same day; and so it seems if it be* day of the date. *M.* 1653. *Street's case. Stiles*, 382. *Obligation dated* 2 *January; release dated* 1 *January of all actions* usque diem hujus præsentis temporis, *but delivered* 3 *January:* præsens tempus *is the* date, *and so the obligation stood.* P. 7 Jac. Hal. MSS.—See further as to the difference between *date* and *day of the date*, Com. Dig. *Estates*, G. 8. *Bargain and Sale*, B. 8. *Temps* A. and Vin. Abr. *Estate*, Z. a. *Time*, A. and Wils. vol. 1. part 2. page 165, and the next note.—[Note 281.]

(9) Vid. *for commencement of lease*, M. 10 Jac. Rot. 75. *Hob. case* 32. *Moor and Musgrave. A. by indenture dated* 4 *May* 10 Jac. *to hold* from the feast of the annunciation last past for the term of 21 years next ensuing the date hereof fully to be complete and ended. *In ejectment plaintiff counts on this lease, as a lease to hold* from the feast for 21 years extunc prox. sequent. *and agreed to be good. But see* T. 24 Car. B. R. *Cornish and Cawsey. Lease by indenture of* 25 *March* 15 Car. *to have and to hold* from and after the day of the date of these presents for the term and time of seven years from henceforth next and immediately ensuing, *shall commence in computation from the delivery, and in point of interest from the date. Stiles*, 118. Hal. MSS.—[Note 282.]

if a man by indenture of lease, either recite a lease which is not, or is void, or misrecite a lease in point materiall which is *in esse*, to have and to hold from the ending of the former lease, this lease shall begin in course of time from the deliverie thereof (10).

"And if the lessor in such case reserve to him a yearely rent upon such lease, he may chuse for to distraine for the rent, or else he may have an action of debt for the arrearages."

☞ *"Reserve to him a yearely rent, &c."* First, it appeareth [*b*] here by *Littleton* that a rent must be reserved out of the land or tenements, whereunto the lessor may have resort or recourse to distreine, as *Littleton* here also saith, and therefore a rent cannot be reserved by a common person (1) out of any incorporeall inheritance, as advowsons, commons, offices, corodie, mulcture of a mill, tythes, fayres, markets, liberties, priviledges, franchises, and the like. [*c*] But if the lease be made of them by deed (2) for yeares, it may be good by way of contract to have an action for debt, but distreine the lessor cannot. Neither shall it passe with the grant of the reversion, for that it is no rent incident to the reversion (3). But if any rent be reserved in such case upon a lease for life, it is utterly void, for that in that case no action of debt doth lie (4). [47. a.]

[*b*] 7 Co. 23. But's case. 10 Co. 59, 60. (Cro. Ja. 173. Post. 142. a. 144. a. 5 Co. 3. 2 Saund. 303. 2 Ro. Abr. 446. 6 Co. Mountjoy's case. Noy, 60.)

[*c*] 30 Ass. p. 5. 12 Ass. 20. 20 H. 4. 10. 1 H. 4. 1, 2, 3. 11 H. 4. 82. 19 E. 2. Fines, 126.

44 E. 3. 45. 9 Ass. 24. 26 Ass. 60. 14 E. 3. Scir. fac. 122. 5 E. 3. 68. 17 E. 3. 35. 11 H. 4. 40. 3 H. 6. 21. 45. 10 H. 6. 12. 21 H. 6. 11. 5 H. 7. 39. 21 H. 7. 19. 17 E. 2. Ex. 112. 23 El. Dyer, 377.

But

(10) *For misrecital a lease shall commence immediately.* 6 *Rep. bishop of Bath's case.—The earl of Oxford by deed dated* 10 *Feb.* 27 *H.* 8. *demises to A. for* 21 *years; and afterwards by indenture reciting that he by indenture dated* 10 *Feb.* 28 *H.* 8. *had demised to A. for* 21 *years, demises the same land to B.* habendum *for* 31 *years from and after the expiration, surrender or forfeiture of the* said *lease. It was ruled, that B.'s lease should commence in computation immediately, because A.'s lease was misrecited.* H. 10 Car. B. R. Crook, n. 8. *Miller and Manwaringe. But if in case of such a misrecital, the* habendum *be from and after the demise and indenture made to A. and it is not said the* said *demise, then the second lease shall commence after the true lease notwithstanding the misrecital.* M. 1 & 2 P. & M. Rot. 648. *Mount and Hodgken, Bendl. n.* 71. Hal. MSS.—See Cro. Cha. 397, and N. Bendl. 38. See further as to the commencement of leases and the effect of misrecitals in that respect, Shep. Touch. 272. New Abr. *Leases*, L. and Vin. Abr. *Estate*, Z. a. and *Grant*, R. 4.—[Note 283.]

(1) Lord Coke confines the rule to common persons, because the king may reserve rent out of an incorporeal inheritance; the reason of which is that he by his prerogative can distrain on all the lands of his lessee. 4 New Abr. 192, and 339.—[Note 284.]

(2) The case of a lease by *deed* is put, because in general things incorporeal will not pass without deed. Post. 48. a. 49. a. 169. a. and ante 9. a.—[Note 285.]

(3) 12 *H.* 4. 17. Vid. supra *fol.* 44. *b. the case of the precentor of Paul's, according to which rent on lease for years of tithes is incident to the reversion.* Hal. MSS.—See ante 44. b. n. 3.—[Note 286.]

(4) That the common law did not allow debt for rent on freehold leases whilst they continued is certain, though the reason is not quite so clear. See 3 Blackst. 233. It has been accounted for by suggesting, that the remedies by

But if a man demiseth the vesture or herbage of his land, he may reserve a rent, for that the thing is maynorable, and the lessor may distreine the cattell upon the land (5): and so a reversion, or a remainder of lands or tenements may be granted reserving a rent, for the apparent possibility that it may come in possession (6), and they are tenements within the words of *Littleton*.

[a] It appeareth by *Littleton*. that *reservando* is an apt word of reserving a rent, and so is *reddendo, solvendo, faciendo, inveniendo, dummodo,* and the like (7).

[a] 40 E. 3. 47. 8 E. 3. 67. 21 E. 4. 62. 3 H. 6. 45. 10 El. Dy. 276.

31 Ass. p. 30. 3 Ass. 9. 26 Ass. 66. 22 E. 3. Br. 291. 3 E. 4. 8. Pl. Com. en. Browning and Beesten's case, fo. 131, 132, &c.

[b] And note a diversity between an exception (which is ever of part of the thing granted and of a thing *in esse*) for which, *exceptis, salvo, præter,* and the like, be apt words; and a reservation which is alwaies of a thing not in *esse*, but newly created or reserved out of the land or tenement demised. [c] *Poterit enim quis rem dare et partem rei retinere, vel partem de pertinentiis, et illa pars quam retinet semper cum eo est et semper fuit.* [d] But out of a generall a party may be excepted, as out of a mannor, an acre, *ex verbo generali aliquid excipitur,* and not a part of a certainty, as out of twenty acres one.

[b] 50 E. 3. 12. 13 Ass. 9. 38 E. 3. 10. 21 E. 3. 4. 34 Ass. 11. 29 E. 3. 14. 3 H. 6. 45. 10 H. 6. 3. 41. 33 H. 6. 1. 35 H. 6. 34. 17 Ass. 14 H. 8. 1. 44 E. 3. 43. [d] 9 El. Dy. 264.

Pl. Com. 361. [c] Bract. li. 2. f. 32. b. & f. 249. 38 H. 6. 38. 14 H. 8. 1. 22 E. 3. 8. 2 E. 3. 56. 34 Ass. 11.

It is further to be observed, that the lessor cannot reserve to any other but to himself, for *Littleton* saith, *reserve to himselfe.* [e] If two jointenants be, and they make a lease for yeares by paroll, or deed poll, reserving a rent to one of them, this shall enure to them both; but if it be so reserved by deed indented, it shall enure to him alone by way of conclusion.

[e] 5 E. 4. 4. 14 E. 3. Bre. 282. 8 Co. 70, 71.

[f] *Littleton* here is putting of a case, and not making a lease, for then he would not reserve the rent to him, but to him

[f] Vid. Sect. 214, 215, 216, &c. 10 E. 4. 18. 30 H. 8. Dy. 45.

11 E. 3. Ass. 86. 27 H. 8. 19. 21 H. 7. 25.

and

---

by *cessavit* and distress were deemed sufficient securities for the rent and services. See Gilb. on Rents, 93, and Gilb. on the Action of Debt in his Cas. in L. and Eq. 370. But it may be proper to observe, that the *cessavit* seems to have been first given by the 6 E. 1. c. 4. though the lord's right of seizing the land for substraction of services, which continued till it was taken away by the 52 H. 3. c. 22. was a remedy in some respects similar, and furnishes occasion for the same observation. See 2 Inst. 295, and Wright's Ten. 197. Note that the 8 Ann. c. 14, now gives debt for rent on a lease for life; on which statute Mr. serjeant Hawkins queries whether it doth not extend to leases of incorporeal hereditaments. Hawk. Abr. of Co. Litt. 73.—[Note 287.]

(5) Quære, *how assise shall be brought in case of herbage.* 17. *E.* 3. 75.—Hal. MSS.

(6) *And after the particular estate determined, distress may be made for all arrears.* 10 *E.* 4. 3. Hal. MSS.—[Note 288.]

(7) *Lease for years by indenture, and lessee covenants to pay 5l. a year; this is a reservation. Dy.* 276. *H.* 6 Car. B. R. *Crook, n.* 1. *Drake and Munday. But if there be* reddendo *rent and the lessee covenants to pay two capons, there it seems to be only covenant.* M. 40, 41 Eliz.. *Bruerton's case.* Hal. MSS.—See Cro. Cha. 207, and Hardr. 326.—[Note 289.]

and his heires, for otherwise the rent shall determine by his death, if he die within the terme (8). [g] But if he reserve a rent generally without shewing to whom it shall goe, it shall go to his heires. If he reserve a rent to him and his assignes, yet the rent shall determine by his death, because the reservation is good but during his life. So it is if he reserve a rent to him and his executors it shall end by his death, because the heire hath the reversion, and the rent was incident to the reversion (9). So if a man warrant land to *B.* and his assigns, the assignee must vouch during the life of *B.* for the warrantie continues but only during the life of *B.* for the warranty is but for life, for want of words of inheritance. But if the warranty be to *B.* his heires and assignes, so as he hath an inheritance therein, then his assignee shall vouch after his decease. So if the rent be reserved to the lessor, his heires and assignes, so as it be incident to the inheritance, then shall all the assignees of the reversion enjoy the same.

[g] Mich. 5 Ja. in repl. inter Wootton & Edwin, Bank le Roy. Hill. 33 El. Rot. 1431. in Bank le Roy, inter Richmond & Butcher. (Post. 215. b. 2 Ro. Abr. 450. 12 Co. 35. 2 Ro. Abr. 743.) Vid. for this word Distreine, Sect. 136. 5 Co. 112. Hob. 170.

"*Yearely rent.*" So it is if the rent be reserved every two or three or more yeares (10). Of rents *Littleton* doth excellently treat hereafter in his Chapter of Rents, and therefore in this place thus much shall suffice.

"*To distraine for the rent.*" Here it is necessary to be seene of what things a distresse may be taken for arrent, and how the distresse ought to be demeaned. [h] 1. It must be of a thing whereof a valuable property is in some body, and therefore dogs, bucks, does (11), conies, and the like that are *feræ naturæ* (12) cannot be distreyned. 2. Although it be of valuable pro

[h] 14 H. 8. 25. 2 E. 2. tit. Distress. 6 R. 2. Reseous, 11. 7 E. 3. Avowr. 199. 15 E. 2. Avowr. 2. (1 Ro. Abr. 666. Cro. El. 852.)

pertie,

---

(8) *Rent, reserved to him and his assigns during the term, or to him, his executors and assigns during the term, determines by the lessor's death.* T. 2 Car. B. R. *Noy, n.* 412. 12 *Co. n.* 20, and Hil. 32 Eliz. *Richmond's case.* Hal. MSS.—See Noy, 96. 12 Co. 35, and Cro. Eliz. 217.—But notwithstanding the cases here cited by lord Hale, it was adjudged, whilst he was chief justice of the king's bench, that the words *during the term* are of themselves sufficient to carry the rent to the heir, if the lessor is seised in fee, and he concurred in the judgment. See the case of Sacheverell and Frogatt, East. 23 Cha. 2. in 2 Saund. 367.—[Note 290.]

(9) *Rendering rent to him, his heirs, executors and administrators, good, and it shall go to the heir. Drake's case,* supra. *Rendering rent to him or his successors good, and the successor shall have it.* 5 *Rep.* Hal. MSS.—[Note 291.]

(10) See further as to reservation of rent, Vin. Abr. title *Reservation,* and Gilb. Treat. on Rents.

(11) But deer kept in a private inclosure may be distrained. See 3 Blackst. Com. 8, where the case of Davis v. Powel, C. B. Hil. 11 G. 2, is cited.—[Note 292.]

(12) Some have thought, that a horse, on which one is riding, may be distrained for *damage feasant.* 2 Keb. 596. 1 Sid. 440. But the opinion was extrajudicial, and may be questioned; for 1 Ro. Abr. 664. A. pl. 4. and the case of 7 E. 3. Fitzh. Abr. Avowry, 199, are directly *contra.* See also n. 13, *infra,* and Cro. Eliz. 549. 596. 6 T. R. 138. Some also have inclined to think, that horses drawing a cart loaded with corn, though one is riding in the

pertie, as a horse, &c. yet when a man or woman is riding on him, or an axe in a man's hand cutting of wood and the like, they are for that time privileged and cannot be distreined (13).

[i] 3. Valuable things shall not be distreyned for rent for benefit and maintenance of trades, which by consequent are for the common wealth, and are there by authority of law; as a horse in a smith's shop shall not be distreyned for the rent issuing out of the shop, nor the horse, &c. in the hostry, nor the materialls in the weaver's shop for making of cloth, nor cloth or garments in a taylor's shop (14), nor sacks of corne or meale in a mill, nor in a market, nor any thing distrayned for damage *feasant*, for it is in custody of law and the like.

[i] 22 E. 4. 49 b. 7 H. 7. 1. b. 22 E. 4. 36. 4 E. 6. tit. Dist. Br. 74. (Cro. El. 596. Noy, 181.)

[k] 4. Nothing shall be distrayned for rent, that cannot be rendered againe in as good plight as it was at the time of the distresse taken (15); as sheaves or shockes of corne or the like cannot be distrayned for rent (16), but for damage *feasant* they may be distreyned (17). But charretts or carts with corne may be distreyned for rent, for they may be safely restored.

[k] 18 E. 3. 4. a. 11 H. 7. 14. a. 21 H. 7. 39. b. 22 E. 4. 50. b. 2 H. 4. 15. (1 Ro. Abr. 667.)

[l] 5. Beasts belonging to the plow (18), *averia carucæ, shall*

[l] Okeham, 38. 39. Bra. lib. 4. f. 217. F. N. B. 90. A. Reg. 97. Flet. lib. 2. ca. 41. Mirr. ca. 2. sect. 15, 16. 4 E. 3. 1. 29 E. 3. 17.

not

---

the cart, may be distrained for rent, and for that purpose may be severed from the cart, if the person distraining does not choose to take the cart with the corn as well as the horses, all of which as it seems are equally liable to the distress. See 2 Keb. 529. 596. 1 Vent. 36. and 1 Sid. 422. 440, in which latter book the reporter makes a query, whether the man's being on the cart should not privilege the whole team. See Bro. Attach. 23. F. N. B. 93.—[Note 293.]

(13) *If ferrets and nets in a warren be taken* damage feasant, *it is good. But if they are in the hands of a man, they cannot be distrained any more than a horse on which a man is; nor can they be distrained, if they are out of the warren.* 2 *E.* 2. *Avowry*, 192. 7 *E.* 3. ibid. 199. Hal. MSS.—See Vin. Abr. *Distress*, A.—[Note 294.]

(14) *If A. brings yarn to his neighbour's house to weigh, it cannot be distrained by the lord. Noy, n.* 298. *Burley and Read.* Vid. 15 *E. Avowry*, 216. Hal. MSS.—See Noy, 68, and S. C. in Cro. Eliz. 549, and 596. For other cases in which things the property of strangers are privileged from distress for the sake of trade and commerce, see *Francis* and *Wyatt*, 3 Burr. p. 1498. In that case the question was, whether a person's chariot, which stood at a common livery stable, could be distrained for rent due from the keeper of the livery stable; and the court after two arguments appearing to be strongly inclined in favour of the distress, the owner of the chariot afterwards declined bringing the question to a third argument, which had been ordered by the court.—[Note 295.]

(15) 20 *H.* 7. 9. 13. 21 *E.* 4. 447. Hal. MSS.

(16) But now by the 2 W. and M. c. 5, sheaves or cocks of corn, or corn loose or in the straw, or hay in any hovel, stack or rick, or otherwise on the land, may be distrained for rent on demise, lease or contract.—[Note 296.]

(17) Sheep are equally privileged with *averia carucæ*, and cannot be taken, if any other distress can be found. See further 2 Inst. 133, 134, and the case cited in n. 18.—[Note 297.]

(18) But it has been adjudged, that beasts of the plough may be taken for the poor's rate under the 43 Eliz. because the remedy given by that and other statutes for compelling the payment of particular rates or sums of money, though

not be destreyned (which is the ancient common law of *England*, for no man shall be distreined by the utensils or instruments of his trade or profession, as the axe of the carpenter, or the bookes of a schollar) while goods or other beasts, which *Bracton* calls the *animalia*, (or *catella*) *otiosa*, may be distrained. [*m*] 6. Furnaces, caudrons, or the like, fixed to the freehold, or the doores or windowes of a house, or the like cannot be distrained (1). [*n*] Lastly, beasts that escape (2) may be distrained for rent, though they have not been *levant* and *couchant* (3). [*o*] Note, that he that distraines any thing that hath life, must impound them in a lawfull pownd within three miles in the same county, and that is either overt or open, in a pinfold made for such purposes, or in his owne close, or in the close of another by his consent (4). And it is there called open, because the owner may give his cattle meat and drinke without trespasse to any other, and then the cattle must be sustained at the perill of the owner. [*p*] Or it is a pownd covert or close, as to impownd the cattle in some part of his house, and then the cattle are to be sustained with meat and drink at the perill of him that distraineth, and he shall not have any satisfaction therefore. But if the distresse be of utensils of household, or such like dead goods which may take harme by wet or weather, or be stolne away, there he must impownd

[47. b.]

[m] 21 H. 7. 26. 3 E. 3. Ass. 46. 9.

[n] 7 H. 7. 1. b. 10 H. 7. 21. 11 H. 7. 4. a. 15 H. 7. 17. 18 E. 2. Avowrie, 219. 6 E. 4. 22 E. 4. 49. 4 E. 3. Distres. 18. 27 E. 3. 80. 2 H. 4. 16. (2 Leon. 7.) Doct. and Stud. lib. 2. cap. 27.)

[o] Marlebr. cap. 4. W. 1. ca. 16. 2 & 3 Ph. and Mar. cap. 13. Fleta, lib. 2 cap. 20. 6 H. 3. Avowrie, 242. 30 Ass. 38. 1 H. 6. 9. 22 E. 4. 11. F. N. B. 89. Doct. and Stud. lib. 2. cap. 27. 5 H. 7. fol. 8.

[p] 33 H. 8. tit. Distres. Br. 65. (1 Ro. Abr. 673.)

---

though called a distress, is in *effect* an *execution*. 1 Burr. p. 579. See acc. Saund. on 22 Ch. 2. against conventicles 39, which is referred to in Com. Dig. *Distress*, C. but not cited in the case in 4 Burr.—[Note 298.]

(1) At common law corn growing could not be distrained, because it adheres to the freehold. 1 Ro. Abr. 666. H. pl. 4. But now by the 11 G. 2. c. 19. landlords are empowered to distrain all sorts of corn, grass or other product growing on the estate demised, and to cut and gather them when ripe. —[Note 299.]

(2) *If they escape for want of inclosure by him who ought to repair, they are not distrainable. Adj.* 14 *Eliz. Dy.* 317. *The lord cannot distrain beasts which escape when they are gone out of the land, though they are within view.* Vid. 41 *E.* 3. 26. 14 *H.* 7. 8. 20 *H.* 7. 10. 15 *H.* 7. 17. 2 *E.* 4. 6. Hal. MSS.—See the next note.—[Note 300.]

(3) This doctrine has been objected to as too general; and several distinctions are taken, the sum of which seems to be, that if a stranger's beasts escape into another's land by default of the owner of the beast, as by breaking the fences, they may be distrained for rent immediately without being levant or couchant; but that if they escape there by default of the tenant of the land, as for want of his keeping a sufficient fence, then they cannot be distrained for rent or service of any kind till they have been levant and couchant, nor afterwards by a landlord for rent on a lease, unless on notice the owner of the beasts neglects to remove them; though it is said, that such notice is not necessary where the distress is by the lord of the fee for an ancient rent, or by the grantee of a rent charge. See this subject argued upon at large in the case of Kimp and Cruwes, 2 Lutw. 1573.—[Note 301.]

(4) And now by the 11 G. 2. c. 19. s. 10, persons distraining for rent may impound the distress on any convenient part of the land chargeable with the rent.—[Note 302.]

impownd them in a house or other pownd covert within three miles within the same county, for if he impownd them in a pownd overt he must answer for them.

[q] If the distresse be taken of goods without cause, the owner may make rescous; but if they be distrained without cause, and impounded, the owner cannot breake the pownd and take them out, because they are then in the custody of the law. [q] 4 E. 6. tit. Distres. 74. F. N. B. 100. H. (Post. 160. b.)

[r] But if a man distraine cattle for damage *feasant*, and put them in the pownd, and the owner that had common there make fresh suite, and finde the door unlocked (5), he may justifie the taking away of the cattle in a *parco fracto*. [s] If the owner breake the pownd, and take away his goods, the party distraining may have his action *de parco fracto*, and he may also take his goods that were distrained wheresoever he find them, and impownd them againe. [r] 3 E. 3. tit. Trans. 11. [s] 34 H. 6. 18.

It is called a writ *de parco fracto* of these words in the writ[t], *Parcum illum vi et armis fregit*. And the forme thereof appeares in the *Register* and *F. N. B.* [t] Regist. F. N. B. 100, 101.

But [illegible] to be observed, that for the rent due the last day of the terme, the lessor cannot distraine, because the terme is ended (6); and therefore some use to reserve the last halfe yeares rent at the feast of the nativitie of Saint *John Baptist* before the end of the terme, so as if the rent be not then paid, he may distraine betweene that and *Michaelmasse* following (7). (Doct. and Stud. lib. 2. cap. 9.)

"*Action of debt.*" Note a diversitie betweene a rent reserved upon a lease for yeares, reserving a yearely rent: the lessor may have severall actions of debt for every yeare's rent. But (1 Ro. Abr. 601. Post. 292. b.)

upon

---

(5) Vid. 30 *E.* 26, *where defendant pleads that he found the cattle* sans nul manner de fermure ne serrure d'autre engine. Hal. MSS.—[Note 303.]

(6) *For one cannot distrain the same day the rent grows due; but it must be the day after.* 21 *H.* 6. 40. Vid. 14 *H.* 4. 31. Hal. MSS.—By the 8 An. c. 14, rent may be distrained for after determination of the lease in the same manner as before, if the distress is made within six calendar months afterwards, and during the continuance of the landlord's title and the possession of the tenant from whom the arrears are due.—[Note 304.]

(7) See further as to distress 3 Blackst. Comment. 6 & 145, and in the several Abridgments, titles *Distress* and *Replevin*, and also Gilbert's Treatise on the law of Replevins. See also 2 W. & M. c. 5. 8 An. c. 14. 4 G. 2. c. 28, and 11 G. 2. c. 19. These statutes have made great alterations in the ancient law of distress, particularly by empowering persons, who distrain for rent of any kind, to sell the distress for payment of the rent in arrear, if the tenant or owner fails to replevy with sufficient security within five days after taking of the distress and giving the tenant notice of the cause. This improvement of the remedy by distress was first introduced by the 2 W. & M. c. 5, with respect to rents due on demise or contract, and afterwards by the 4 G. 2. c. 28, was extended to rents seck, rents of assise, and chief rents. Before these two statutes, the remedy by distress was very imperfect; for the distress was merely taken *nominæ pœnæ* to compel satisfaction, and could not be sold or used for the profit of the person distraining, except in case of the king and in some few other instances. Most of the other changes, made by the statutes since lord Coke's time, have been incidentally hinted at in the preceding notes. —Note 305.]

upon a bond or contract for payment of several summes, no action of debt lieth till the last day be past (8). But otherwise it is of a recognizance, which see at large and the reason thereof cap. Releases, Sect. 512, 513. [u] Note, that the lord shall not have an action of debt for relief or for escuage due unto him, because he hath other remedie; but his executors or administrators shall have an action therefore, because it is now become as a flower falne from the stocke, and they have no other remedy. Neither shall the lord have an action of debt for aid *pur file marier*, or *faire fitz Chivaler*, for the cause aforesaid.

[u] 7 H. 6. 13. 4 Co. 49. 8 Co. 16. 34 E. 1. tit. Avowrie, 233. 32 H. 8. Br. Reliefe, 11. F. N. B. 82, 83. Glanvil. lib. 9. cap. 35. Fleta, lib. 2. cap. 40. and lib. 3. cap. 14. Bracton, lib. 2. fol. 36. W. 1. cap. 35. 25 E. 3. cap. 11. Britton, fol. 57. & 70. (Post. 3. a. 1 Ro. Abr. 596.)

"*But in such case it behooveth, that the lessor be seised* (9) *in the same tenements at the time of his lease; for it is a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of the lease.* And the reason of this is, for that in every contract there must be *quid pro quo*, for *contractus est quasi actus contra actum*; and therefore if the lessor hath nothing in the land, the lessee hath not *quid pro quo*, nor any thing for which he should pay any rent. And in that case he may also plead, that the lessor *non dimisit*, and give in evidence the other matter (10).

"*Except* [x] *the lease be made by deed indented, &c.*" If the lease be made by deed indented, then are both parties concluded, [y] but if it be by deed poll, the lessee is not estopped to say, that the lessor had nothing at the time of the lease made. *A.* lessee for the life of *B.* makes a lease for yeares by deed indented, and after purchases the reversion in fee. *B.* dieth, *A.* shall avoid his owne lease, for he may confesse and avoid the lease which took effect in point of interest, and determined by the death of *B.* But if *A.* had nothing in the land, and made a lease for yeares by deed indented, and after purchase the land, the lessor is as well concluded as the lessee to say, that the lessor had nothing in the land (11); and here it worketh only upon the condition, and the lessee cannot confesse and avoid, as he might in the other case. [z] If a man take a lease of his owne land by deed indented reserving a rent, the lessee is concluded. [a] But if a man take a lease of the herbage of his owne land by deed indented, this is no conclusion to say, that the lessor had nothing in the land, because it was not made of the land itselfe: [b] but if a man take a lease for yeares of his owne land by deed indented, the estoppell doth not continue after

[x] 45 E. 3. 7. 20 E. 4. 10. 34 H. 6. 48. 35 H. 6. 34. 9 H. 6. 35. 14 H. 4. 22. [y] 2 E. 2. Estop. 253. 39 E. 3. 13. Pl. Com. 434. 18 E. 3. 16. 15 E. 3. Estop. 236. 14 H. 4. 32. (Mo. 20.)

[z] 14 H. 6. 23. 8 H. 4. 7.

[a] Resolve Pasch. 2 Eliz. in Communi Banco. (Cro. Cha. 110.

[b] Mich 31 & 32 Eliz. in Communi Banco adjudge in London's case.

---

(8) See New Abr. *Debt*, B. and Vin. Abr. *Debt*, O.

(9) Nota *this diversity. In pleading a lease one ought to say, that the lessor was* seised *and demised; but in count in debt for rent it is good without alleging seisin.* 20 *E.* 3. *Barr.* 132. 21 *H.* 7. 32. Hal. MSS.—[Note 306.]

(10) 18 *E.* 3. 16. *Brief*, 747. *Dy.* 122. *Martyne and Hardye.* Hal. MSS.

(11) Et videtur, *that by purchase of the land, that is turned into a lease in interest, which before was purely an estoppel.* Vid. tamen. P. 3 Car. C. B. *Crook, n.* 2. *Isham and Morris* Hal. MSS.—See Cro. Cha. 109.—[Note 307.]

after the terme ended (12). For by the making of the lease, the estoppell doth grow, and consequently by the end
[48. a.] of the lease, the estoppel determines (13), [c] and that part of the indenture which belonged to the lessee, doth after the terme ended belong to the lessor, which should not be if the estoppell continued.

[c] 38 H. 6. 24. 30 E. 3. 21. (Post. 229. a.)

Sect. 59.

AND it is to be understood, that in a lease for yeares, by deed or without deed (1), *there needs no livery of seisin to be made to the lessee, but he may enter when he will by force of the same lease. But of feoffements made in the country, of gifts in taile, or lease for terme of life; in such cases where a freehold shall passe, if it be by deed or without deed, it behoveth to have livery of seisin.*

LIVERY of seisin." (2) *Traditio*, or *deliberatio seisinæ*, is a solemnitie, that the law requireth for the passing of a freehold of lands or tenements by delivery of seisin thereof. [b] *Intervenire debet solennitas in mutatione liberi tenementi, ne contingat donationem deficere per defectu probationis* (3).

18 E. 3. fo. 16. 41 E. 3. 17. 40 Ass. 10. 2 Ass. 1. 2 E. 3. 4. 43 E. 3. Feoff. 51.

Pl. Com. 25. a. & 302. b. Vid. Sect. 66. (Post. 216.) [b] Bract. lib. 2. ca. 15.

And

(12) Vid. 4. *H.* 6. 7. *If disseisee makes lease for years by indenture to disseisor, he shall not have assise during this lease.* Hal. MSS.—[Note 308.]

(13) 30 *E.* 3. 21. Vid. 14 *H.* 6. 22, per curiam. *But if it be estoppel by matter of record, as by fine, &c. it continues after.* 2 *E.* 4. Hal. MSS.—[Note 309.]

(1) As to the distinction at common law between hereditaments lying in livery, which may be passed for any estate without deed or even writing, and those lying in grant, which could be transferred by deed only, and the alteration of our ancient law by the 29 Cha. 2. c. 3, which requires a deed or writing in most cases, see infra, n. 3. ante 9. a. and post. 49. a. 121. b. 169. a.

(2) For the origin and history of the transfer of lands by livery of seisin, see 2 Blackst. Comment. 311. Mad. Formul. Anglic. Dissert. 9, and Spelm. Gloss. and Du Fresn. Gl. voce *Investitura*.

(3) But since the introduction of uses and trusts and the statute of 27 H. 8, for transferring the possession to the use, the necessity of livery of seisin for passing a freehold in corporeal hereditaments has been almost wholly superseded, and in consequence of it the conveyance by feoffment is now very little in use. Before the statute of uses *equitable* estates of freehold might be created through the *medium* of trusts without livery, and by the operation of the statute *legal* estates of freehold may now be created in the same way. Those who framed the statute of uses evidently foresaw, that it would render livery unnecessary to the passing of a freehold, and that a freehold of such things as do not lie in grant would become transferrable by *parol* only without any solemnity whatever. To prevent the inconveniences which might arise from a mode of conveyance so uncertain in the proof and so liable to misconstruction and abuse, it was enacted in the same session of parliament, that an estate of freehold

[c] Bract. lib. 2. ca. 15 & 18. Brit. ca. 33. in fine fo. 87. Flet. lib. 3. cap. 15.

And there be two kinds of livery of seisin, viz. a liverie in deed, and a livery in law. A livery in deed is when the feoffor taketh the ring of the doore, or turfe or twigge of the land, and delivereth the same upon the land to the feoffee in name of seisin of the land, &c. *per hostium et per haspam et annulum vel per fustem vèl baculum, &c.*

[d] 6 Co. 26. Sharp's case.

A. seised of an house in fee, and being in the house, [d] saith to *B.* I demise to you this house for terme of my life: this is a good beginning to limit the state but here wanteth livery (4). A livery in deed may be done two manner of wayes. By a solemne act and words; as by delivery of the ring or haspe of the doore, or by a branch or twigge of a tree, or by a turfe of the land and with [e] these or the like words, the feoffor and feoffee both holding the deed of feoffment, and the ring of the doore, haspe, branch, twigge, or turfe; and the feoffor saying, Here I deliver you seisin and possession of this house, in the name of all the lands and tenements contained in this deed, according to the forme and effect of this deed; or by words without any ceremony or act (5); as, the feoffor being at the house doore, or within the house, Here I deliver you seisin and possession of this house, in the name of seisin and possession of all the lands and tenements contained in this deed; *et sic de similibus:* or, Enter you into this house or land, and have and hold according to the deed: or, Enter into the house or land, and God give you joy; or, I am content you shall enjoy this land according to the deed; or the like. For if words may amount to a liverie within the view, much more it shall upon the land (6). But if a man deliver the deed of feoffment upon the land, this amounts to no livery of

[e] See more of this Sect. 60. (2 Ro. Abr. 7.)

41 E. 3. 17. b. 41 Ass. p. 10. 38 Ass. p. 2. 38 E. 3. 11. 39 Ass. p. 12. 26 Ass. 39. 27 Ass. p. 61. 18 E. 3. 16. 6 Co. 26. Sharp's case. (Post. 37. Cro. Jam. 80.)

---

freehold should not pass by bargain and sale only, unless it was by indenture enrolled. See 27 H. 8. c. 16. The objects of this provision evidently were, first, to force the contracting parties to ascertain the terms of the conveyance by reducing it into writing; secondly, to make the proof of it easy by requiring their seals to it; and consequently the presence of a witness; and lastly, to prevent the frauds of secret conveyances by substituting the more effectual notoriety of enrolment for the more ancient one of livery. But the latter part of this provision, which if it had not been evaded would have introduced almost an universal register of conveyances of the freehold in the case of corporeal hereditaments, was soon defeated by the invention of the conveyance by lease and release, which sprung from the omission to extend the statute to bargains and sales for terms of years; and the other parts of the statute were necessarily ineffectual in our courts of equity because these were still left at liberty to compel the execution of trusts of the freehold though created without deed or writing. The inconveniences from this insufficiency of the statute of enrolments are now in some measure prevented by the 29 Ch. 2. c. 3, which provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them, otherwise than by writing. See post. 121. b.—[Note 310.]

(4) 9 *Rep.* 13. *Thoroughgood's case.* Hal. MSS.

(5) 43 *Ass.* 10. 18 *H.* 6. 16. *A. makes charter of feoffment to uses to B. and B. being on the land, A. says,* I am content you shall have this house and land according to the deed made to you; *it is not livery, because it imports only assent and is future.* H. 6 Jac. *Maund's case. Ley, n.* 3. Hal. MSS.—See Ley, 2.—[Note 311.]

(6) But Cro. Jam. 80, and Ley, 2, seem *contra.*

of the land, for it hath another operation to take effect as a deed: but if he deliver the deed upon the land in name of seisin of all the lands contained in the deed, this is a good livery: and so are other books intended that treat hereof, that the deed was delivered in name of seisin of that land. Hereby it appeareth, that the delivery of any thing upon the land in name of seisin of that land, though it being nothing concerning the land, as a ring of gold, is good, and so hath it beene resolved by all the judges; and so of the like.

43 E. 3. tit. Feoff. 51. 35 H. 8. Br. Feoff. (9 Co. 136. b. 1 Leon. 207.)

50 E. 3. Rot. Parl. nu. 30.

If divers parcels of land be conteyned in a deed, and the feoffor delivers seisin of one parcell according to the deed, all the parcels doe passe, albeit he saith not (in name of all, &c.) because the deed containeth all. And so if there be divers feoffees, and he make livery to one according to the deed, the land passeth to all the feoffees (7); and yet the plainer way is to say (in the name of the whole, or of all the feoffees)(8).

(Post. 50. a.) 13 E. 3. Estop. 177.

If a man make a charter in fee, and deliver seisin for life *secundum formam cartæ*, the whole fee simple shall passe, for it shall be taken most strongly against the feoffor. Note, that these words (*secundum formam cartæ*) are understood according to the quantitie and quality of the effectuall estate contained in the deed. If a man make a lease for yeares by deed, and deliver seisin according to the forme and effect of the deed; yet he hath but an estate for yeares, and the liverie is void, as *Littleton* saith. So if *A.* by deed give land to *B.* to have and to hold after the death of *A.* to *B.* and his heires, this is a void deed, because he cannot reserve to himselfe a particular estate, and construction must be made upon the whole deed; and if livery be made according to the forme and effect of the deed, the livery also is void, because the livery referreth to a deed that hath no effect in law, and therefore it cannot worke *secundum formam et effectum cartæ* (1). And so it was adjudged, *et sic de similibus.* * And it is to be observed, that neither the feoffor being absent can make livery, nor the feoffee being absent can take livery, but by warrant of attorney, by deed, and not by parol, because it concerneth matter of freehold (2).

[48. b.]

Ibidem. (2 Co. 246. Post. 222.) 7 E. 4. 25. 29 Ass. 40. 10 Ass. 19. 43 Ass. 20. (Hob. 171. Plow. 155. 197. 1 Sid. 82. 2 Ro. Abr. 7. 1 Co. 127. 129. Cro. Jac. 376. Mich. 33 & 34 Eliz. in the King's Bench, inter Hogge & Crosse, for lands in London. Vid. Pl. Com. 395.

* See more of this Sect. 66. 11 H. 4. 71. 19 Ass. 9. 19 H. 8. 9. b. (2 Ro. Abr. 8. Post. 359. 2 Sid. 61.)

Vide

---

(7) *But if it be without deed nothing passes to the others.* *Dy.* 14. 35. Hal. MSS.

(8) 15 *E.* 4. 18. 18 *E.* 4. 12. 18 *H.* 6. 9. 22 *H.* 6. 1. 40 *E.* 3. 40. Hal. MSS.

(1) *Charter of feoffment* habendum a die datus, *Ruled*, 1. *If livery be made the same day* secundum formam cartæ, *it is void.* 2. *If it was after the day by the feoffer himself, it is good.* 3. *If there be letter of attorney to deliver seisin in the deed, or it was at the same time, and it is delivered after the day, yet it is not good, because the authority was given at a time when it was a void charter. But* 4. *If letter of attorney be made after the day, and livery is made according to the deed, it is good.* *Hob.* 314. *Greenwood and Tiler.* *T.* 3 Car. *Owen and Price.* C. B. H. 3 Jac. Rot. 216. B. R. *Hennings and Paucharden.* *So there is a diversity between this and a grant of a reversion* habendum *from a day to come, for attornment after the day doth not aid the grant.* 2 *Rep.* 55. *Buckler's case,* Hal. MSS.—See Cro. Jam. 563, and 153.—[Note 312.]

(2) *Adjudged, that feoffee being absent cannot take livery, nor feoffer being absent*

Bridgewater's case. (Ante 4. b. Post. 190. b.)

Vide Sect. 1, in *Bridgewater's* case, where a man hath a moveable estate of inheritance, for example there put, in 13 acres: the question is, where livery shall be made. First, if they be parcel of a mannor, they may passe by the name of the mannor; but if they be in grosse, then the charter of feoffment must be of 13 acres lying and being in the meadow of 80 acres, generally, without bounding or describing of the same in certaintie; and livery of the seisin of any 13 acres allotted to the feoffee for a yeare *secundum formam cartæ* is a good livery to passe the content of 13 acres wheresoever the same lie in that meadow. In the second case, where one entire mannor is separate and divided, as is aforesaid, there is no question but the livery must be made of that mannor; but in the other case, where two mannors are separate, and divided *alternis vicibus*, there the charter of feoffment must be made of both, and liverie in that mannor which he seised of in any one yeare *secundum formam cartæ*, and the next yeare in the other *secundum formam cartæ*: for there are two distinct mannors, and severall estates in them (3).

Vide Sect. 1.

38 E. 3. 11. 38 Ass. p. 2. 43 Ass. p. 20. Temps H. 8. tit. Feoffments, Br. 70. 18 E. 3. 16. b. 28 H. 8. f. 18. 9 E. 4. 39, per Moyle. Bract. lib. 2. cap. 18. & lib. 4. fo. 225. a. (1 Co. 156. Post. 253. a.)

A livery in law is, when the feoffor saith to the feoffee, being in the view of the house or land, (I give you yonder land to you and your heires, and goe enter into the same, and take possession thereof accordingly) and the feoffee doth accordingly in the life of the feoffor enter, this is a good feoffment, for *signatio pro traditione habetur* (4). And herewith agreeth *Bracton: Item dici poterit et assignari, quando res vendita vel donata sit in conspectu, quam venditor et donator dicit se tradere:* and in another place he saith, *in seisinâ per effectum et per aspectum.* But if either feoffor or the feoffee die before entry the livery is voyd (5). And livery within the view is good where there is no deed of feoffment [*a*]. And such a liverie is good albeit the land lie in another county. [*b*] A man may have an inheritance in an upper chamber (A), though the lower buildings and soile be in another, and seeing it is an inheritance corporeall it shall passe by livery. [*c*] A man maketh a charter of feoffment, and delivers seisin within the

[a] 9 E. 4. 39. 38 E. 3. 11. [b] 9 E. 4. 28. 40. 5 H. 7. 9. 3 H. 6. tit. Pleint, 1. 11 H. 4. 32. 11 E. 3. Ass. 86. [c] 38 Ass. p. 23.

view,

---

absent make livery, by attorney by parol. *T.* 1659. *Gregory and Badbourne. But a lease for years may be delivered by attorney by* parol *as has been often adjudged.* Hal. MSS.—[Note 313.]

(3) Vid. 8 *E.* 2. *Feoffments*, 111. *Livery by the lord of any part of the manor without going to it; but* contra *if not parcel.* Hal. MSS.—[Note 314.]

(4) Nota *the case of* 38 *Ass.* 2. *A. makes feoffment to B. within the view, and afterwards marries her, and afterwards claims to the use of the wife; it is a good execution of the livery.* 38 *E.* 3. 11. Vid. 42 *E.* 3. *Feoffments*, 54. *Livery good, though the land is not within view.* Hal. MSS.—[Note 315.]

(5) 1 *Rep. rector of Cheddington's case.* Hal. MSS. And see Bro. Feoff. Detinue, 70; and there said to have been held *sæpe temp.* H. 8. See Acc. 1. Co. 156. a. Shepp. Touch. 216. 2 Ro. A. 3 I. pl. 1. 38 E. 3. 11 B. and 32 Ass. 2. The case of Parsons *v.* Pearse in Poll. 45. 2 Lev. 34. 1 Vent. 186. 1 Mod. 91. 2 Keb. 872. and 880, is a curious case on the effect of marriage of a woman, being feoffor, with the feoffee before entering, after livery within the view. See also the case in Perk. sect. 214, and Fitz. Abr. Feoff. & Faits, 47.

(A) See Keilway, 98.

view, the feoffee dares not enter for feare of death, but claimes the same, this shall vest the freehold and inheritance in him, albeit by the livery no estate passed to him, neither in deed nor in law, so as such a claime shall serve, as well to vest a new estate and right in the feoffee, as in the common case to revest an ancient estate and right in the disseisee, &c. as shall be said hereafter more at large in the Chapter of Continuall Claime. And so note a liverie in law shall be perfected and executed by an entry in law. [*d*] If a man be disseised, and make a deed of feoffment and a letter of attorney to enter and take possession, and after to make livery *secundum formam cartæ*, this is a good feoffment albeit he was out of possession at the time of the charter made (6), for the authority given by the letter of attorney is executory, and nothing passed by the delivery of the deed till livery of seisin was made. And in ancient letters of attorney power is given to others to take possession for the feoffor. But if a man be disseised, and make a writing of a lease for yeares and deliver the deed, and after deliver it upon the ground, the second delivery is voyde, for the first delivery made it a deed, and for that the lease for yeares must take effect by the delivery of the deed, therefore the deed delivered when he was out of possession was voyde. But so it is not of a charter of feoffment, for that takes effect by the livery and seisin. But if the lessor had delivered it as an escrowe, to be delivered as his deed upon the ground, this had beene good.

[*d*] Hill. 37 Eliz. Rot. 620, in Com. Banco, inter Browne & Terry adjud. Dyer, 16 Eliz. 234. 3 Eliz. Dyer, 131. (6 Co. 26.)

3 Co. 35. inter Jennings & Bragge.

(2 Co. 31. b.) (3 Co. 35. b.)

A man makes a lease for yeares, and after makes a deed of feoffment and delivers seisin, the lessee being in possession and not assenting to the feoffment, this livery is voyd; for albeit the feoffor hath the freehold and inheritance in him, yet that is not sufficient, for a livery must be given of the possession also (7); but if the lessee be absent, and hath neither wife nor servants (though he hath cattell) upon the ground, the livery of seisin shall be good.

(2 Ro. Abr. 4. Dy. 33. a. Mo. 11.)

2 Co. 31, 32. Bettisworth's case.

If a man be seised of an house, and of divers severall closes in one countie in fee, and makes a lease thereof for yeares, and afterward maketh a feoffment in fee of the same, and makes liverie of seisin in the closes (the lessee or his wife or servants then being in the house) the livery is voyd for the whole; for the

---

(6) H. 22 Car. B. R. *Hinde's case.* M. 4 Jac. B. R. *Sparks and Darcy,* 37 Eliz. *Brown's case. Charter of feoffment of lands in the hands of the king with letter of attorney to make livery, and afterwards the feoffor sues* ouster maine, *and the attorney makes livery; it is good.* 25 Eliz. *Feoffment on condition which is broken; feoffor makes charter of feoffment and letter of attorney to deliver seisin, the attorney enters and makes livery; it is good. Dick's case.* Hal. MSS.—[Note 316.]

(7) P. 40 Eliz. B. R. *A. tenant for years; the reversion is granted to B. for life, remainder to C. in tail, remainder to D. in fee; D. by deed infeoffs A. and one E. and makes livery: it was ruled to be void, because there was not any surrender, and A. was in possession and could not take by livery. Edes and Knotsford. A. tenant for years, remainder to the king for years, remainder to B. in fee; B. enters and ousts A. and makes livery; it is good, notwithstanding the mesne remainder for years to the king; but it would have been otherwise, if the king's remainder had been for life.* Hal. MSS.—[Note 317.]

the lessee cannot be upon every parcell of the land to him demised, for the preservation or continuance of his possession therein. And therefore his being in the house, or upon any part of the land to him demised, is sufficient to preserve and continue his possession in the whole from being ousted or dispossessed (8).

7 E. 4. 20. a. pertouts les Just. 11 H. 4. 71. Pl. Com. 152. 10 E. 4. 8. ... [49. a.]

☞ Note a great diversity, when a man hath two waies to passe land, and both of the waies be by the common law, and he intendeth to passe them by one of the wayes, yet *ut res magis valeat*, it shall passe by the other. But where a man may passe lands either by the common law, or by raising of an use, and settling it by the statute, there in many cases it is otherwise (1). For example, if a man be seised

(Mo. 99.)

(8) But nota, *if lessee consents, livery is good, though he be upon the land.* Tr. 40 Eliz. *Shephard and Grey. A. makes lease for years, and afterwards makes charter of feoffment with letter of attorney to enter and take possession and seisin for him, and such seisin and possession to deliver; the attorney makes livery with the consent of the lessee, he being in the land; and it was ruled good.* P. 1651. *Wegg and Villers.—Lessee for years consents that feoffor shall make livery, and afterwards goes out of the country, leaving servants on the land; the feoffor enters and makes livery; it was ruled good. But it was ruled, that if lessee be absent, livery by lessor by consent of servants is void, they being upon the land.* T. 7 Jac. C. B. *n.* 45. *D. D. Blackleach and Small. But if A. be lessee of* White Acre *by one demise, and of* Black Acre *by another demise of the same lessor; or if there be lessee of* White Acre *and* Black Acre *by one demise, and he makes lease for years of* Black Acre, *and lessor enters on* Black Acre *and makes livery, though A. be on* White Acre, *it is good.* 2 *Rep. Bettisworth's case.* Hal. MSS.—[Note 318.]

(1) Where land shall pass by one way or the other at common law.—*Termor for years makes charter of feoffment by the word* dedi, *with letter of attorney in the same deed to deliver seisin, and afterwards livery is made, yet it is a forfeiture and the term shall not be said to pass first by the delivery of the deed, as it seems.* *Dy.* 362.—*Grant to a tenant at will shall enure as a confirmation.* *Dy.* 269.—29 Eliz. B. R. *Leonard's case. If A. makes lease for years to B. and afterwards makes charter of feoffment to B. being in possession with the words* dedi et concessi, *with letter of attorney to deliver seisin; before livery, he may use the deed as a confirmation in fee, and after livery as a feoffment. And there it was also agreed, that if by indenture in consideration of money A. bargains and sells to B. with letter of attorney, and the deed is enrolled, it is a good bargain and sale.*—17 Eliz. *Lessee for life and he in remainder in fee make charter of feoffment, and letter of attorney to make livery, which is made accordingly, it is good, and the remainder shall not be said to pass by delivery of the deed.*—Where one shall have election to take by statute or common law. Vid. *Dy.* 302. *Grant of reversion to a brother averred to be* pro fraterno amore.—2 *Rep. Sir R. Heyward's case.* Demisi *or* concessi *taken either as lease or bargain and sale.* 7 *Rep. Bedell's case. Grant to a son.* T. 15 Car. B. R. *entered* H. 11 Car. Rot. 459. *Father gives and grants to his son and his heirs,* habendum *after the death of the father; and no consideration of blood or marriage is mentioned in the deed: an estate shall not arise by way of use.* Nota videtur, *that there was a letter of attorney in the deed.* P. 1657. *Jackson's case. A. by indenture for love and affection grants to B. a rent* in esse, habendum *to B. for life, remainder to the use of C. in tail, remainder to the use of A.'s right heirs, and attornment was made, but not till after the death of A.; and it being found that B. was cousin, it was ruled that an estate should arise by way of use without attornment.*

seised of two acres in fee, and letteth one of them for yeares, and intending to passe them both by feoffment, maketh a charter of feoffment, and maketh livery in the acre in possession, in name of both, onely the acre in possession passeth by the livery; yet if the lessee attorne, the reversion of that acre shall passe by the deed and attornement, for he is in by the common law, and in the *per* in both, and so in the like. But otherwise it is, if the father make a charter of feoffment to his son, and a letter of attorney to make livery, and no livery is made, yet no use shall rise to the son, because he should be in by the statute in another degree, viz. in the *post*, and the intention of the parties worke much both in the raising and direction of uses. So if *cesty que use* and his feoffees had joyned in a feoffment after the statute of 1 *R.* 3, &c. it had beene the feoffment of the feoffees, and the confirmation of *cesty que use*, for the state at the common law shall be preferred. So to conclude this point; of freehold and inheritances, some be corporeall, as houses, &c. lands, &c. these are to passe by liverie of seisin, by deed or without deed; some be incorporeall, as advowsons, rents, commons, estovers, &c. these cannot passe without deed, but without any liverie (2). And the law hath provided the deed in place or stead of a livery. And so it is if a man make a lease, and by deed grant the reversion in fee, here the freehold with attornement of the lessee by the deed doth passe, which is in lieu of the livery. See *Bract.* lib. 2. cap. 18. *Et est traditio de re corporali de personâ in personam de manu, &c. gratuita translatio, et nihil aliud est traditio in uno sensu, nisi in possessionem inductio, de re corporali; et ideo dicitur, quòd res incorporales non patiuntur traditionem sicut ipsum jus quod rei sive corpori inhæret, et quia non possunt res incorporales possideri sed quasi, ideo traditionem non patiuntur.*

2 Co. 35, 36. Sir R. Heyward's case.' (1 Sid. 25, 26. 82. 8 Co. 94. 3 Leo. 371.) 1 R. 3. ca. 1. 21 H. 7.

This ancient manner of conveyance by feoffment and livery of seisin, doth for many respects exceed all other conveyances. For (as hath beene said) (3) if the feoffor be out of possession, neither fine, recovery, indenture of bargaine and sale inrolled, nor other conveyance, doth avoid an estate by wrong, and reduce cleerly the estate of the feoffee, and make a perfect tenant of the freehold, but onely livery of seisin upon the land: the other conveyances being made off from the ground, doe sometimes more hurt than good, when the feoffor is out of possession (4). And yet in some cases a freehold shall passe by the

2 Co. 55. Buckler's case.

---

attornment.—Where one may elect one way or the other by statute.—Vid. 7 *Rep. Bedell's case. If father in consideration of money bargains and sells to his son, there ought to be an enrolment. But if A. for natural love to his son, and also for money grants to the son, the land shall pass without enrolment, because the consideration of love is expressed.* M. 1649. *Wats and Dicks*, B. R. Hal. MSS.—See further as to electing in what way an estate shall pass, Yelv. 124, the case of Crossing and Scudamore, 1 Ventr. 137, and 1 Mod. 175, and Barker and Keat in 2 Mod. 249. See also Vin. Abr. *Uses*, B. a. and the observation in Hawk. Abr. of Co. Litt. 83.—[Note 319.]

(2) See ante 9. a. 47. a. 48. a. and post. 121. b. and 169. a.

(3) Ante 9. a.

(4) *For this see* 2 *Rep.* 56, *Buckler's case. Fine by disseisee extinguishes his right, and shall enure to the disseisor. But see this denied* M. 13 Car. B. R. *Crook*,

1 H. 7. 28. 8 H. 7. 4. 31 H. 6. 16. 8 H. 7. 4. M. 31 E. 1. cor. Rege, Randulph Huntingsel's case. (5) 3 E. 3. Coron. 310. 11 H. 4. 33. V. Sect. 74.

the common law without livery of seisin; as if a house or land belong to an office, by the grant of the office by deed, the house or land passeth as belonging thereunto. So if a house or chamber belong to a corodie, by the grant of a corodie, the house or chamber passeth. A freehold may by custome be surrendered without livery, as hereafter shall be said (6): and so of assignment of dower *ad ostium ecclesiæ*, or otherwise, and by exchange a freehold may passe without livery, as hereafter shall be said in this Chapter.

Crook, n. 7. *Fitzherbert's case.* Hal. MSS.—See Cro. Cha. 483, and S. C. W. Jo. 397. In this last book it is said, that the judges did not deliver any opinion on the point. See further W. Jo. 317. Cro. Cha. 305, and Gouldsb. 162.—[Note 320.] Both Brampton, C. J. and Crook, J. held *contra*, but it was not a point adjudged, and so far Jones and Crook agree. The doctrine was further denied by the judges, conceived what is in 2 Co. 5. b. at the end of Buckler's case, to be no law. It is observable also against the doctrine at the end of Buckler's case when in court, that on a question put by Coke, attorney-general, to B. R. as in Gouldsb., both Popham, C. J. and Gawdy, J. answered, "nay truly." This appears as in Gouldsb. R. 162. Note also, that Gawdy was not made a justice of B. R. till 17 Nov. 40 Eliz. which was some little time subsequent to the decision of C. B. in Buckler's case. It should seem from Coke putting the question to B. R. he was not clear that what he states at the end of Buckler's case as doctrine said in it was law; nor do I understand, that what comes from him in this respect should be considered as a point adjudged in Buckler's case, either in B. R. or in C. B., nor do I at present look to the report in 2 & 29 Moore, 423, and Cro. Eliz. 450 & 585, as comprising any adjudication of such a point. Upon the whole, the doctrine stands as a mere *dictum* mentioned by lord Coke as passing from somebody in the course of Buckler's case, and on a sanction said to have been given to it by lord Bridgeman in charging the jury at Nisi Prius, in the Earl of Peterboro *v.* Bladworth, 1 Lev. 128, and it is opposed by all of the authorities before mentioned, countenanced by lord Hale, referring to the denial of it in Fitzherbert's case, Cro. Ch. 483, and made a question of by lord Coke himself in B. R. whilst Popham was C. J. and seemingly after Buckler's case. [8 B. & C. 497, and 10 B. & C. 181.]

(5) Rot. 74. Hal. MSS.

(6) Vid. 5 *Rep. Peryman's case.* Hal. MSS.—See 5 Co. 84. In Peryman's case the jury found, that in the manor of Portchester there was a custom, according to which all alienations of lands within that manor by writing, feoffment, or last will were void, unless presented to be a good custom. In the same case mention is made, that by the custom of Lidford Castle in Devonshire, a freehold of inheritance cannot pass his freehold except by surrender into the lord's hands. As to this latter kind of custom, in consequence of which the estates subject to it have been called *customary freeholds*, see post. 59. b. and Blackst. Law Tracts, 8vo. ed. vol. 1. p. 144.—[Note 321.]

Sect. 60.

BUT if a man letteth lands or tenements by deed or without deed for terme of yeares (per fait ou sans fait a (7) terme des ans), *the remainder over to another for life, or in taile, or in fee; in this case it behooveth that the lessor maketh livery of seisin to the lessee for yeares, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements. And if the termour in this case entreth before any livery of seisin made to him, then is the freehold and also the reversion in the lessor. But if he maketh liverie of seisin to the lessee, then is the freehold together with the fee to them in the remainder, according to the form of the grant and the will of the lessor.*

"*BY deed or without deed.*" For seeing that the remainders take effect by livery, there needes no deed (8). 22 H. 6. 1. 10 E. 4. 1. 18 E. 4. 13. (Plow. 25. a.)

"*The remainder*" is a residue of an estate in land depending upon a particular estate, and created together with the same, and in law *Latine* is called *remanere* (9). (Post. 143. a. Vaugh. 269.)

"*Maketh livery of seisin to the lessee.*" This livery is not necessary in this case for the lessee himselfe, because he hath but a terme for yeares, but it is for the benefit of them in the rem', so as the livery to the lessee shall enure for the benefit of them in the rem'; for the ☞ livery of the possession could not be made to the next in remainder, because the possession belonged to the lessee for yeares; and for that the particular terme and all the remainders made in law but one estate, and take effect at one time, therefore the livery is to be made to the lessee. But if a lease for yeares without deed be made to *A.* and *B.* the remainder to *C.* in fee, and livery is made to *A.* in the absence of *B.* in the name of both; it seemeth the livery is good to vest the remainder; and there is a diversity between two joynt attornies to receive livery for another, and livery and seisin is made to one of them in the name of both, this is cleerly void, because they had but a meer and bare authority (1), and they both doe in law make but one attorney, unlesse the warrant be joyntly and severally (2), but the lessee for years hath an interest in the land. Againe, if *A.* is to make a feoffment to *B.* and *C.* and their heires without deed, and *A.* makes livery to *B.* in the absence of *C.* in the name of both, and to their heires; this livery is void to *C.* because a man being absent cannot take a freehold by a livery, but by his attorney being lawfully authorised to receive livery (Post. 359. a.) (Ante 36. a. 9 Co. 137.)

[49. b.]

(Post. 143. a.) (5 Co. 94. b.) 10 E. 4. 1. 12 E. 4. 16. 15 E. 4. 18. 22 E. 4. 35. 40 E. 3. 10. 41. (3) Temps H. 8. Feoffments, 72. 6 H. 4. 2. b. Litt. 158. 3 H. 7. 13.

by

---

(7) un pur. *L. and M.*

(8) 12 *H.* 4. 20. Hal. MSS.—[See also Sanders on Uses.]

(9) *Sect.* 215. Hal. MSS.

(1) See further as to the difference between a naked authority and an authority coupled with an interest, post. 52. b. 113. a. and 181. b.

(2) See post. note 1, in 52. b.

(3) 18 *E.* 4. 12. Hal. MSS.

by deed, unlesse the feoffment be make by deed, and then the livery to one in the name of both is good (4).

Note, there is a diversity between livery of seisin of land, and the delivery of a deed; for if a man deliver a deed without saying of anything, it is a good delivery, but to a livery of seisin of land words are necessary; as taking in his hand the deed, and the ring of the doore (if it be of an house) or a turffe or twigge (if it be of land) and the feoffee laying his hand on it, the feoffor say to the feoffee, Here I deliver to you seisin of this house, or of this land, in the name of all the land contained in this deed, according to the forme and effect of the deed (as hath been said); and if it be without deed, then the words may be, Here I deliver you seisin of this house or land, &c. to have and to hold to you for life, or to you and the heires of your body, or to you and your heires for ever, as the case shall require.

Ruth, cap. 4. verse 7, 8. Deut. 25. 9. 10.

When the kinsman of *Elimelech* gave unto *Boas* the parcell of land that was *Elimelech's*, he tooke off his shoe, and gave it unto *Boas* in the name of seisin of the land (after the manner in *Israel*) in the presence and with the testimony of many witnesses.

Gen. 23. verse 11.

And when *Ephron* infeoffed *Abraham* of the field of *Machpelah*, he said to him, *Agrum trado tibi, &c.* I deliver this field to thee.

A man makes a lease for yeares to *A.* the remaider to *B.* in fee, and makes a livery to *A.* within the view; this livery is void, for no man can take by force of a livery within the view, but he that taketh the freehold himselfe.

(Mo. 14.)

"*And if the termour in this case entreth before any livery of seisin made, &c.*" By the entry of the lessee he is in actual possession, and then the livery cannot be made to him that is in possession, for *quod semel meum est, amplius meum esse non potest.* But if the lessor and lessee come upon the ground, of purpose for the lessor to make, and for the lessee to take livery, there his entry vests no actuall possession in him untill livery be made; for [a] *affectio tua nomen imponit operi tuo* (5). And therefore if it be agreed betweene the disseisor and disseisee, that the disseisee shall release all his right to the disseisor upon the land, and accordingly the disseisee entreth into the land, and delivereth the release to the disseisor upon the land, this is a good release, and the entry of the disseisee, being for this purpose did not avoid the disseisin, for his intent in this case did guide his entry to a speciall purpose. And so was it resolved [b] by sir *James Dyer*, and the whole court of common pleas, *Pasch.* 18 *Eliz.* upon evidence which I myselfe heard and observed. But if the disseisor enfeoffe the disseisee and others, there albeit the disseisee came to take livery, yet when livery is made, the disseisee is remitted to the whole in judgment of law as shall be said more at large in the Chapter of Remitter in his proper place.

[a] Bracton, lib. 1.

[b] P. 19 Eliz. in Communi Banc. Pl. Com. in Ass. de fresh-force, 91. 29 Ass. 26. 43 Ass. p. 3. 3 H. 6. 19. in formedon. (6)

---

(4) *Dy.* 14. 35. 18 *H.* 6. 9. 22 *H.* 6. 1. Hal. MSS.

(5) Nota, *if the lease for years with the remainder over be by deed, the deed ought not to be delivered till livery made; for otherwise the livery is bad.* H. 2. Eliz. *Helyar's case.* Vide *Bendl. n* 130. Hal. MSS.—See N. Ben. 85. and S. C. Mo. 14. 1 And 8.—[Note 322.]

(6) 9 *H.* 7. 1. 41 *E.* 3. 7. Hal. MSS.

[50. a.]

☞ Sect. 61.

AND if a man wil make a feoffment, by deed or without deed, of lands or tenements which he hath in divers townes in one countie, the livery of seisin made in one parcell of the tenements in one towne, in the name of all the rest, is sufficient for all other lands and tenements comprehended within the same feoffment in al other the townes in the same countie (1). *But if a man maketh a deed of feoffment of lands or tenements in divers counties, there it behoveth in every county to have a livery of seisin* (2).

(Post. 253. a.) (2 Co. 31. b.) (Post. 168. a.)

"*IN one countie.*" A *countie* is fetched from the *French*, and *shire* from the *Saxon*. For *scyran* in the *Saxon* tongue signifieth *partiri*, because everie countie or shire is divided and parted by certaine metes and bounds from another, and in *Latine* is called *Comitatus, à comitando*, for accompanying together. And for as much as the men of one county doe not accompany together with men of another county at countie courts, turnes, leets, and other courts, therefore in judgment of law they shall take no notice of a liverie in another countie to passe any lands in their owne countie. But of this more shall be said hereafter.

45 E. 3. 21.

Sect. 62.

AND in some case a man shall have by the grant of another a fee simple, fee tail, or freehold without livery of seisin. As if there be two men, and each of them is seised of one quantitie of land in one countie, and

---

(1) Vid. 11. Eliz. *Dy.* 283. Cestui que use of *three acres by three several feoffments in one county makes charter of feoffment of all and livery in one of the acres, it is pursuant to the statute and passes all.* Hal. MSS.—The statute meant is the 1 R. 3. c. 1, which empowers *cestui que use* to make effectual feoffments and conveyances against his feoffees in trust; and the case cited was of a feoffment before the 27 H. 8, for transferring uses into possession. It is stated, that the livery was made by attorney, and that was the cause of the doubt; it being said, by some, that the statute of R. 3, ought to be construed strictly, and to be confined to conveyances made by the *cestui que use* in his own person. See Bro. *Feoffment to Uses*, 28.—[Note 323.]

(2) Vid. *Dy.* 246. 22 *H.* 6. 10. *If a manor extends in two counties, livery in that part of the manor which is in one county, doth not pass that which is in the other county. So it is with respect to disseisin.* Hal. MSS.—But Mr. Perkins holds, that livery of parcel of such a manor in one county will pass the parcel in the other county. Perk. sect. 227. However, he admits, that if one be disseised of two acres in different counties, entry into the acre in one of the counties, though made in the name of both acres, will not extend to the acre in the other county. Perk. sect. 229.—[Note 324.]

In some books a material distinction is made; viz. between the site of a manor and its appurtenances; and it seems that the latter, though in a different county, may pass by livery in the county where the manor lies.

and the one granteth his land to the other in exchange for the land which the other hath, and in like maner the other granteth his land to the first grantor in exchange for the land which the first grantor hath; in this case each may enter into the other's land, so put in exchange, without any livery of seisin (1); *and such exchange made by paroll of tenements within the same county without writing is good enough* (2).

(4 Co. 121.)
45 E. 3. 21.
3 E. 4. 10.
9 E. 4. 21.
7 H. 4. 1.
8 H. 7. 4.
28 H. 6. 2.

HERE *Littleton* putteth a case where freehold, &c. shall passe without liverie of seisin, and thereupon putteth the case of an exchange of lands in one countie that is good by deed or without deed, without any livery, but if it be in severall counties there must be a deed. Also of things that lye in grant, as advowsons, rents, commons, &c. an exchange of them, albeit they be in one countie, is not good, unlesse it be by deed; and therefore *Littleton* putteth his case warily of land. And in case of a fine, which is a feoffment of record, of a devise by a last will, of a surrender, of a release or confirmation to a ☞ lessee for yeares, or at wil. In all these and some other cases a freehold, &c. (as hath beene said) may passe without livery. But this word (*exchange*) which our author here useth, is appropriated by law to this case, as it cannot be expressed by any periphrasis or circumlocution (3).

Vide Sect. 1.

[50. b.]

"In this case each may enter, &c." For by the exchange the parties, albeit the lands be all in one county, have no freehold in deed or law in them before they execute the same by entry; and therefore if one of them dyeth before the exchange be executed by entrie, the exchange is void; for the heire cannot enter and take it as a purchasor, because he was named onely to take by way of limitation of estate in course of descent.

9 E. 4. 38, 39.
45 E. 3. 20, 21.
45 E. 3. Exchange, 10.

---

(1) It is observable, that Littleton expresses himself concerning an exchange as of a transaction between *two;* and in a late case the court held, that an exchange in the strict legal sense of the word cannot be between *three*, the principles of it not being applicable to more than two *distinct* contracting parties for want of the mutuality and reciprocity on which its operation so entirely depends. For, 1. The consideration of an exchange and of the implied warranty incident to it is the receiving something with warranty from the *same* person, to whom something with warranty is given; but if there could be *three* distinct parties, each would give to one and receive from another. . 2. The implied condition of re-entry is, that re-entry may be made on him whose title fails; but if there could be three parties to an exchange, then each person would be liable to re-entry for the fault of another's title as well as of his own. See the case of Eton College in Wilson, v. 2. part 3, page 483, and post. n. 1. in 51. a. and n. 2. in 51. b. [See also Watkins's Conv. by Preston, 179; and Preston's ed. of Sheppard's Touchstone, 297; Sugden's Pow. 141.]—[Note 325.]

(2) But now by force of the statute of 29 C. 2. c. 3, a writing is necessary, if the exchange is of freeholds, or of terms for years being for more than three years—[Note 326.]

(3) See acc. post. 51. b. and Wils. vol. 2. part 3. p. 491. 496.

Sect. 63.

AND if the lands or tenements be in divers counties, viz. that which the one hath in one county, and that which the other hath in another county, there it behoveth to have a deed indented made betweene them of this exchange.

THIS is evident enough. But of what things an exchange may be made (which was a conveiance frequent in former times) is to be seene: and herein many things are to be observed. (Hob. 41.)

First, that the things exchanged [a] need not be *in esse* at the time of the exchange made. As if I grant a rent newly created out of my lands in exchange for the manor of *Dale*, this is a good exchange (4). (Post. 366. a.)

[a] 30 E. 1. Esch. 15. 8 E. 4. 10. 9 E. 4. 21. 14 H. 8. 20.

[b] Secondly, there needeth no transmutation of possession, and therefore a release of a rent, or estovers, or right to land, in exchange for land, is good (5). (1 Ro. Abr. 812.)

[b] 6 E. 56. 30 E. 1. Es. 16. 16 E. 3. Esch. 2.

The things [c] exchanged need not be of one nature, so they concerne lands or tenements, whereof *Littleton* here speaketh. As land for rent or common, or any other inheritance which concerne lands or tenements, or spirituall things, as tythes, &c. for temporall, and tenure by a divine service for a temporall seigniory, &c. But annuities or such like which charge the person onely, and doe not concerne lands or tenements, cannot be exchanged for lands or tenements.

7 H. 4. 34. 3 E. 4. 11. [c] 9 E. 4. 21. 9 E. 3. 56. 21 E. 3. 6.

Sect. 64, 65.

AND note, that in exchanges it behooveth, that the estates which both parties have in the lands so exchanged, be equall; for if the one willeth and grant that the other shall have his land in fee taile for the land which he hath of the grant of the other in fee simple, although that the other agree to this, yet this exchange is voyde, because the estates be not equall.

IN the same manner it is, where it is granted and agreed betweene them, that the one shall have in the one land fee taile, and the other in the other land but for terme of life; or if the one shall have in the one land fee taile generall, and the other in the other land fee taile especiall, &c. So alwaies it behoveth that in exchange the estates of both parties be equall, viz. if the one hath a fee simple in the one land, that

---

(4) But in one of the books cited by lord Coke, the opinion is, that both of the things exchanged ought to be *in esse* at the time of the exchange. See 9 E. 4. 21.—[Note 327.]

(5) See as to this Fulb. Paral. 33. a. in the dialogue on exchanges. [Also Preston's Sheppard's Touchstone, vol. 2. p. 289.]

that the other shall have like estate in the other land; and if the one hath fee taile in the one land, the other ought to have the like estate in the other land, &c. and so of other estates. But it is nothing to charge of the equal value of the lands; for albeit that the land of the one be of a farre greater value than the land of the other, this is nothing to the purpose, so as the estates made by the exchange be equall. And so in an exchange there be two grants, for each party granteth his land to the other in exchange, &c. and in each of their grants mention shall be made of the exchange.

Estates. Vide Sect. 650. 4 Co. 121. Perk. 105. 3 Wils. 489.

"*IN exchanges it behooveth, that the estates be equal, &c.*" Equality in lands is threefold, viz. First equality in value: Secondly, equality in quantity of estate given and taken. Thirdly, equality in quality or manner of the estate given and taken. But as *Littleton* after saith, equality in value of lands in exchange is not requisite; neither equality in the quality or manner of the estate. And therefore if two jointenants give lands jointly to two men and their heires, and the other in exchange of other lands to them and their heires in common, this is a good exchange (1); and yet the manner of their estates is not equall, for the estate of one party is joynt and the other in common. And so it is if two men give lands in exchange to *A.* and his heires for lands from *A.* to them two and their heires, though the one party have a joynt estate, and the other a sole estate, yet the exchange is good. The like is if the one land be of a defeasible title, and the other of an undefeasible title, yet the exchange is good till it be avoyded. [51. a.]

[a] Bracton, lib. 5. fo. 389. 17 E. 3. 12. b. 4 H. 4. 2.

[a] An exchange with the king is good, and yet the king is seised in his politike capacity, and the subject in his naturall capacity (2). But equality of the quantity of the estate is requisite, as it appeareth clearly in the cases put by *Littleton*.

[b] 14 H. 6. 6 E. 2. Exch. 12. 8 E. 2. Cui in vita, 28. 10 E. 2. Exch. 13.

[b] But therein it is to be observed, that it is not necessary that the parties to the exchange be seised of an equall estate at the time of the exchange made: for if tenant in taile, or a husband seised in the right of his wife, exchange lands, and both by the

16 E. 3. Exch. 2. 3 E. 3. 19. 12 H. 4. 12. 21 H. 6. 25. 13 E. 4. 3. (3)

exchange

---

(1) Here *four* persons are named as parties to an exchange. But this is not irreconcilable with the opinion mentioned in note 1. of fol. 50. b. that an exchange cannot be between more than *two distinct* parties; because though *four* persons are named, yet they constitute only *two distinct* parties; for in point of interest the two joint-tenants are the conveying parties on the *one* side, and the two tenants in common are the conveying parties on the *other*, and consequently there is the same reciprocity as if the transaction was between *two* persons only. The same observation applies to any number of persons, if so conjoined in the mutuality of giving and receiving in exchange, as to make only *two distinct relative* parts.—[Note 328.]

(2) See 2 Inst. 269.—But if the king makes exchange, it seems that it should be by writing *recorded;* because he can neither give nor take land without matter of record. See Lane, 31. 60. Vin. Abr. Z. c. A. d. B. d.—[Note 329.]

(3) 45 *E.* 3. 20. Hal. MSS.

exchange give a fee simple, this is good untill it be avoyded by the issue in tail, or by the wife after the death of the husband; [d] so as *Littleton* saith, that in exchanges it behooveth that the estates which both parties have in the land so exchanged be equal, is as much as to say that the state reciprocally given in exchange ought to be equall. [e] But in a partition the estates allotted to either party need not to be equall, as shall be observed in his proper place.

(1 Ro. Abr. 811. 4 Co. 121.)

[51. b.]

[d] 44 E. 3. 20. 38 E. 3. 15. 39 E. 3. 1. 9 E. 4. 21. 7 H. 4. 17. 30 E. 1. tit. Bre. 884. 30 E. 1. tit. Exchange, 15.

[e] F. N. B. 62. M. (Post. 172. b.

To shut up this point there be five things necessary to the perfection of an exchange. 1. That the estates given be equall (1). 2. That this word (*excambium* exchange) be used, [f] which is so individually requisite, as it cannot be supplied by any other word, or described by any circumlocution (2); and herewith agreeth *Littleton* afterwards in this Section. In the booke of Domesday I finde *Hanc terram vendidit Hugo Brictuino quod modo tenet ipse Herbon, et ipse scambium valet duplum.*

[f] 9 E. 4. 21. 25 H. 6. 56. 19 H. 6. 27. 14 E. 3. 24. 50 Ass. Dorset. Wadon Bedf. Scudeia.

Hugo de Belcamp pro escambio de Warre.

3. That there be an execution by entry or claime in the life of the parties as hath ben said. [g] 4. That if it be of things that lye in grant, it must be by deed. [h] 5. If the lands be in severall counties, there ought to be a deed indented, or if the thing lye in grant, albeit they be in one county.

9 E. 4. 39. 15 E. 4. 3. 45 E. 3. 30. 45 E. 3. Exchange, 1. (4 Co. 121.) [g] 26 H. 6. 2. [h] 45 E. 3. 20. 7 H. 4. 11.

[i] If an infant exchange lands, and after his full age occupy the lands taken in exchange, the exchange is become perfect, for the exchange at the first was not void (because it amounted to a livery, and also in respect of the recompense) but voidable (3).

[i] 4 E. 2. tit. Exch. 10. 12 H. 4. 12.

"Although that the other party to this, yet this exchange is voyd in the confirmation of the parties cannot make that good which the law maketh void."

---

(1) Vid. 22 H. 3. 3. Contra 38. E. 3. 15. Hal. MSS.—Ante 28. a. 11 Co. 80. 1 Rol. Rep. 46. 1 Roll. Abr. 811.

(2) See ante 50. b. n. 1, and 3, and the case of Eton College there cited. In that case one reason given, why an act of parliament was not suffered to operate as an exchange, was the want of that word in the act.—[Note 330.]

(3) Cro. Car. *surrender or partition*. 1 Leo. 4. 61.—Hal. MSS.—But see the case of Zouch v. Parsons, 3 Burr. 1806, where lord Manfield in delivering the opinion of the court seems inclined strongly in favour of construing an infant's surrender, if made by *deed*, as voidable only. In Zouch and Parsons it became necessary to consider what was the true ground for holding the acts of infants as *voidable* only, whether the *solemnity of the instrument*, or the *semblance of benefit* to the infant on the face of the deed. As to the *former* ground, the court thought fit to approve of Mr. Perkins's distinction, according to which all such grants, gifts, or deeds of an infant as do not *take effect* by *delivery of his hand* are *void*, and those which do are *voidable*. See Perk. sect. 12. But the court decided the case principally on the *latter* ground, and held a *lease* and *release* by an infant to be voidable, because the consideration of the conveyance and other circumstances showed that the act was right and proper, and apparently not in the least to his prejudice. See further as to the *deeds* of infants, ante 45. b. n. 1. and post. 171. b. —[Note 331.]

Sect.

Sect. 66.

ALSO, if a man letteth land to another for term of yeares, albeit the lessor dieth before the lessee entereth into the tenements, yet he may enter into the same tenements after the death of the lessor, because the lessee by force of the lease hath right presently to have the tenements according to the forme of the lease. But if a man maketh a deed of feoffment to another, and a letter of attorney to one to deliver to him seisin by force of the same deed, yet if livery of seisin be not executed in the life of him which made the deed, this availeth nothing, for that the other had nought to have the tenements according to the purport of the said deed, before livery of seisin made; and if there be no livery of seisin, then after the decease of him who made the deed, the right of these tenements is forthwith in his heire or in some other.

(Post 270. a.) [illegible] *a man letteth land to another for term of years, albeit the* [illegible] the reason is, because the interest of the tearme (as hath beene said) doth passe and veste in the lessee before entry; and therefore the death of the lessor cannot devest that which was vested before.

(9 Co. 75. F. N. B. 156.) *"Attorney"* is an ancient *English* word, and signifieth one that is set in the turne, stead, or place of another: and of these some be private (which our author here speaketh) and some be publike, as attorneys at law, whose warrant from his master is *ponit loco suo talem attornatum suum*, which setteth in his turne or place such a man to be his attorney.

Vid. Sect. 196. F. N. 54. [illegible] *seisin by force of the* [illegible] that the authority to deliver seisin (as hath been said) must be by deed (1): for *letter of attorney* is as much as a warrant of attorney by deed, for *literæ* doe signifie sometime a deed, as *literæ acquietantiæ* doe signifie a deed of acquittance, and herewith [a] agreeth *Britton*. [52.]

[a] 24 E. 3. 27. 11 H. 7. 13. Britt. 101. b.

2. *Britton* here speaks generally *to one*, and few persons are [b] disabled to be private attorneys to deliver seisin; for mounks, [illegible] outlawed, excommunicated,

[b] 21 E. 4. 18. Br. Feoffments, 50. 21 H. 6. 30. 33 E. 3. Attorney, 13.

---

(1) Vid. 1 *Ass.* 16. 26 *Ass.* 29. 35 *Ass.* 1. 12 *H.* 7. 27. 13 *H.* 7. 14. 4 *H.* 7. 13. 13 *H.* 4. 8. Rad. MSS.

(2) In another place lord Coke cites a passage from the Mirror, which excludes both infants and femes covert from being attornies. Post. 128. a. But that is quite reconcilable with the doctrine here; for there *public* attornies for prosecuting suits at law are meant, whose office cannot be properly executed without considerable knowledge and discretion; but here lord Coke in the first part of the sentence confines himself to *private* attornies to deliver seisin, which is an act so merely ministerial that it may be done by the most ignorant. See the case of Earle and Greenough in 3 Atk. 695, and 1 Ves. 298. One question in that case was, whether a power of disposing of real estate

excommunicated, villeins, aliens, &c. may be attorneyes. A fem may be an attorney to deliver seisin to her husband, and the husband to the wife, and he in remainder to the lessee for life.

3. It appeareth here that the attorney must [c] pursue his warrant, otherwise he doth not deliver seisin by force of the deed, as *Littleton* speaketh. Now his authority is twofold. expressed in his warrant, and implied in law, both which he must pursue. And first of his expresse authority. A man seised of *Black Acre* and *White Acre* makes a deed of feoffment of both, and a letter of attorney to enter into both *Acres*, and to deliver seisin of both of them according to the forme and effect of the deed, and he entreth into *Black Acre* and delivers seisin *secundum formam cartæ*, this livery and seisin is good, albeit he did not enter into both, nor into one in the name of both; for when he delivereth seisin of one *secundum formam cartæ*, this [illegible] and implyeth a livery of both. So when the feoffment is made to two or more, and the attorney is to make livery of seisin to both, and the attorney make livery of seisin to one of the feoffees *secundum formam et effectum cartæ*, this is good for both, and yet in that case he that is absent may waive the livery (3). If lessee for life make a deed of feoffment and letter of attorney to the lessor to make livery, and the lessor maketh livery accordingly, notwithstanding he shall enter for the forfeiture. But if lessee for years makes a feoffment in fee and a letter of attorney to the lessor to make livery, and he make livery accordingly, this livery shall binde the lessor, and shall not be avoyded [illegible] for the lessor cannot make livery as attorney to the [illegible] because he had no freehold whereof to make livery, but the freehold was in the lessor (4). If the lessor make a deed of feoffment and a letter of attorney to the lessee for yeares to make livery, and he doth it accordingly, this shall not drowne or extinguish his tearme, because

[c] 12 Ass. pl. 24. 26 Ass. 39. 11 H. 4. 3. 10 H. 7. 11 H. 7. 13. 10 Ass. 38. (9 Co. 76. b.) 27 Ass. 61. 41 Ass. 10. 41 E. 3. 17. (2 Leon. 73.)

(Post. 310. a. 359. a.)

Tr. 7 Eliz. in Com. Banco. (5) (Mo. 11. Cro. Ja. 177.)

---

estate could be well executed by an infant feme covert of the age of 19; and lord ch. Hardwicke determined against the execution of the power, 1, because he thought in general that such a power could not be well given to an infant, the disability of infancy being stronger than that of coverture; 2, because in the particular case it did not appear that the power was intended to be given during infancy, the power being given *notwithstanding coverture*, without the least notice of *infancy*; and 3, because it was a power coupled with an interest, the infant having a trust in equity for life together with the trust of the inheritance subject to the power.—[Note 332.]

(3) *Adjudged accordingly of livery to one feoffee.* T. 1651. B. R. *Trotman's case.* Vide M. 31, 32. Eliz. C. B. *Trevillian's case. A. seised of two acres makes lease of one acre to B. for years, and afterwards makes charter of feoffment of both acres and letter of attorney to B. and* C. conjunctim et divisim *to make livery; B. makes livery in one acre and C. in another, and adjudged good. Entered* M. 30. 31. Eliz. Rot. 2908. Vide *Bendl. n.* 15. M. 32, 33 Eliz. 1868. Hal. MSS.—[Note 333.]

(4) *Yet* vide *if lessee for years makes feoffment and livery, though lessor be on the land, it seems to be a forfeiture. Dy.* 362, 363. 14 *H.* 7. Hal. MSS. —[Note 334.]

(5) *Smith's case.* Hal. MSS.

because he did it as a minister to another (6) and in another's right, and is accounted in judgment of law the act of the other, and the feoffee claimeth nothing by him (7).

17 E. 3. 61. (F. N. B. 35. O.)

If one as procurator or attorney to another present to his owne benefice, he puts himselfe out of possession, because he commeth in by the induction and institution of the ordinary. If the tenant devise that the lord shall sell the land, and dieth, and the lord selleth it, the seigniory remaines. But if the lord or a grantee of a rent charge had been also *cestuy que use* of the land, and after the statute of *R.* 3, and before the statute of 27 *H.* 8. *cestuy que use* had made a feoffment in fee of the land, albeit the land passeth from the feoffees, and his feoffment is warranted by the power given to him by the statute, yet the seigniory or rent charge is extinct by his feoffment, for that he hath not a bare authority as the attorney hath (8).

(1 Co. 111. Post. 265. b.)

Perk. 72. 2 Burr. 1147.

If a man be disseised of *Black Acre* and *White Acre*, and warrant of attorney is made to enter into both and to make livery, there if the attorney enter into *Black Acre* only and

(Post. 252. b.)

makes livery *secundum formam carte*, there the livery of seisin is void, because he doth lesse than his warrant(9). [52. b.] the estate of the disseisor in. *White Acre* cannot be divested without an entry. But there is a diversity between an authority coupled with an interest, and a bare authority (1). For example, a custome within a manor time out of mind of man used, was to grant certaine lands parcell of the said manor in fee simple, and never any grant was made to any, and the heires of his body, for life or for yeares; and the lord of the said manor did grant to one by copie for life, the remainder over to another, and the heires of his body; and it was [*k*] adjudged, that the grant and remainder over was good; for the lorde having authoritie by custome, and an

(1 Ro. Abr. 511.)

[*k*] Hill. 36 El. Rot. 492. inter Stanton & Barnes, in ejectione firmæ, in the King's Bench. (Post. 263. b. 1 Sid. 6.) 2 & 3 Ph. & M. Dyer, 131. 17 El. Dyer, 340. (Mo. 91. 2 Sid. 65. 2 Leon. 19. Ante 48. b.)

interest

---

(6) *If A. brings* præcipe *of C.'s land against B. and recovers, and C. is made sheriff, and* habere facias seisinam *comes to him he may return the special matter on account of the mischief.* 13 *H.* 4. 15. 7 *H.* 6. 33. Hal. MSS.—[Note 335.]

(7) *So it is of livery by the lord.* H. 4. *E.* 6. *Mo. n.* 41. *Travillian's case*, supra. Hal. MSS.—See note 3.—By the case of livery by the lord, it is meant, that if tenant make feoffment of his tenancy, and the lord as attorney makes livery, it shall not extinguish his seigniory. Mo. 11.—[Note 336.]

(See *supra*, note 7. [Also Preston's Sheppard's Touchstone, 203.]

(9) Vid. 11 *H.* 4. 3. *If there be feoffment on condition and letter of attorney to make livery accordingly, and livery is made absolutely, it is void, and a disseisin. So* è converso 12 *Ass.* 24. 26 *Ass.* 39.—H. 38 Eliz. B. R. *Poph. n.* 2. *Slaning's case. A. seised of the manors of B. and C. and also of a mill in possession of I. S. by force of a lease for years makes charter of feoffment, with letter of attorney to enter into the said manors,* and all other the said lands and tenements and seisin thereof to take, and after such possession and seisin taken, such seisin and possession to deliver, &c. according to the form and effect of the deed. *The attorney makes livery in the manors of C. and B. but not of the mill, nor doth I. S. attorn. Ruled, that the mill doth not pass, but that the livery of the manors was well executed.* Hal. MSS.—[Note 337.]

[1] See ante, 49. b. and post. 115. a. and 181. b.

interest withall, might grant any lesser estate: for in this case, the custome that enableth him to the greater, enableth him to the lesser, *Omne majus in se continet minus.* But he that hath but a bare authority, as he that hath a warant of atturney, must pursue his authority (as hath beene said), and if he doe lesse, it is voyd (2).

A man make a lease for life, and after make a charter of feoffment, with a letter of attorney to deliver seisin, the atturney enters upon the lessee, this is sufficient to convey away the reversion; for (3) (that it may be said once for all) livery of seisin being to perfect the common assurance of lands, is alwayes expounded favourably, *ut res magis valeat quàm pereat.* And all this was adjudged and [*l*] resolved by the court of common pleas, and after affirmed by all the judges of the king's bench, in a writ of error.

[*l*] Pasc. 31 El. Rot. 514. in Com. Banc. inter Carter pl. & Claypole & al. def. In ejectione firmæ & in briefe de error. Hil. 32 El. Rot. 791.

And it is to be knowne, that a deed of feoffment beginning *Omnibus Christi fidelibus, &c.* or *Saint præsentes et futuri, &c.* or the like, a letter of atturney may be contained in such a deed; for one continent may containe divers deeds to severall persons; but if it be by indenture between the feoffor on the one part, and the feoffee on the other part, * there a letter of atturney in such a deed is not good, unlesse the atturney be made a party in the deed indented (4).

* Communis error fecit jus (ut dicitur) in contrarium. (2 Inst. 673. 2 Ro. Abr. 8. Cro. Eliz. 905.)

Now the authoritie of an atturney implyed in the law, is, though the warrant be generall, to deliver seisin; yet the atturney cannot deliver seisin within the view, for his warrant is intendable in law of an actuall and expresse liverie and not of a liverie in law, and so hath it been resolved (5). See more hereof here next following.

Pasc. 3 El. in Com. Banc. in Yarham's case.

"*Yet if livery of seisin be not executed in the life of him which made the deed, there albeit the warrant of atturney be indefinite,*

22 H. 6. 6.

---

(2) Vide *these diversities.* If *makes letter of attorney to B. C. and D.* conjunctim & divisim *to make livery. If two make livery it is void, because it is neither* conjunctim *nor* divisim. 27 H. 8. 6. *But if one makes livery in one parcel, and another in another parcel, it is good.* M. 31, 32 Eliz. *Trevillian's case. But if two make livery in presence of the third, he not saying any thing, it seems good. Dy.* 63. *But if authority be to six or any two of them to do an act, there if it be done by three it is good.* 5 *Rep.* 91. *Hoe's case. So where one devised, that his executors or any one of them might sell his land, and made three executors, and one died, and the other two sold, it was ruled good; for it is not so strict as* conjunctim et divisim. M. 37, 38 Eliz. C. B. *the case of Townsend and Whales. But if warrant be by sheriff to three bailiffs* conjunctim & divisim, *execution by two is good, because it is the execution of justice.* M. 44, 45 Eliz. *King and Hobbs.* Hal. MSS.—See ante, 52. note 3. to which part this note more properly belongs. See also infra, note 6.—[Note 338.]

(3) *So such attorney may deliver seisin with assent of lessee for years, he being on the land. Adjudged* P. 1651. B. R. *Wegg and Villers.* Hal. MSS.—See ante, 48. b.—[Note 339.]

(4) *Adjudged* contra *between Dicker and Noland.* Hal. MSS.—See also another case *contra* in Cro. Eliz. 905. The case cited by lord Hale is in 2 Ro. Abr. 8. pl. 12, and *contra* Shepp. T. 217.

(5) *Dy.* 233. *Sir Walter Deny's case.* Hal. MSS.

finite, without limitation of any time, yet the law prescribeth a time, as *Littleton* here saith, in the life of him that made the deed; but the death not only of the feoffor, of whom *Littleton* speaketh, but of the feoffee also, is a countermand in law of the letter of atturney, and the deed it selfe is become of none effect, because in this case nothing doth passe before livery of seisin. For if the feoffor dieth, the land descends to his heire, and if the feoffee dieth, liverie cannot be made to his heire, because then he should take by purchase, where heires were named by way of limitation (6). And herewith agreeth *Bracton, Item oportet quòd donationem sequatur rei traditio, etiam in vitâ donatoris et donatorij.* Therefore a letter of attorney to deliver livery of seisin after the decease of the feoffor is voyd (7).

Bracton, li. 2. fo. 16. 40 Ass. pl. 38. 29 H. 6. 7. a. 14 E. 4. 2. 18 E. 3. 16. b. 11 H. 7. 13, &c. 18 H. 8. 3. 11 H. 7. 19. (1 Sid. 162.)

Fourthly, in all cases the atturney must pursue the warrant in substance and effect that he hath to deliver seisin.

Fifthly, all this is to be understood of sole persons, or of a corporation or body consisting of one sole person, as a bishop, parson, &c. But it holdeth not in a corporation aggregate of many persons capable (8). And therefore if a maior and commonalty make a charter of feoffment, and a letter of atturney to deliver seisin, the livery of seisin is good after the decease of the maior, because the corporation never dieth (9). The like of a deane and chapter, *et sic de similibus.*

(4 Co. 119. b. Cro. Ja. 103. 6 Co. 38.) Mich. 3 Ja. in Com. Banc. F. N. B. 223. 2 E. 3. Offi. de Court. 29. Staunt. Prær. 30. (1 Ro. Abr. 331, 332.)

Lastly, if the lessor by his deed license the lessee for life or yeares (which is restrained by condition not to alien without licence) to alien, and the lessor dieth before the lessee doth alien, yet is his death no countermand of the licence, but that he may alien, for the licence exempteth the lessee out of the penaltie of the condition, and it was executed on the part of the lessor as much as might be. And so it was resolved, *Michael.* 3 *Jacob in Communi Banco.* As if the king doth license to alien in mortmaine, and dyeth, the licence may be executed after (10).

---

(6) *If A. and B. joint-tenants in fee make charter of feoffment to C. and D. with letter of attorney to deliver seisin, and B. or C. dies, it is good as to the survivor.* M. 32, 33 Eliz. W. 68.—[Note 840.]

(7) Vid. *letter of attorney to deliver seisin after the feoffor's death in* 40 *Ass.* 38. Nota, *by devise or by special custom authority may be created executory after the party's death. Lease to A. for life, remainder to B. for life. A. dies,* videtur, *that livery cannot be made to B.* P. 31 Eliz. B. R. W. n. 4. *Pierce and Leversage.* Hal. MSS.—[Note 841.]

(8) 11 *H.* 7. 27. 12 *H.* 8. 5. 5 *H.* 7. 25. 21 *H.* 7. 1. Hal. MSS.

(9) *But it seems that livery cannot be made till the new mayor is made.* Hal. MSS.—[Note 842.]

(10) Vid. *Plowd. Com.* 457, contra *in license to the tenant to alien,* ut videtur. Hal. MSS.

Sect. 67.

ALSO, if tenements be let to a man for terme of halfe yeare, or for a quarter of a yeare, &c. in this case, if the lessee commit wast, the lessor shall have a writ of waste against him, and the writ shall say, quod tenet ad terminum annorum; *but he shall have an especiall declaration upon the truth of his matter, and the count shall not abate the writ, because he cannot have any other writ upon the matter.*

"*IF the lessee commit waste.*" Waste, *Vastum, dicitur à vastando,* of wasting and depopulating: and for that wast is often alledged to be in timber, which we call in *Latine maremium,* or *maresnium,* or *maresmium,* it is good to fetch both of them from the original. First, *timber* is a *Saxon* word. Secondly, *maremium* is derived of the *French* word *marreim,* or *marrein,* which properly signifieth timber. (F. N. B. Waste, 55. Post. 355.)

[53. a.]

An action of wast doth lie against tenant by the curtesie, tenant in dower, tenant for life, for yeares, or halfe a yeare, or gardian in chivalry (1), by him that hath the immeditate estate of inheritance, for wast or destruction in houses, gardens, woods, trees, or in lands (2), meadows, &c. or in exile of men to the disherison of him in the reversion or remainder. There be two kinds of waste, viz. voluntary or actuall, or permissive. V. Mari. ca. 23. 2 Part of the Instit. (F. N. B. 55.)

[a] What may be done in houses, by pulling or prostrating them down, or by suffering the same to be uncovered, whereby the spars or rafters, plaunchers, or other timber of the house are rotten (3). [b] But if the house be uncovered when the tenant commeth in, it is no wast in the tenant to suffer the same to fall downe. But though the house be ruinous at the tenant's coming in, yet if he pull it downe, it is wast unlesse he reedifie it againe (4). [c] Also if glasse windows (tho' glased by the tenant himselfe) be broken downe, or carried [a] 34 H. 3. Wast. 143. (4 Co. 62. Mo. 54. 2 Ro. Abr. 819.) [b] 40 Ass. p. 22. 2 Mar. Dyer, 117. 23 H. 6. 24. 10 H. 7. 2. 44 E. 3. 44. 29 E. 3. 33. 4 Co. 63.

Herlakenden's case. [c] 22 H. 6. 18. 12 H. 8. 1. 13 H. 7. 21. 22 E. 4. 18. 21 E. 4. 39. 10 H. 7. 2. Reg. Judic. 26.

away,

---

(1) Some of these were not punishable at common law. See post. 53. b. and 54. a. [See also Preston on Estates.] As to tenant by the curtesy, see 1 B. & P. 108, a doubt made of this by counsel, *arguendo;* the authorities in note there.

(2) *On writ of waste in* lands, *one cannot assign waste for cutting of* trees, *because for that the writ should be* in boscis. Tr. 6 Eliz. *Moore, n.* 200. Hal. MSS.—[Note 343.]

(3) *But the bare suffering them to be uncovered, without rotting the timber, is not waste.* P. 9 Jac. C. B. *Knoll's case. Converting two chambers into one, or* è converso, *or converting a hand-mill into a horse-mill, is waste.* H. 4 Jac. C. B. *Graves's case.* Hal. MSS.—[Note 344.]

(4) *But if a house built* de novo *was never covered in, it is not waste to abate it.* 40 *Ass.* 12. Vid. 21 *H.* 6. 46. 26 *E.* 3. 26. *Dy.* 36. Hal. MSS. —[Note 345.]

away, it is wast, for the glasse is part of his house. And so it is of wainscot (5), benches, doores, windowes, furnaces, and the like, annexed or fixed to the house either by him in the reversion, or the tenant.

[d] 44 E. 3. 21. 38 Ass. 1. 4 E. 3. Wast. 22. 10 El. Dyer, 276. 5 Co. 119. in Whelpdale's case. 19 E. 3. Wast. 30. 44 E. 3. 44.

[d] Though there be no timber growing upon the ground, yet the tenant at his perill must keepe the houses from wasting. If the tenant doe or suffer waste to be done in houses, yet if he repaire them before any action brought, there lieth no action of waste against him, but he cannot plead, *quòd non fecit vastum*, but the speciall matter.

[e] 7 H. 6. 38. 44 E. 3. 44.

A wall uncovered when the tenant commeth in, is no wast if it be suffered to decay. [e] If the tenant cut downe or destroy any fruit trees growing in the garden or orchard, it is waste; but if such trees grow upon any of the ground which the tenant holdeth out of the garden or orchard, it is no waste (6).

[f] 42 E. 3. 21. 49 E. 3. 2. 9 H. 6. 52. 17 E. 2. Wast. 118. (Hob. 234. 2 Ro. Abr. 814, 815. 820. 1 Ro. Abr. 507. cont. Mo. 7.) [g] 4 Co. 63. Harlakenden's case. 43 E. 3. 6. 26 E. 3. 76. 11 H. 4. 32. 12 H. 4. 5. 22 H. 6. 18. 19 E. 3 Wast. 30.

[f] If the tenant build a new house, it is waste, and if he suffered it to be wasted, it is a new waste. [g] If the house fall downe by tempest, or be burnt by lightning, or prostrated by enemies or the like, without a default of the tenant, or was ruinous at his comming in, and fall downe, the tenant may build the same againe with such materialls as remaines, and with other timber which he may take growing on the ground for his habitation, but he must not make the house larger then it was. If the house be discovered by tempest, the tenant must in convenient time repaire it (7).

[h] Temps E. 1. Wast. 128. Brit. fo. 34. 5 R. 2. Wast. 97. 12 H. 8. 1. Pl. Com. 322. 7 H. 3. Wast. 141. (2 Ro. Abr. 814.)

[h] If the tenant of a dove-house, warren, parke, vivary, estangues, or the like, do take so many, as such sufficient store be not left as he found when he came in, this is waste; and to suffer the pale to decay, whereby the deere is dispersed, is waste (8).

And

---

(5) It is said, that a tenant for years during his term may take away chimney pieces, and even wainscot if put up by himself. See 1 Atk. 477, and 3 Atk. 13, and note there the distinction taken as to fixtures between the several cases of heir and executor, of tenant for life and him in remainder, and of landlord and tenant. See further 2 East, R.—[Note 846.] See 2 Bulstrode, 103, where pavement is said to be *structura*, because lime is used to finish it. This seems to make chimney-pieces of marble or stone a fixture to the freehold, and therefore not removeable. But the modern doctrine is stated otherwise by lord Hardwicke in Atkins. See further 2 East Rep. 88.

(6) 14 *H.* 4. 12. Hal. MSS.

(7) 12 *H.* 4. 5. Hal. MSS.—The 6 An. ch. 31, which was at first temporary, but is now made perpetual, enacts, that no action shall be prosecuted against any person in whose house any fire shall accidentally begin, with the proviso that the act shall not defeat any agreement between landlord and tenant. See post. 53. b. and n. 5, there.—[Note 347.]

(8) *If B. lessee of warren by charter or prescription ploughs the land, it is waste.* Contra *if it be only land stored with conies, and not a legal warren.* P. 40 Eliz. C. B. *Moyle's case.* C. C. n. 21, and T. 40 Eliz. n. 11. Vid. *Noy*,

And it is to be observed, that there is wast, destruction and exile. Wast properly is in houses, gardens, (as is aforesaid) in timber trees, (viz. oak, ash, and elme, and these be timber trees in all places) (A) either by cutting of them downe, or topping of them, or doing any act whereby the timber may decay. Also in countries where timber is scant, and beeches or the like are converted to building for the habitation of man, or the like, they are all accounted timber. [i] If the tenant cut down timber trees, or such as are accounted timber (10), as is aforesaid, this is wast; and if he suffer the young germins to be destroyed, this is destruction. [k] So it is, if the tenant cut down underwood, (as he may by law) yet if he suffer the young germins to be destroyed, or if he stub up the same, this is destruction.

[i] 22 H. 6. 12. a. 9 H. 6. 1. 66. 11 H. 6. 1. F. N. B. 59. M.
[k] 20 E. 3. Wast. 32. 10 H. 7. 2. 42 E. 3. 6. b. 5 E. 4. 100.

41 E. 3. Wast. 82. 20 E. 3. Wast. 32. 12 E. 4. 1. (9.)

[l] Cutting down of willowes, beech, birch, aspe, maple, or the like, standing in the defence and safeguard of the house, is destruction. [m] If there be a quickset fence of white thorne, if the tenant stub it up, or suffer it to be destroyed, this is destruction (11); and for all these and the like destructions an action of wast lyeth. [n] The cutting of dead wood, that is, *ubi arbores sunt aridæ, mortuæ, cavæ, non existentes maremium,* [53. b.] *nec portantus fructus; nec folia in æstate,* is ☞ no wast; but turning of trees to coles for fewell, when there is sufficient dead wood, is wast.

[l] 40 E. 3. 15 b. & 35. 12 E. 4. 1. 12 H. 8. 1. b. 10 H. 7. 2. 8 E. 2. Wast. 111. 4 E. 6. Wast. Br. 136. (Cro. Ja. 126. 4 Co. 63, 64. 1 Ro. Abr. 569.)
[m] 46 E. 3. 17. 20 E. 3. Wast. 32.

9 H. 6. 10. 12 H. 8. 1. F. N. B. 59. M. [n] 16 El. Dy. 332.

[o] If the tenant suffer the houses to be wasted, and then fell down timber to repaire the same, this is a double wast. [p] Digging for gravel, lime, clay, brick, earth, stone, or the like, or for mines of mettall, coale, or the like, hidden in the earth, and were *not open* (A) when the tenant came in, is wast; but the tenant may dig for gravell or clay for the reparation of the house, as well as he may take convenient timber trees (1).

[o] 44 E. 3. 44. 20 E. 3. Wast. 32. F. N. B. 59. B. 19 E. 3. Wast. 30.
[p] 22 H. 6. 18 b. 9 E. 4. 35. 41 E. 3. Wast. 82.

17 E. 3. 7. 9 H. 6. 66. 2 H. 7. 24. F. N. B. 59. N. & 149. E. (2 Ro. Ab. 815, 816.) 20 E. 3. Wast. 32.

It

Noy, n. 312. *Moyle's case. Stopping and digging coney-burrows not waste in a warren.* Hal. MSS.—See Noy, 70.—[Note 348.]

(A) As to Beech in Bucks, see 10 East, 446. Birch in Berks, 2 Ro. Ab. 814.

(10) *Beech and white-thorn may be timber by the custom of the country, and it is waste to cut them.* M. 9 Jac. *Palmer's case.* Hal. MSS.—[Note 349.]

(9) 7 *H.* 6. 38. *Dy.* 35. Hal. MSS.

(11) *But cutting up of quick-sets is not waste, if it preserves the spring.* M. 9 Jac. C. B. Palmer's case. Cutting of ash under the growth of 20 years not waste. M. 41, 42 Eliz. C. B. Hal. MSS.—[Note 350.]

(A) 5 Co. 12. Mosel. 223. 2 Wms. 388. 2 Mod. 193. And as to mines, see fo. 6. a. Campbell *v.* Leach, Amb. 740; and another case in 173. 3 Woods, 405. 4 East, 409. 10 East, 189. post. 54. a.

(1) Nota, *though mines be open at the time, one cannot take timber to use*

in

[q] Anno 6 El. Of the report of justice Dalison in Griffin's case. 17 E. 3. 65. Brit. fol. 168. b. (Mo. 62. 69.) [r] 20 H. 6. 1. F. N. B. 59. N. 6 El. ubi supra.

[q] It is wast to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea, the meadow or marsh is surrounded, whereby the same becomes unprofitable; but if it be surrounded suddenly by the rage or violence of the sea, occasioned by winde, tempest, or the like, without any default in the tenant, [r] this is no wast punishable (2). So it is, if the tenant repaire not the bankes or walls against rivers, or other waters, whereby the meadows or marshes be surrounded, and become rushy and unprofitable (3).

[s] 28 H. 8. Dyer, 37. 22 H. 6. 24. 10 H. 7. 5. a. 44 E. 3. 44. (2 Ro. Ab. 814. Cro. Ja. 182.)

[s] If the tenant convert arable land into wood, or *è converso*, or *meadow into arable* (B), it is waste, for it changeth not onely the course of his husbandry, but the proofe of his evidence.

[t] 16 El. Dy. 332. 21 H. 6. 41. 5 E. 4. 100. 12 R. 3. Wast. 28. 48 E. 3. 25. Tempa. E. 1. 128. 20 E. 3. Wast. 32. 19 E. 3. Wast. 30. (Cro. Ja. 292.)

[t] The tenant may take sufficient wood to repaire the walls, pales, fences, hedges, and ditches, as he found them; but he can make no new (4): and he may take also sufficient plowbote, firebote, and other housbote.

The tenant cutteth downe trees for reparations and selleth them, and after buyeth them againe, and imploys them about necessary reparations, yet it is wast by the vendition: he cannot sell trees, and with the money cover the house: burning of the house by negligence or mischance is waste (5).

[u] 3 E. 3. Wast. 5. Bracton, lib. 4. fol. 315.

[u] If a man make a lease for life, and by deed grant that if any waste or destruction be done, that it shall be redressed by neighbours, and not by suit or plea, notwithstanding an action of wast shall lye, for the place wasted cannot be recovered without a plea.

[x] Bracton, fol. 168. Fleta, lib. 1. cap. 11. 16 H. 3. Wast. 135. 3 E. 3. tit. Wast. 2. 17 E. 2. Wast. 118. 10 H. 7. 2 H. 6. 11. 9 H. 6. 52. 11 E. 2. Wast. 113. F. N. B. 56. H. & 55 C. Regist. Judic. 25.

[x] *Bracton*, *Fleta*, and *Britton* doe use the same division as is aforesaid, viz. *vastum*, *destructio*, *et exilium*, in their proper signification.

Now somewhat is to be spoken of exile or destruction of men: exile or destruction of villaines, or tenants at will, or making them poore, where they were rich when the tenant came in, whereby they depart from their tenures, is wast. [a] And yet the statute of *Glouc'* speaketh not of exile, but it is comprehended under the general word of wast. The statute of *W.* 1. hath *destructionem*, the statute of *Magna Charta* hath

[a] Glouc. c. 5. W. 1. cap. 21. Magna Charta, cap. 4. Merleb. cap. 23.

vastum

---

in them, T. 16 Jac. *Darcye's case*. *Hutt.* 19. *Hob. n.* 298. Hal. MSS.—[Note 351.]

(2) See Call. on Sow. 2d ed. 146.

(3) *Because he is bound to repair, though he doth hold the bank.* 46 *E.* 3. *Waste*, 91. Vid. T. 6 Eliz. *Mo. n.* 173. Hal. MSS.—[Note 352.]

(B) Acc. Hob. 234. 2 Show. 8. 1 Ch. R. 14. according to which it seems that, in the case of pasture land, it must be ancient; see the cases and distinctions on this subject in 2 Ro. Ab. 814. 15 & 22 Vin. 436. See Goring *v.* Goring, Nott. MSS. 622. 1 Ch. Rep. 106–116. Mitf. Plead. 123, 4. 6 Ves. 828.

(4) *Tenant cannot make rails, where none were before.* *Dy.* 332. Hal. MSS. —[Note 353.]

(5) But now by the 6 Ann. c. 31, no action will lie against the tenant for such an accident. See the statute more fully stated in note 7, ante 53. a. Note also the passage from *Fleta* cited infra by lord Coke.

vastum et destructionem, the statute of *Merlebridge* hath *vastum, venditionem et exilium in domibus, boscis, vel hominibus, &c.*

But wast and destruction in their larger sense are words convertible. [b] *Item de hoc quod dicit vastum et exilium, sciendum est quòd non sunt referenda ad eundem intellectum, sed vastum et destructio ferè idem sunt, vastum idem est quod destructio, et è converso, et se habent ad omnem destructionem generaliter.* [b] Bract. lib. 4. fol. 316 & 317.

[c] *Vastum autem et destructio ferè æquipollent et convertibiliter se habent in domibus, boscis, et gardinis; sed exilium dici poterit, cùm servi manumittantur et à tenementis suis injuriosè ejiciantur. Fortuna autem et ignis vel hujusmodi eventus inopinati omnes tenentes excusant.* [c] Fleta, lib. 1. cap. 11.

[d] No person shall have an action of wast, unlesse he hath the immediate state of inheritance, but sometime another shall joyne with him for conformity. As if a reversion be granted to two, and to the heires of one; they two shall joyne in an action of wast: and in like sort the surviving coparcener and the tenant by the curtesie shall joyne in an action of waste: and if two joyntenants be, and to the heires of one of them, and they make a lease for life, they shall joyne in an antion of waste (7). [e] If the estate taile determine, hanging the action of waste, and the plt. becomes tenant in taile after possibility, the action of waste is gone. [f] If the tenant doth wast, and he in the reversion dyeth, the heyre shall not have an action of waste for the waste done in the life of the ancestor: nor a bishop, master of an hospitall, parson, or the like, in the time of the predecessor. [g] And so if lessee for yeares doth waste, and dyeth, an action of wast lyeth not against the executor or administrator for waste done before their time. But if two coparceners be of a reversion, and waste is committed, and the one of them die, the aunt and the neece shall joine in an action of waste (10).

[d] 7 E. 3. 54. b. 2 H. 5. 7. 22 H. 6. 24. 13 H. 7. 27 H. 8. 13. F. N. B. 59. F. 8 R. 2. Wast. 147. (6) (5 Co. 11.)

[e] 2 H. 4. 22.

[f] 2 H. 4. 2. (8)

[g] 10 E. 4. 1. 49 E. 3. 25. 23 H. 8. tit. Wast. Br. 38 E. 3. 17. 44 E. 3. 8. 45 E. 3. 3. 46 E. 3. 31.

11 E. 2. Wast. 115. 2 Mar. Wast. 117. 8 E. 2. Wast. 110. (9) (Ant. 42. a.)

[h] If lands be given to two and the heires of one of them, he that hath the fee shall not have an action of waste upon the statute of *Glouc.* for that they are joyn-tenants, but his heire shall have an action of waste against tenant for life.

Note, after wast done there is a speciall regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done; for if after the waste he granteth it over, though

[h] 24 E. 3. 27. 50 E. 3. 3. 8 H. 6. 13 (Post. 247. b. 5 Co. 75. 2 Ro. Ab. 834. Post. 218. b.)

---

(6) 17 *E.* 3. 50. Hal. MSS.

(7) *Fine to the use of A. for life, remainder to B. in fee, with power for A. to make leases for three lives; A. makes lease accordingly, and the lessee commits waste; A. and B. shall join in waste.* T. 4 Car. C. B. *Sacheverell's case.* Hal. MSS.—[Note 354.]

(8) 21 *H.* 6. 46. 39 *E.* 3. 15. 42 *E.* 3. 22. Hal. MSS.

(9) 18 *E.* 4. 16. 10 *H.* 7. 5. 2 *E.* 3. 2. Hal. MSS.

(10) Waste amongst tenants in common.—*A. makes lease to B. for years of two parts of a messuage; B. commits waste. It was ruled that waste lies, and shall be assigned in the entirety, but that the recovery should be of only two parts of the damages and of two parts of the place wasted.* P. 35 Eliz. *Poph. n.* 2. *Warnford's case.* Hal. MSS.—[Note 355.]

though he taketh backe the whole estate again, yet is the wast dispunishable. So if he grant the reversion to the use of himselfe and his wife, and of his heires, yet the wast is dispunishable, and so of the like; because the estate of the reversion continueth not, but is altered, and consequently the action of waste for waste done before (which consists in privity) is gone.

[i] Bract. lib. 4. fol. 315, 316, 317. Fleta, lib. 1. cap. 11. Brit. fol. 168. Doct. and Stud. lib. 2. ca. 1.

[i] A prohibition of waste did lye against tenant by the curtesie (11), tenant in dower, and a gardian in chivalry, by the common law, but not against tenant for life or yeares, because ☞ they came in by their own act, and he might have provided that no waste should be done. [54. a.]

12 H. 4. 3. 10 H. 3. Wast. 142. 20 H. 6. 1. 4 H. 3. Wast. 140. 9 H. 3. ibid. 136. (10 Co. 116. b.) (2 Inst. 145. Post 273. 299. b. 5 Co. 77. Stat. Glouc. c. 5.)

[j] F. N. B. 56. E. et F. Temps E. 1. Wast. 122. 18 E. 3. 3. 30 E. 3. 16. 38 E. 3. 23. 11 H. 4. 18. 4 E. 3. 25. Regist. 72. 3 Co. 23. Walker's case. 9 Co. 142. Beaumont's case. (1) (2 Inst. 303. Dr. and Stud. lib. 2. c. 1.)

[j] A tenant by the curtesie or in dower can hold of none but of the heire, and his heires by descent, and therefore if they grant over their whole estate, and the grantee doth waste, yet the heire shall have an action of waste against them, and recover the land against the assignee; but if the heire either before the assignment had granted, or after the assignment doth grant the reversion over, the stranger shall have an action of waste against the assignee, because in both cases the privity is destroyed: in all other cases the action of waste shall be brought against him that did the waste (for it is in nature of a trespasse) unlesse it be in the case of a ward [k]; for there if the gardian doth waste and assigne over, the action lieth against the assignee [l]. A gardian shall not be punished for waste done by a stranger, it is so penall unto him, for he shall lose the wardship both of the body and of the land (3), though the waste be but to the value of twenty shillings; and if that sufficeth not to satisfie for the wast, then he shall recover damages of the waste, over and above the losse of the ward. But tenant by the curtesie, tenant in dower, tenant for life, yeares, &c. shall answer for the waste done by a stranger, and shall take their remedy over. [m] But if there be two joyntenants of a ward, and one of them doe wast both shall answer for it.

[k] 27 E. 3. 81. 26 E. 3. Wast. 10. (2)

[l] 12 H. 4. 3. Bract. lib. 4. 316, 317. Fleta, lib. 1. c. 11. Brit. 168. 34 E. 3. Wast. 146. 44 E. 3. 27. F. N. B. 59. A. & 60. G. & T.

[m] 33 E. 3. Wast. 6. (4)

[n] 44 E. 3. 27. 48 E. 3. 10. F. N. B. 60. T. 12 H. 4. 3. 19 E. 2. Wast. 117. 41 E. 3. Wast. 81.

[n] If the gardian doth waste, and the heire within age bring an action of waste, the gardian shall lose the wardship, as is aforesaid; but if the heire bring an action of waste at his full age, then he shall recover treble damages, for then he cannot lose the wardship.

3 E. 2. Wast. 3. 7 E. 3. 12. 2 Inst. 306.

An

---

(11) Some have thought, that at common law waste did not lie against tenant by the curtesy. See 2 Inst. 301.—[Note 356.]

(1) 7 *E.* 3. 34. Hal. MSS.

(2) 26 *E.* 3. *Waste*, 10. *is* contra. Hal. MSS.

(3) *Value of wardship not lost.* Vid. *Dy.* 35. 28 *H.* 8. *Bendl. n.* 33.—Hal. MSS.

(4) 3 *E.* 3. 13. Hal. MSS.

[o] An infant and baron and fem shall be punished for waste done by a stranger, and so shall the wife that hath the state by survivour for wast done by the husband in his life time, if she agree to the estate, though there hath beene variety of opinions in our bookes.

[o] 15 H. 3. Wast. 16. temps E. 1. Wast. 128. 2 H. 4. 3. a. 3 E. 3. 13. 76. 11 Ass. 11.

21 H. 6. 24. b. 33 H. 6. 31. a. 42 E. 3. 22. 19 E. 3. Breve, 246. 46 E. 3. 25. 7 H. 6. 2. b. 3 E. 3. 46. 10 E. 3. 17, 18. 9 E. 3. 42. 9 E. 3. Breve, 246. 17 E. 4. 7. 9 H. 6. 52. F. N. B. 36. B. Doct. & Stud. lib. 2. c. 1. 23 H. 8. Wast. 138. 8 Co. 44, Willingham's case.

[p] But if a fem tenant for life take husband, and the husband doth waste, and the wife dieth, no action of wast lyeth against the husband in the *tenuit*, for he was seised but *in jure uxoris*, and his wife was tenant of the freehold; but if a fem be possessed of a terme for yeares, and take husband, and the husband doth wast, and the wife dieth, the husband shall be charged in an action of waste, for the law giveth the terme to him.

[p] 5 Co. 75. Clifton's case. 49 E. 3. 25. 46 E. 3. Wast. Statham. 10 H. 6. 11, 12. (2 Inst. 301.)

[q] If tenant for life grant over his estate upon condition, and the grantee doth wast, and the grantor re-entreth for the condition broken, the action of wast shall be brought against the grantee, and the place wasted recovered.

[q] 30 E. 3. 16.

[r] If a lease for life be made to a villeine, and waste is done, the lord entreth, he shall not be punished for the waste done before, but for waste done after, he shall.

[r] 48 E. 3. 19.

[s] An occupant shall be punished for waste; and so if an estate be made to *A.* and his heires during the life of *B.* *A.* dieth, the heire of *A.* shall be punished in an action of waste.

[s] 6 Co. 37. le Deane & Chapter of Worcester's case. 10 Co. 9. b. (2 Ro. Abr. 826.)

[t] If a lease be made to *A.* for life, the remainder to *B.* for life, the remainder to *C.* in fee, in this case where it is said in the *Register*, and in *F. N. B.* that an action of wast doth lie, it is to be understood after the death or surrender of *B.* in the meane remainder, for during his life no action of waste doth lie (5).

[t] 4 E. 3. 18. Cote's case. 8 E. 3. 18. F. N. B. 58. C. & 59. H. 50 E. 3. 3. 33 E. 3.

Wast. 144. 11 E. 3. Receit, 118. 10 E. 4. 9. Regist. 74. 2 Co. 92. inter Paget and Carie in Bingham's case. 5 Co. 76. Paget's case. 10 Co. 44. Jenning's case. F. N. B. 59. H. 4 E. 3. 18.

But if a lease for life be made, the remainder for yeares, the remainder in fee, an action doth lie presently during the terme in remainder, for the meane terme for yeares is no impediment.

F. N. B. 18.

But if a man make a lease for life or yeares, and after granteth the reversion for yeares, the lessor shall have no action of waste during the yeares, for he himself hath granted away the reversion, in respect whereof he is to maintaine his action. [*] Otherwise it is, if he had made a lease in reversion, which had been but a future

[*] 4 E. 3. 18. F. tit. Wast. 18.

---

(5) But though action of waste doth not lie in this case on account of the intermediate remainder for life, yet a court of equity will interpose by injunction to prevent waste. See 3 Atk. 95, and 210.—See also 1 Ves. 546. 4 Ves. 875. and ante 27. b. n. 2.—[Note 357.]

a future interest; for there an action of wast lieth during the terme, and so is the booke to be understood, and the terme shall be saved in that case.

[u] Merlebridge, cap. 17. 21 E. 3. 30. 16 E. 3. tit. Wast. 100. 14 E. 3. Wast. 107. 2 E. 2. Wast. 1. 28 H. 6. Wast. 9. 32 H. 6. 7. F. N. B. 59. E.

[u] No action of wast lieth against a gardian in socage, but an account or trespasse, nor against tenant by statute staple, &c. or *elegit* (6).

[w] 11 H. 6. cap. 5. 5 Co. 77. Boothe's case.

[w] If tenant for life or yeares or their assignee make a grant over, and notwithstanding take the profits, an action of wast lieth against him, by him in the reversion or remainder by the statute, *Nota* (7).

[x] 8 E. 3. Wast. 112. 4 E. 6. Wast. 136. 4 E. 3. 32. 15 H. 7. 11. 15 E. 3. Wast. 134. temps E. 1. Wast. 134. 18 H. 8. 1. (8)

[x] If wast be done *sparsim* here and there in woods, the whole woods shall be recovered, or so much wherein the wast *sparsim* is done. And so in houses so many rooms shall be recovered wherein there is wast done; but if wast be done *sparsim* throughout, all shall be recovered. It hath beene said that if the hall be wasted, the whole house shall be recovered, because the whole house is denominated of the hall: but later authority is to the contrary.

[y] Bract. lib. 4, fo. 316. 38 E. 3. 7. b. 34 E. 3. Wast. 146. 14 H. 4. 11. b.

[y] There is waste of a small value (A), as *Bracton* saith, *Nisi vastum ita modicum sit propter quod non sit inquisitio facienda.* Yet trees to the value of three shillings and foure pence hath beene adjudged wast, and many things together may make waste to a value (9). But let us now returne to our author (10).

F. N. B. 60. C. temps E. 1. Wast. 124. 19 H. 6. 8. (11)

"A writ of waste." See in the *Register* five severall writs of wast; two at the common law for wast done by tenant in dower, or the gardian; and three by speciall or statute law, for waste done by tenant for life, for yeares, and tenant by the curtesie.

" The

---

(6) Vid. *F. N. B.* 58. *Grantee of reversion shall have waste.* Hal. MSS.

(7) *F. N. B.* 59. *C.* Hal. MSS.

(8) 3 *E.* 3. 24. Hal. MSS.

(A) See 2 Bos. & P. 86.

(9) Vid. Hil. 40 Eliz. C. B. *n.* 9. *Thorne's case, C. C. Waste to the value of* 4*d.* Hal. MSS.

(10) *It ought to be to the value of* 40*d. at least. Noy, n.* 18. *Thore and Thomas,* Hal. MSS.—See Noy 4.—As Lord Hale makes so frequent a reference to *Noy's Reports,* it may not be amiss to apprise the student, that though the booke is known by the name of that very learned lawyer, yet there is not the least reason to suppose, that such a loose collection of notes was intended by him for the public eye. In an edition of Noy's Reports *penes editorem,* there is the following observation upon them in manuscript. *A simple collection of scraps of cases made by serjeant Size from Noy's loose papers, and imposed upon the world for the reports of that vile prerogative fellow Noy.* This account of Noy's Reports, which was probably written soon after the first publication in 1656, though expressed in terms inexcusably gross, contains an anecdote not altogether useless.—2 Ro. Abr. 824. Vin. Waste, *n.*—[Note 358.]

(11) 9 H. 6. 66. Hal. MSS.

[54. b.] ☞ *"The writ shall say."* The writs originall of the *Register* [z] (as *Bracton* saith), were formed, and of course had their first authority by act of Parliament; and therefore without an act of Parliament they cannot be altered, or changed, which is proved by the statute of *W.* 2. cap. 24, whereby remedy is provided in many cases. But heare what *Bracton* saith, *Sunt quædam brevia formata in suis casibus, et quædem de cursu, quæ concilio totius regni sunt approbata, quæ quidem mutari non possunt, absque eorundem contrariâ voluntate. Magistralia autem sæpè variantur secundum varietatem casuum*, &c. And this is the reason that in this case of halfe a yeare the words of the writ shall be without change, *quod tenet ad terminum annorum*, and the pl' must make a speciall declaration according to his case, for otherwise he should be without remedy. In this particular, case the statute of *Glouc.* cap. 5, which giveth the action of waste against the lessee for life or yeares (which lay not against them at the common law) speaketh of one that holdeth for tearme of yeares in the plural number; and yet here it appeareth by the authority of *Littleton*, that although it be a penall law, whereby treble damages and the place wasted shall be recovered, yet a tenant for halfe a yeare being within the same mischiefe, shall be within the same remedie, though it be out of the letter of the law; for *Qui hæret in literâ, hæret in cortice*, which is an excellent example, whereupon in many like cases a man may settle a certaine judgment. You may observe in the said ancient authors, what remedie was given for waste at the common law, and against whom, and what was adjudged waste, destruction, and exile.

Ante 17. a. Post. 73. b. [z] Vid. Bract. lib. 5. f. 413. b. Fleta, lib. 2. cap. 12. See the Second Part of the Institutes. W. 2. cap. 24. De vasto Bract. li. 4. f. 315, 316. 317. Fleta, li. 1. c. 11. & li. 5. c. 33. Britton, fol. 162 & 168. 46 E. 3. 31. F. N. B. 60. C. 4 E. 4. 13. 37 H. 6. 26. b. 7 H. 7. 2. 14 H. 8. 12. 18 E. 3. 27. (Dr. & Stud. li. 1. cap. 23.) Vide Marlebridge, ca. 23. 2d Part of the Institutes.

In many cases a tenant for life or years may fell down timber to make reparations albeit he be not compellable thereunto, and shall not be punished for the same in any action of waste. As [a] if a house be ruinous at the time of the lease made, if the lessee suffer the house to fall down he is not punishable, for he is not bound by law to repaire the house in that case. And yet if he cut down timber upon the ground so letten, and repaire it, he may well justifie it; and the reason is, for that the law doth favour the supportation or maintenance of houses of habitation for mankind. And therefore if two or more joyntenants or tenants in common be of a house of habitation, and the one will not repaire the house, the other shall have by the law a writ of *de reparatione faciendâ*, and the writ saith, *ad sustentationem ejusdem domûs teneantur*. So it is if the lessor by his covenant undertaketh to repaire the houses, yet the lessee (if the lessor doth it not) may with the timber growing upon the ground repaire it though he be not compellable thereunto (1). In the same manner, if a man make a lease of a house and land without impeachment of waste for the house, yet may the lessee with the timber upon the ground repaire the house though he may utterly waste it if he will; and so in many other cases. A man hath land in which there is a mine of coales, or of the like, and maketh [b] a lease of the land (without mentioning

[a] 12 H. 8. 1. (11 Co. 47. 79. b. Mo. 23.) Dy. 361. Post. 56. b. 200. b.

F. N. B. fo. 127. 14 Vin. 321.

(Hob. 234.)

[b] 17 E. 3. 7. 9 H. 6. 66.

12 H. 6. 18. 9 E. 4. 35. 12 E. 4. 8. F. N. B. 149. C. & 59. N.

any

(1) *But if lessee covenants to repair and doth not repair, waste will not lie.* 29 *E.* 3. 43. 21 *H.* 6. 6. *Dy.* 198. Hal. MSS.—[Note 359.]

any mines) for life or for yeares, the lessee for such mines as were open at the time of the lease made, may digge and take the profits thereof. [c] But he cannot digge for any new mine that was not open at the time of the lease made, for that should be adjudged waste. And if there be open mines and the owner make a lease of the land, with the mines therein, this shall extend to the open mines onely, and not to any hidden mine (2): but if there be no open mine, and the lease is made of the land together with all mines therein, there the lessee may digge for mines, and enjoy the benefit thereof, otherwise those words should be void. I have been the more spacious concerning this learning of waste, for that it is most necessary to be knowne of all men (3).

[c] 5 Co. 12. Sander's case. (1 Co. 46.)

Now hath *Littleton* spoken of an estate for life, and an estate for years in severall persons. Now let us see how they stand *simul* and *semel* in one person.

If a man letteth lands to another for life, the remainder to him for 21 yeares, he hath both estates in him so distinctly, as he may grant away either of them; for a greater estate may uphold a lesser, but not *è converso*; and therefore if a man make a lease to one for 21 yeares, the remainder to him for terme of his life, the lease for yeares is drowned.

[d] If a man make a lease for life to one the remainder to his executors for 21 yeares, the terme for yeares shall vest in him (4); for even as ancestor or heire is *correlativa* as to inheritance; (as if an estate for life be made to *A.* the remainder to *B.* in taile, the remainder to the right heires of *A.* the fee vesteth in *A.* as it had been limited to him and his heires); even so are the testators and the executors *correlativa* as to any chattell. And therefore if a lease for life be made to the testator, the remainder to the executors far yeares, the chattel shall vest in the lessee himselfe, as well as if it had been limited to him and his executors.

[d] 19 E. 2. Covenant, 25. 19 E. 3. Covenant, 24. 32 E. 3. Quid juris cl. 5. 17 E. 3. 29. 46 E. 3. 31. 40 E. 3. 5. 11 H. 4. 34. 14 Eliz. Dyer, 309. M. 40 & 41, Eliz. in Com. Banc. Rot. 2215, in tresp. inter Sparke & Sparke. Hill. 42 Eliz. Sir John Savage's case in Curiâ Wardorum. (2 Ro. Abr. 47. 418. Mo. 100. 339. 666. 2 Leon. 6. Yelv. 85.)

---

(2) See ante 53. b. and 1, there.

(3) See further as to *waste* in the several Abridgments, title *Waste*, and Fulb. part 2. Paral. Dial. 5. fol. 49. b. 2 Lev. 185. Ante 53. b.

(4) 50 *Ass.* 1. *And* per curiam *in Sparkes's case adjudged, that it shall go to the administrator.* Vide tamen M. 44, 45. Eliz. *Moore's Reports, n.* 911. contra. Vid. 4 & 4 P. and M. *Blendl. n.* 115. *Gravenor's case.* Hal. MSS.

[55. a.] Chap. 8. Of Tenant at Will. Sect. 68.

TENANT at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him. Yet if the lessee soweth the land, and the lessor, after it is sowne and before the corne is ripe, put him out, yet the lessee shall have the corne, and shall have free entry egresse and regresse to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him. Otherwise it is if tenant for yeares, which knoweth the end of his terme, doth sow the land, and his terme endeth before the corn is ripe. In this case the lessor, or he in the reversion, shall have the corne, because the lessee knew the certainty of his terme, and when it would end.

"*TENANT at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, &c.*" (1) It is regularly true, that every lease at will must in law be at the will of both parties, and therefore when the lease is made, to have and to hold at the will of the lessor, the law implyeth it to be at the will of the lessee also; for it cannot be onely at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor; and so are all the bookes that seeme *prima facie* to differ, cleerly reconciled (3). Fleta, lib. 3. cap. 15. (1 Ro. Abr. 858.) 18 H. 6. 1. 38 H. 6. 21. 9 E. 4. 1. b. 10 E. 4. 18. b. 21 H. 7. 38. 13 H. 8. 16. 14 H. 8. 11. 14. (2)

"*Because he hath no certain nor sure estate, &c.*" *Alia possessio est præcaria, et alia pro prece concessâ, ut si quis sine scripto concesserit* Fleta, lib. 3. cap. 15.

---

(1) 21 *H.* 6. 37. *Lease for years with proviso that lessor may enter at his will is a lease at will.* Per Past.—21 *H.* 6. 37. *A. grants to B. that he may sow A.'s land, which is done accordingly; yet A. shall have the emblements, because B. hath not an interest.* Per Past. Hal. MSS.—See acc. as to the former case, 15 H. 8. 12, and by Yelverton, justice, in Litt. Rep. 235, and Hetl. 128. —[Note 360.]

(2) 49 *H.* 6. 18. 20 *E.* 4. 9. Hal. MSS.

(3) See further as to the manner in which an estate at will may be created by *act of the parties*, or arise by *act of law*, Vin. Abr. *Estate*, S. b. and T. b. Com. Dig. *Estates*, *H.* 1. 2. In 3 Burr. page 1609, it is said, that in the country leases at will in the strict legal notion being found extremely inconvenient, exist only *notionally*. But this observation I presume means, not that estates at will may not arise now as well as formerly, but only that it is no longer usual to create such estates by express words, and that the judges incline strongly against *implying* them. See 2 Blackst. Comment. 147.—[Note 361.]

concesserit alicui habitationem vel usumfructum in re suâ tenenda ad voluntatem suam, hæc quidem possessio præcaria est et nuda, ẽo quòd tempestivè et intempestivè pro voluntate domini poterit revocari.

(5 Co. 85. a. 1 Sid. 339.) [1 H. Bl. 5. 1 Esp. N. P. 384. 2d edit. 9 Vin. 372. pl. 77.]

"*Yet if the lessee soweth the land, and the lessor after it is sowne, &c.*" (4) The reason of this is, for that the estate of the lessee is uncertaine, and therefore lest the ground (5) should be unmanured, which should be hurtfull to the commonwealth, he ☞ shall reape the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set rootes, or sow hempe or flax, or any other annual profit, if (1) after the same be planted, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have that yeare's crop. But if he plant young fruit trees, or yong oaks, ashes, elmes, &c. or sow the ground with acornes, &c. there the lessor may put him out notwithstanding, because they will yeeld no present annuall profit. And this is not only proper to a lessee at will, that when the lessor determines his will that the lessee shall have the corne sowne, &c. but to every particular tenant that hath an estate incertaine, for that is the reason which *Littleton* expresseth in these words (*because he hath no certaine nor sure estate*) (2). And therefore if tenant for life soweth the ground, and dieth, his executors shall have the corne, for that his estate was uncertaine, and determined by the act of God (3). And the same law

[55. b.]

18 E. 4. 18. (Cro. Cha. 515.)

Temps E. 1. B. 25. 10 Ass. pl. 6. 10 E. 3. 29. 46 E. 3. 1. 7 H. 4. 17. 7 Ass. 19. 5 Co. 116. Oland's case. (2 Inst. 81. Hob. 132. 5 Co. 85. 1 Ro. Abr. 727.)

---

(4) 9 *E.* 3. 24. *is according to Littleton's diversity, and so is the* 11 *H.* 4. 90. *But lessee at will in such case of entry of the lessor before sowing shall not have the costs of ploughing and manuring.* Hal. MSS.—See S. C. acc. in Bro. Abr. *Emblements*, pl. 7, and *Tenant by Copie*, pl. 3.—[Note 362.]

(5) *But if lessor covenants that lessee for years shall have the emblements which are growing at the end of the term, there the property of the corn is well transferred to the lessee, though it be not severed during the term. Hob. case* 175. *Grantham and Hawley.* Hal. MSS.—See Hob. 132.—[Note 363.]

(1) *If lessee for life of a hop-ground dies in August before severance of the hops, the executor shall have them, though growing on ancient roots. Adjudged* M. 13 Car. B. R. Crook, n. 13. *Latham and Atwood.* Hal. MSS.—See Cro. Cha. 515.—[Note 364.]

(2) *A. seised in fee sows the land, and devises to B. for life, remainder to C. in fee, and dies before severance. Ruled,* 1. *The executor of A. shall not have the emblements.* 2. *If B. dies before severance, his executor shall not have them, but they shall go to him in remainder. But,* 3, *if the devise had been only to B. and B. had died, there the executor of B. should have had the corn, though B. did not sow.* M. 20 Jac. C. B. *n.* 22. *Spencer's case. Winch.* 51. M. 5 Jac. C. B. *Skele and Arnold.* Vid. *Hob.* 132. Hal. MSS.—See acc. as to the first point, Cro. Eliz. 61. Yet it seems agreed, that executors shall have the corn growing as against an *heir*. See Hob. 132. 3 Salk. 160. 1 Ventr. 187. 3 Atk. 16, the opinion of Saund. ch. j. in Lill. Pract. Reg. tit. *Emblements*, and the year-books cited in Com. Dig. *Biens*, G. 2. It is not easy to account for this distinction, which gives corn growing to the *devisee*, but denies it to the *heir;* though it has been attempted. See Gilb. Law of Evid. 250.—[Note 365.]

(3) *Whether executor of tenant in dower shall pay rent on the statute of Merton*, vid. *Keilw.* 125. Hal. MSS.—This annotation by lord Hale requires explanation.

law is of the lessee for yeares of tenant for life (4). So if a man be seised of land in the right of his wife, and soweth the ground, and he dieth, his executors shall have the corne, and if his wife die before him he shall have the corne (5). But if husband and wife be jointenants of the land, and the husband soweth the ground, and the land surviveth to the wife, it is said, [a] that she shall have the corne (7). If tenant *pur terme d'auter vie* soweth the ground, and *cesty que vie* dieth, the lessee shall have the corne. If a man seised of lands in fee hath issue a daughter and dieth, his wife being *enseint* with a son, the daughter soweth the ground, the sonne is borne, yet the daughter shall [b] have the corne, because her estate was lawful, and defeated by the act of God, and it is good for the commonwealth that the ground be sowne (8). [c] But if the lessee at will sow the ground with corne,

[a] 8 Ass. 21. 8 E. 3. 54. Dyer, 316. (6) (Cro. Cha. 515.)

[b] 16 H. 6. 6.

[c] 5 Co. 116. Oland's case.

---

explanation. By the statute of Merton, 20 H. 3. c. 2, the widow may devise the corn on the land she holds in dower, which, as some of our most ancient writers have thought, she could not do before; but the statute saves customs and services due in respect of the land which the widow held in dower. Now in the case of Keilway it is asserted, that under this statute the wife's executors may retain the land till they can reasonably carry the corn out of the land; and this I apprehend gave occasion to the query, whether the executors shall not pay rent. See 2 Inst. 80, 81.—[Note 366.]

(4) See Gouldsb. 144.

(5) *But it is said, that if the land was sown before the marriage, the wife shall have the corn.* 1 *Ro. Abr.* 727. *pl.* 17.—[Note 367.]

(6) 7 *Ass.* 13. 10 *Ass.* 6. 7 *E.* 3. 57. Hal. MSS.

(7) *In Skele and Arnold*, M. 5 Jac. C. B. n. 5. D. D. *the court was divided on the point, whether the wife should have the emblements; but it was adjudged that she should not. But in* P. 26 El. C. B. n. 4. E. E. *in Brewster's case it was adjudged that the wife shall have them.* Hal. MSS.—See Skele and Arnold in 1 Ro. Abr. 727, pl. 16. Noy, 149, and Dy. 316. a. in marg. and further on the subject in the books cited Vin. Abr. *Emblements*, pl. 16, and Com. Dig. *Biens*, G. 2.—[Note 368.]

(8) See ante 11 b. and n. 4, there, in respect to intermediate profits, where an estate vested is devested by the birth of a posthumous child. To the observation in that note it may be useful to add, that there is an important distinction as to mesne profits between real estate and personalty. The law will not permit the freehold of land, except in certain special cases, to be in abeyance; and therefore where an estate is to arise on a contingency, the freehold must vest in some person in the *mean time*, either in the heir or some other person who takes subject to the contingency; and that person, whoever he is, has the right to the *mesne* profits for his own benefit, unless they are otherwise disposed of by *express* provision of the parties, as in the case of trustees to preserve contingent remainders, who are generally directed how to apply the profits they receive, or by act of parliament, as by the 10 and 11 W. 3. c. 16, which preserves contingent remainders for posthumous children, where there are no trustees for that purpose, and gives such children the estate *in the same manner as if* they were born in the life-time of the father, and is *therefore* construed to carry the profits from the father's death. But the case of personalty is different, for the right to that may be in suspense and contingency, and *generally* during the time it continues so the profits accumulate till the vesting of the capital happens, and then are added to that and belong to the same person. See 3 P. Wms. 305. 2 Atk. 473, and Fearne on Conting. Rem. 2d ed. 173. —[Note 369.]

corne, &c. and after he himself determine his will and refuseth to occupy the ground, in that case the lessor shall have the corne, because he loseth his rent. And if a woman that holdeth land *durante viduitate sua* soweth the ground and taketh husband [*d*], the lessor shall have the emblements, because that the determination of her owne estate grew by her owne act. But where the estate of the lessee being incertaine is defeasible by a right paramount, or if the lease determine by the act of the lessee, as by forfeiture, condition, &c. [*e*] there he that hath the right paramount, or that entreth for any forfeiture, &c. shall have the corne (10).

(1 Ro. Abr. 726.)

[*d*] Oland's case, ubi supra. (Dy. 31. 11 Co. 51. b.)

[*e*] 33 E. 3. Tresp. f. 254. 42 E. 3. 25. Oland's case, ubi supra.

If a disseisor sow the ground and sever the corne, and the disseissee re-enter, [*f*] he shall have the corne, because he entreth by a former title, and severance or remooving of the corne altereth not the case, for the regresse is a recontinuation of the freehold in him in judgment of law from the beginning (11).

[*f*] 27 H. 6. 1. 37 H. 6. 6. 12 E. 4. 45. 14 E. 4. 6. 15 E. 4. 31. 2 H. 7. 1. 5 H. 7. 17. 12 H. 7. 25. 10 H. 4. 1. 28 H. 8. 32. Dyer.

[*g*] If tenant by statute merchant soweth the ground, and then a sudden and casuall profit falleth by which he is satisfied, he shall have the embleaments (12).

[*g*] 44 E. 3. 15. Fleta, lib. 3. cap. 15.

..... "*The lessor may put him out.*" There is an expresse *ouster*, and implied *ouster;* an expresse, as when the lessor commeth upon the land, and expressly forewarneth the lessee to occupy the ground no longer; an implyed, as if the lessor without the consent of the lessee enter into the land, and cut downe a tree, [*h*] this is a determination of the will, for that it should otherwise be a wrong in him, unlesse the trees were excepted, and then it is no determination of the will, for then the act is lawfull albeit the will doth continue. If a man leaseth a mannor at will whereunto a common is appendant, if the lessor put in his beasts to use the common, this is a determination of the will (13).

[*h*] 35 H. 6. 24. 21 H. 6. 9. 1 E. 4. 3. 21 E. 4. 5. Pl. Com. parson de Honyland's case. (1 Ro. Abr. 860. Post. 245. b. 8 Co. 89. 5 Co. 90.) 14 E. 4. 6. 8 E. 4. 11, &c.

The

---

(10) Vid. 20 *E.* 3. *Trespass*, 194. 46 *Ass.* 2. Hal. MSS.

(11) According to *some* of the *antient* authorities, the disseisor shall have the emblements, if the disseisee's entry is *after* severance. See many books cited on this subject in Vin. Abr. *Emblements*, 54. The more modern cases are with lord Coke. See Dy. 31. b. Dal. 30. Mo. 24. and 11 Co. 51. b.—[2 Dan. 766. pl. 26.]—[Note 370.]

(12) See further on this subject infra, and also Perk. sect. 512 to 524. Vin. Abr. *Emblements* per tot. and *Executor*, U. Com. Dig. *Biens*, B. C. and G. New. Abr. *Executors* and *Administrators*, H. 3, and Gilb. Law of Evid. 242 to 252.

(13) Vid. 11 *H.* 6. 28, *by Cottes. lessor's granting a rent charge doth not determine his will, nor are the lessee's cattle distrainable. Whether the will be determined, if lessor or lessee be outlawed, see* 9 *H.* 6. 20. 5 *Rep.* 116. Hal. MSS.—Rolle makes a *quære*, on the case of the rent charge. The doubt seems reasonable, for the lease at will and the rent charge clash with each other. If the grantee has the remedy by distress, that makes the tenant's chattels liable to seizure for money not due by his contract. On the other hand, if the grantee of the rent charge cannot distrain, he is left without that remedy, which by the grant is expressly given to him. See 1 Ro. Abr. 860. As to the case of outlawry, see Vin. Abr. *Estate*, Z. b. pl. 1. In

The lessor may by actuall entry into the ground determine his will in the absence of the lessee (14), but by words spoken from the ground the will is not determined untill the lessee hath notice (15). No more than the discharge of a factor, attorney, or such like, in their absence, is sufficient in law untill they have notice thereof.

[a] If a woman make a lease at will reserving a rent, and she taketh husband, this is no countermand of the lease at will, but the husband and wife shall have an action of debt for the rent; and so it is if a lease be made to a woman at will reserving a rent, and the lessee taketh husband, this is no countermand of the lease, but the lessor may have an action of debt or distreine them for the rent. So if the husband and wife make a lease at will of the wife's land reserving a rent and the husband die, yet the lease continueth. In like manner, if a lease be made by two to two others at will, and the one of the lessors or of the lessees die, the lease at will is not determined in neither of those cases; which are necessary points to be knowne (16).

[a] 5 Co. 10. Henstead's case, 10 Eliz. Dier. 269. b.

"*After it is sowne and before the corne is ripe.*" Then put the case that the corn is ripe and ready to cut downe, and the lessor, before the lessee reapeth it, enter and put out the lessee, whether shall the lessee have the corne? And it is without all question that the lessee shall have it, for by the same reason that he shall have it when he is put out before it be ripe, he shall have it when he is put out when it is ripe. *Et ubi eadem est ratio, ibi idem jus.*

[56. a.]

"*And shall have free entry, egresse and regresse.*" [b] For when the law doth give anything to one, it giveth impliedly whatsoever

[b] Temps. E. 1. tit. Grant, 4. 9 E. 4. 35. 5 E. 3. Tresp. 13. 21 H. 7. 14. b. 8 H. 6. 18. b. 2 R. 2. Barre, 237. 14 H. 8. 2. 27 H. 8. 18. b. (11 Co. 52.)

---

2 Ventr. 248, one of the books cited, lord Hale says, that outlawry is not a determination till seizure.—[Note 371.]

(14) Nota, *if lessee at will is ousted by a stranger, he may re-enter and continue tenant at will; but if he accepts of a new lease from a stranger after such ouster, it has been holden, that his re-entry will not revest the estate in the antient lessor.* Hal. MSS.—See Vin. Abr. *Estate*, A. c.—[Note 372.]

(15) *So if lessee says that he will not hold any longer, it is not a determination of the will unless he waives the possession.* 20 *H.* 7. *Kelw*, 65. Hal. MSS.—[Note 373.]

(16) *If there is tenant at will rendering rent at Michaelmas, and lessor determines the will before Michaelmas, he shall not have any rent. But it has been holden, that if lessee at any day before the rent-day determines his will, yet lessor shall have the rent incurring the next day after such determination of the will.* Per *Fenner and Williams; Yelverton* contra, M. 3 Jac. *Carpenter and Collins, Yelv.* 73. 20 *H.* 7. *Kelw.* 65, *is accord. if lessor doth not enter before the rent-day.* Hal. MSS.—See All. 4, in which booke there is an opinion by Rolle conformable to that of Fenner and Williams. Also in 1 Sid. 339, it is said to have been agreed by the court, that if land be leased at will, and the rent is reserved half-yearly or quarterly, the lessee cannot determine his will two or three days before the next rent-day, because that would be a fraudulent determination. See 1 T. R. 159, as to the proper time for notice to quit on a lease from year to year.—[See also 4 Taunton, 128.]—[Note 374.]

whatsoever is necessary for the taking and enjoying of the same: *Quando lex aliquid alicui concedit, concedere videtur et id, sine quo res ipsa esse non potest* (1): and the law in this case driveth him not to an action for the corne, but giveth him a speedy remedy to enter into the land, and to take and carry it away, and compelleth not him to take it at one time, or to carry it before it be ready to be carried; and therefore the law giveth all that which is convenient, viz. free entry, egresse and regresse as much as is necessary.

If the lessee be disturbed of this way which the law doth give unto him, he shall have his action upon his case, and recover his damages; and this action the law doth give unto him, for whensoever the law giveth anything, it giveth also a remedy for the same. But here is to be observed a diversity betweene a private way, whereof *Littleton* here speaketh, and a common way. For if the way be a common way, if any man be disturbed to goe that way, or if a ditch be made overthwart the way so as he cannot goe, yet shal he not have an action upon his case: and this the law provided for avoiding of multiplicity of suites, for if any one man might have an action, all men might have the like. But the law for this common nusance hath provided an apt remedy, and that is by presentment in the leete or in the torne, unless any man hath a particular damage; as if he and his horse fall into the ditch, whereby he received hurt and losse, there for this special damage, which is not common to others, he shall have an action upon his case (2); and all this [c] was resolved by the court in the king's bench. And in that case it was said, that it had been adjudged in that court betweene *Westbury* and *Powell*, that where the inhabitants of *Southwarke* had by custome a watering place for their cattell which was stopped up by *Powel*, that in that case any inhabitant of *Southwarke* might have an action; for otherwise they should be without remedy, because such a nusans is not presentable in the leete or torne. Note the diversity.

(5 Co. 100. 104. b. 1 Ro. Abr. 88. Cro. Jam. 446. 491. F. N. B. 176. B. Cro. Jam. 158.)

[c] 27 H. 8. 27. 2 E. 4. 9. 5 E. 4. 2. Tr. 41 Eliz. betweene Finieux and Hovenden. Vid. 5 Co. 72. Williams's case.

There be three kinde of wayes, whereof you shall [d] reade in our ancient bookes. First, a foot way, which is called *iter, quod est jus eundi vel umbulandi hominis;* and this was the first way.

[d] Fleta, lib. 4. cap. 27. Bracton, lib. 4. fol. 232. (1 Ro. Abr. 390.)

The second is a foot way and horseway, which is called *actus ab agendo;* and this vulgarly is called *packe* and *prime way*, because it is both a foot way, which was the first or *prime way*, and a *packe* or *drift way* also.

The third is *via* or *aditus*, which contains the other two, and also a cart way, &c. for this is *jus eundi, vehendi, et vihiculum et jumentum ducendi;* and this is two fold, viz. *regia via*, the king's highway for all men, *et communis strata*, belonging to a city or towne, or between neighbours and neighbours. This is called in our bookes *chimin*, being a *French* word for a way, whereof commeth *chiminage, chiminagium*, or *chimmagium*, which signifieth

32 E. 3. Barre, 261. 27 E. 3. 78. 6 E. 3. 23.

Carta de foresta, cap. 14.

---

(1) See further on this maxim Finch. Disc. on Law, 69, and Finch. Descript. of Law, 16. b.

(2) *On special damage action on the case lies for not repairing as well as for a nuisance in the highway.* P. 1657. C. B. *Adjudged* 18 *E.* 4. Hal. MSS. —[Note 375.]

nifieth a toll due by custome for having a way through a forest: and in ancient records it is some time also called *pedagium* (3).

If the lessee at will by good husbandry and industry, either by overflowing or trenching, or compassing of the meadowes, or digging up of bushes or such like, make the grasse to grow in more abundance, yet if the lessor put him out, the lessee shall not have the grasse, because that the grasse is the naturall profit of the earth. And the same law is if he doth sow hay-seed, and thereby encreaseth the grasse.

"Otherwise it is if tenant for yeares, which knoweth the end of his terme, &c." Well said *Littleton* (which knoweth the end of his terme), that is, where the end of the terme is certaine: but where the lease for yeares depends upon an incertainty, as upon the death of tenant for life being made by him, or of a husband seised in the right of his wife, or the like, there it is otherwise. (F. N. B. 149. Ante 32. a. Post. 171. a. 179. a.)

Sect. 69.

ALSO, if a house (si un mese) *be letten to one to hold at will, by force whereof the lessee entreth into the house, and brings his household-stuff into the same, and after the lessor puts him out, yet he shall have free entrie egresse and regresse into the said house by reasonable time to take away his goods and utensils. As if a man seised of a mese in fee simple, fee taile, or for life, hath certainte goods within the sayd house, and maketh his executors and dieth; whosoever after his decease hath the house, his executors shall have free entry egresse and regresse to carrie out of the same house the goods of their testator by reasonable time.*

"IF a house be letten to one to hold at will, &c." The reason of this is evident upon that which hath been said before.

[56. a.] *"House," Mese,* or *Maison* ☞ called in legall *Latine messuagium*, containeth (as hath beene said) the buildings, curtelage, orchard, and garden (1). (2 Co. 32. a.)

Cottage, *cotagium*, is a little house without land to it. [a] See 31 *Eliz.* cap. 1. and cottagers in Domesday booke are called *cotterelli:* and in ancient records *haga* signifieth a house. If a man hath a house neer to my house, and he suffereth his house to be so ruinous as it is like to fall upon my house, [b] I may have a writ [a] 31 El. ca. 1. in Domesday. [b] Reg. 153. F. N. B. 127.

4 E. 2. Vouch. 244. Six acres of land may be parcel of a house. (Post. 200. b.)

---

(3) See further as to *ways* tit. *Chimin*, in Com. Dig. and Vin. Abr. and tit. *Highway*, in New Abr. and Burn's Just.

(1) See ante 5. b. and note 1, where some authorities are cited to show how much will pass by the word *messuage*. See also 1 Saund. 7.

a writ *de domo reparandâ*, and compell him to repair his house (2). But a *præcipe* lieth not *de domo*, but *de messuagio*.

[c] 22 E. 4. 27. 34 H. 6. 40. (Cro. Jam. 335. 204. Hob. 69. 135. 2 Instit. 4. 6. 2 Ro. Rep. 143. 153. 1 Ro. Abr. 523. 2 Ro. Abr. 578. 5 Co. 100. a.) [d] Bract. li. 2. ca. 52. b. (Post. 59. b. 62. a.)

"By reasonable time." [c] This reasonable time shall be adjudged by the discretion of the justices before whom the cause dependeth; and so it is of reasonable fines, customes, and services, upon the true state of the case depending before them: for reasonablenesse in these cases belongeth to the knowledge of the law, and therefore to be decided by the justices [d] *Quàm longum esse debet non definitur in jure, sed pendet ex discretione justitiariorum.* And this being said of time, the like may be said of things incertaine, which ought to be reasonable; for nothing that is contrary to reason, is consonant to law.

[e] 2 H. 6. 15. 21 H. 6. 30.

[e] *"As if a man seised of a mese in fee simple, fee taile, &c."* This is so evident, as it needeth no explanation.

Sect. 70.

ALSO, if a man make a deed of feoffment to another of certaine lands, and delivereth to him the deed, but not liverie of seisin; in this case he, to whom the deed is made, may enter into the land, and hold and occupie it at the will of him which made the deed, because it is proved by the words of the deed, that it is his will that the other should have the land; but he which made the deed may put him out when it pleaseth him.

(1 Ro. Abr. 859. 2 Co. 55. b.) Bac. L. T. 90.

HERE it appeareth, that if the feoffee doth enter, he is tenant at will, because he entreth by the consent of the feoffor.

(6 Co. 26. Ante 48. a.) [f] Flet. li. 3. ca. 3. & ca. 15. 43 E. 3. tit. Feof. & Faits, 51. 35 H. 8. Feof. Br. 27 Ass. 61. 38 Ass. 2. 39 Ass. 12. 41 E. 3. 17.

"And delivereth to him the deed." Albeit the deed be delivered upon the ground, yet doth it not amount to a livery of seisin of the land; for it hath its naturall effect to make it a deed. [f] *Donationum alia perfecta, alia incepta et non perfecta: ut* ☞ *si donatio lecta fuerit et concessa, ac traditio nondum fuerit subsecuta.* But if the deed be delivered in name of seisin of the land, or if the feoffor saith to the feoffee, Take and enjoy this land according to the deed; or, Enter into this land, and God give you joy; these words do amount to a livery of seisin. [57. a.]

6 Co. 26. Sharp's case. (Ante 48. a.) 1 Wils. 176. 10 Vin. 398.

(2) Also an action on the case will lie for damages arising from the neglect to repair. See Fitzh. N. B. ed. 1730, p. 296, note a.—[Note 376.]

Sect. 71.

ALSO, if a house be leased to hold at will, the lessee is not bound to sustain or repair the house, as tenant for terme of years is tyed. But if tenant at will commit voluntary wast, as in pulling downe of houses, or in felling of trees, it is said that the lessor shall have an action of trespasse for this against the lessee. As if I lend to one my sheepe to tathe his land, or my oxen to plow the land, and he killeth my cattell, I may well have an action of trespass against him, notwithstanding the lending.

"*IF a house be leased to hold at will, the lessee is not bound, &c.*". (5 Co. 13. b.) For the statute of *Gloucester* above mentioned extends not to a tenant at will, and therefore for permissive waste, the lessor hath no remedy at all.(1)

"*But*

---

(1) *Action on the case doth not lie for permissive waste.* 5 *Rep.* 13. b. Hal. MSS.—The case cited by Lord Hale is that of the countess of Salop, who brought action on the case against her tenant at will for negligently keeping his fire, that the house was burnt; and the whole court held, that neither action on the case nor any other action lay; because at common law and before the statute of *Gloucester* action did not lie for waste against tenant for life or years, or any other tenant coming in by agreement of parties, and tenant at will is not within the statute. But the doctrine that no action lies should be understood with some limitation; for if tenant at will stipulates with his lessor to be responsible for fire by negligence or for other permissive waste, without doubt an action will lie on such *express* agreement. The same observation holds with respect to tenants for life or years before the statute of *Gloucester*; for though the *law* did not make them liable to *any* action for waste, yet it did not restrain them from making themselves liable by *agreement*. It may be of use here to add something on the progress of the law as to the accidental burning of houses, so far as regards landlord and tenant. At the common law lessees were not answerable to landlords for accidental or negligent burning; for as to fires by accident, it is expressed in *Fleta* that *fortuna ignis vel hujusmodi eventûs inopinati omnes tenentes excusant;* and lady Shrewsbury's case is a direct authority to prove, that tenants are equally excusable for fires by *negligence*. See *Fleta, lib.* 1. *cap.* 12. Then came the statute of *Gloucester*, which, by making tenants for life and years liable to waste without any exception, consequently rendered them answerable for destruction by fire. Thus stood the law in lord Coke's time; but now by the 6 Ann. ch. 31, the ancient law is restored, and the distinction introduced by the statute of *Gloucester* between tenants at will and other lessees is taken away; for the statute of Anne exempts *all persons* from actions for *accidental* fire in any house, except in the case of special agreements between landlord and tenant. See ante 53. a. and note 7, there, and 53. b. and note 5, there. So much relates to tenants coming in *by act or agreement of parties*. As to tenants of *particular estates* coming in by *act of law*, as tenant by the curtesy, tenant in dower, and also before the statute for taking away military tenures, guardian in chivalry, these, or at least the two latter, being at common law punishable for waste, were therefore

[g] 21 H. 6. 38. 28 H. 3. 25. 12 H. 4. 3. 22 H. 4. 50. (1 Ro. Abr. 860. 2 Ro. Abr. 555.)

"But if tenant at will commit voluntary waste, &c." [g] And true it is, that if tenant at will cutteth downe timber trees, or voluntarily pull downe and prostrate houses, the lessor shall have an action of trespasse against him, *quare vi et armis*; for the taking upon him power to cut timber, or prostrate houses, concerneth so much the freehold and inheritance, as it doth amount in law to a determination of his will; [h] and so hath it beene adjudged.(2)

[h] Mich. 28 & 29 Eliz. Rot. 318. in Com. Banc. inter Walgrave & Somerset. V. le Counte de Shrewsburie's case, 5 Co. 13. b.

[i] 27 H. 6. 3. 22 H. 4. 5. (2 Instit. 154. 1 Ro. Abr. 661. 663. 659. Post. 57. b. Cro. Cha. 303. Cro. Jam. 660. 4 Leon. 35.)

[i] If tenant at will granteth over his estate to another, and the grantee entereth, he is a disseisor, (3) and the lessor may have an action of trespasse against the grantee; for albeit the grant was void, yet it amounteth to a determination of his will.

[k] V. 11 H. 4. 24. 1 R. 4. 9. b. 12 R. 4. 8. 21 R. 4. 19, & 76. 22 R. 4. 5. 3 H. 7. 4. 21 H. 7. 14.

"As if I lend to one my sheepe to tathe his land, &c." And the reason is, [k] that when the bailee having but a bare use of them, taketh upon him as an owner to kill them, he loseth the benifit

of

---

therefore responsible for losses by fire; unless, indeed, they were answerable for waste *voluntary* only, and not for waste *permissive*, which is a distinction I have not yet met with in any book. If then tenant by the curtesy and tenant in dower were by the common law responsible for accidental fire, it may some time or other become necessary to determine whether they are within the statute of queen Anne. The statute in expression is very *general*, the words being, that no action shall be prosecuted against *any person* in whose house any fire shall *accidentally* begin; and it seems calculated to take away all actions in cases of accidental fire as well from *other* persons as from *landlords*. Note, that it has been doubted on the statute of Anne, whether a covenant to repair *generally* extends to the case of *fire*, and so becomes an agreement within the statute; and therefore where it is intended that the tenant shall not be liable, it is most usual in the covenant for repairing expressly to *except* accidents by fire.—Note also, that the distinction which is taken as to waste at common law between tenants coming in by *act of law* and tenants whose estates accrue by *act of parties*, will not universally hold; for tenants by statute-merchant and statute-staple, though they come in by *process of law*, are not punishable for waste. 6 Co. 37. Perhaps the reason of this may be, that it is in the power of debtors to prevent the commencement of these estates, or to determine them by paying the debts for which creditors have such estates, and also that the tenants of such estates are accountable for all profits they make beyond the amount of the debts due to them.—[Note 377.]

(2) *Yet if a stranger cuts trees, the tenant at will shall have action, as shall also the lessor, regard being had to their several losses.* 2 *H.* 4. 12. 19 *H.* 6. 45. Hal. MSS.—[Note 378.]

(3) *Lessee at will makes lease for years, and the lessee enters. Ruled on solemn argument,* 1. *That it is only a disseisin* at election, *and not* primâ facie. 2. *That admitting it to be a disseisin, the lessee at will is the disseisor, and has gained the freehold, and not the lessee for years.* Pasch. 9 Car. B. R. *Blunden and Baugh.* Hal. MSS.—See S. C. in W. Jo. 315. Cro. Cha. 302. Litt. 297. 372, and 1 Ro. Abr. 661. See also Mr. Atkins's case in 1 Bur. p. 60, in which the curious doctrine of *disseisin by election* is most elaborately explained.—[Note 379.]

of the use of them. Or in these cases he may have an action of trespasse *sur le case* for this conversion, at his election (4).

"*Trespass.*" *Transgressio derivatur à transgrediendo*, because it passeth that which is right: *Transgressio autem est, cum modus non servatur, nec mensura: debet enim quilibet in suo facto modum habere, et mensuram. Nota*, in the lowest and the highest offences there are no accessories, but all are principalls; as in [57. b.] ryots, routs, forcible entries, and other ☞ transgressions *vi et armis*, which are the lowest offences; and so in the highest offence, which is *crimen læsæ majestatis*, there be no accessaries; but in felonies there be accessaries both before and after.

Fleta, li. 2. ca. 1. (2 Ro. Abr. 556. Cro. Cha. 35.) (2 Inst. 183. 3 Inst. 20, 21.

Sect. 72.

NOTE, if the lessor upon a lease at will reserve to him a yearly rent, he may distreine for the rent behinde, or have for this an action of debt at his own election (1).

"*HE may distreine for the rent behinde, or have for this an action of debt, &c.*" But if he impound the distresse upon the ground letten at will, the will is determined. Note, he may distreine for the rent, and yet it is no rent service, for no fealty belongeth thereunto, but a rent distreinable of common right.

21 H. 7. 39. b. 2 E. 4. 6. b. 7 E. 4. 27. a. 6 R. 2. Avowrie, 86. 5 Burr. 2831.

There is a great diversity between a tenant at will and a tenant at sufferance; for tenant at will is alwaies by right, and tenant at sufferance entreth by a lawfull lease, and holdeth over by wrong. A tenant at sufferance is he that at the first came in by lawfull demise, and after his estate ended continueth in possession and wrongully holdeth over (2). [*l*] As tenant *pur terme d'auter vie*

(Post. 142. a.)

[*l*] Bracton, lib. 4. fol. 318.

---

(4) *A. lessee for* 20 *years makes lease to B. for* 10; *B. continues in possession after expiration of the lease for* 10 *years, and commits waste. A. may have either trespass or action on the case, because he is chargeable over in waste.* P. 6 Car. B. R. *Crook, n.* 7. *West and Treade.* Hal. MSS.—See Cro. Cha. 187. and S. C. W. Jo. 224.—[Note 380.]

(1) *But in his count in debt against lessee at will, he ought to show that he entered; but otherwise it is as to lessee for years.* 18 *H.* 8. 1 *Dy.* 14.—*Debt lies against copyholder for his rent. Adjudged M.* 10 *Car. B. R. Hitcham's case.* Hal. MSS.—Hitcham's case is in 1 Ro. Abr. 374. P. pl. 1. and 374. Q. pl. 3. But from Rolle's report of the case, and from some subsequent authorities, it seems doubtful whether debt will lie for rent against a copyholder, particularly unless the lord has conveyed away the manor, and so lost the remedy by distress. See Carth. 92, and Gilb. Ten. 3d Lond. ed. 308.—[Note 381.]

(2) As to holding over, see 4 G. 2. c. 28, by which every tenant for life or years, or other person claiming under or by collusion with such tenant, who shall wilfully hold over *after* determination of the term, and *demand* made in writing of delivery of the possession by the landlord or him in reversion or remainder,

4 E. 3. 39.
7 E. 3. 13.
24 E. 3. 24.
38 E. 3. 28.
7 R. 2. Saver de def. 30.
8 E. 4. 25.
4 H. 6. 30.
22 E. 4. 38.
18 E. 4. 25.
F. N. B. 201.
D. 203.
8 E. 2. Entre, 87.
Temps H. 8.
Br. 15. tit. Tenant a volunt.
Pl. Com. 138.
4 H. 7 3. (3)
(Post. 270. b.
Cro. Cha. 187.
Cro. Jam. 169.
Ante 57. a.)
[m] 13 H. 7. 10. a.
21 H. 6. 54.
5 E. 4. 3.
22 R. 2. tit. Discont.
48 E. 3. 23.

vie continueth in possession after the decease of *Ce' que vie*, or tenant for yeares holdeth over his terme; the lessor cannot have an action of trespasse before entry. Now that a writ of entry *ad termium qui præteriit* lyeth against such a tenant as holdeth over is rather by admission of the demandant, than for any estate of freehold that is in him, for in judgement of law he hath but a bare possession. But against the king there is no tenant at sufferance, but he that holdeth over in the cases abovesaid is an intruder upon the king, because there is no laches imputed to the king for not entring (4). [*m*] If tenant in taile of a rent grant the same in fee and dieth, yet the issue in taile may bring a *formedon*, and admit himselfe out of possession. The like law is it, if a man maketh a lease a lease at will and dieth, now is the will determined; and if the lessee continueth in possession, he is tenant at sufferance, and yet the heyre by admission may have an assise of Mordancestor against him (5). [*n*] But there is a diversity between particular estates made by the *terretenant*, as above is said, and particular estates created by act in law; as if a gardian after the full age of the heire continueth in possession, he is no tenant at sufferance, but an abator, against whom an assize of Mordancestor doth lye (6). *Et sic de similibus* (7).

Pl. Com. 435. 19 E. 3. Bre. 468. 15 E. 4. Discont. 30. 6 E. 3. 56, 57. 21 E. 4. 5. 21 H. 7. 38. 10 E. 4. 18. Per Choke & Litt.

[n] Statute de Merlbridge, cap. 26. Abb. Ass. 120 b. F. N. B. 196. 11 E. 4. 10 & 11. Bract. lib. 4. fol. 252, 253. (Post. 271. 1 Ro. Abr. 663.)

---

remainder, is made liable to the payment of double the yearly value of the lands detained. This statute only took in cases in which the *landlord* gave notice to quit, and therefore the deficiency was supplied by the 11 G. 2. c. 19, which extends the provision for double rent to the holding over after the *tenant's* giving notice to quit. See a case on this latter statute in 3 Burr. page 1603. See also 6 Ann. c. 18. s. 1, against holding over by guardians or trustees of infants, and by husbands seised in right of their wives, and by all others having particular estates determinable on any life or lives. [See also 57 G. 3. c. 52 & c. 93. 1 G. 4. 87.]—[Note 382.]

(3) Vid. 21 *H.* 6. 38. Hal. MSS.

(4) 4 *H.* 6. 12. Hal. MSS.

(5) *If the heir accepts rents from him, he is tenant at will to the heir.* 10 *E.* 4. 18. *Tenant for years surrenders, and still continues possession, he is tenant at sufferance or disseisor at election. Dy.* 62. Hal. MSS.—[Note 383.]

(6) *And if guardian in such case dies seised, the entry of the heir tolls.* 7 *H.* 4. 42. per *Cul.* Hal. MSS.—[Note 384.]

(7) See further as to tenant by sufferance in title *Estate*, Vin. Abr. and Com. Dig.

Chap. 9. Tenant by Copie. Sect. 73.

TENANT by copy of court roll is, as if a man be seised of a mannor within which mannor there is a custome, (tenant per copie de court rol' est (8), deins quel manor il y ad un custome), *which hath beene used time out of minde of man, that certaine tenants within the same mannor have used to have lands and tenements, to hold to them and their heires in fee simple, or fee taile, or for terme of life, &c. at the will of the lord* (1) *according to the custome of the same manor.*

"*TENANT by copy, &c.*": *Tenens per copiam rot. Cur'.* *Copy* we call in *Latine copiam*, though *copia* in his proper signification signifieth plenty: but we have made a *Latine* word of the *French* word *copie:* and this is ancient; for in the *Register*, fol. 51, there is a writ *de copiâ libelli deliberandâ*, which is grounded upon the statute of 2 *H.* 4. ca. There is no tenant in the law that holdeth ☞ by copie, but onely this kinde of customary tenant, for no man holdeth by copie of a charter, or by copy of a fine, or such like, but this tenant holdeth by copy of court roll.

(3 Co. 7. Heydon's case. 1 Ro. Abr. 498.) 4 H. 4. 34.

[58. a.]

[a] *Bracton* calleth copiholders *villanos sockmannos*, not because they were bond, but because they held by base tenure, by doing of villein services.

[a] Bracton, lib. 2. cap. 8. fol. 26. & lib. 4. fol. 209.

And *Britton* saith, that some that be free of blood doe hold land in villenage; and *Littleton* himselfe in the next Chapter calleth them tenants by base tenure: and in *F. N. B.* fol. 12. C. *Et cest terme, que est ore a cest jour appel copitenaunts, ou copiholders, ou tenaunts per copie, est forsque un novel nosme trove, car d'ancient temps ils feur' appelles tenants in villenage, ou de base tenure, &c.* [b] And yet in 1 *H.* 5. 11. they be called copiholders; in 14 H. 4. 34, *tenant per le verge;* in 42 *E.* 3. 25. *tenant per roll solonque le volunt le seignior;* and in the statute of 4 *E.* 1, called *extenta manerii*, they are called *custumarii tenentes*, and so doth *Fleta* call them; and before him *Ockam* (2) (who

Britton, 165. Fleta, lib. 1. ca. 8. & lib. 2. cap. 6. Item de custumariis. Ockham Cap. quid murdrum. F. N. B. f. 12. C.

[b] 1 H. 5. 11. 14 H. 4. 34. 42 E. 3. 25. Vid. 4 Co. 2. Browne's case.

---

(8) Si come un home soit seisie d'un maner, *L. and M.—Roh.—P. and Red.*

(1) Nota, *these words* ad voluntatem domini *are material to express copyhold; for if these words be omitted in pleading, it shall be intended that the estate is a customary freehold.* M. 7 Car. B. R. *Crook, n.* 7. *Hughes's case.* Hal. MSS.—See Cro. Cha. 219.—See further as to *customary freehold*, post. 59. b. and note 1, there.—[Cro. Cha. 229. Salk. 384. 4 East 288.]—[Note 385.]

(2) This author, whom lord Coke cites on several occasions, according to sir William Dugdale, wrote a book on *tenures of the king*, but did not perfect it. Dugd. Orig. Jurid. 1st ed. 56. I imagine, that this book is the work referred to by lord Coke; but whether it is in print, or lord Coke cites it from a manuscript, I have not yet been able to learn. See post. 68. b. n. 7.—[Note 386.]

(who wrote in the raigne of *H.* 2.) spake of them, and how, and upon what occasion they had their beginning.

[c] Lamb. verb. Terra ex scripto.

[c] *Terra ex scripto Saxonicè Bockland. Fundum veteres aut et scripto qui Bockland, i. bookland, aut sine scripto qui Folkland dicebatur, possidebant. Quæ fuit ex scripto possessio commodiore erat possessione, libera, atque immunis. Fundus sine scripto censum pensitabat annuum, atque officiorum servitute quâdam est obligatus. Priorem viri plerumque nobiles atque ingenui, posteriorem rustici ferre et pagani possidebant* (3).

(4 Inst. 268.)

"*Court.*" *Curia*, court, is a place where justice is judicially ministred, and is derived *à cura, quia in curiis publicis curas gerebant* [d]. The court baron must be holden on some part of that which is within the mannor, for if it be holden out of the manner it is voyd; unlesse a lord being seised of two or three mannors hath usually time out of mind kept at one of his manors courts for all the said manors, then by custome such courts are sufficient in law, albeit they be not holden within the severall mannors (4). And it is to be understood that this court is of two natures. The first is by the common law, and is called a court baron, as some have said, for that it is the freeholders or freemans court (for barons in one sense signifie freemen), and of that court the freeholders being suitors be judges, and this may be kept from three weekes to three weekes. The second is a customary court, and that doth concerne copiholders, and therein the lord or his steward is the judge. Now as there can be no court baron without freeholders, so there cannot be this kind of customary court without copiholders or customary holders. And as there may be a court baron of freeholders only without copiholders, and then is the steward the register, so there may be a customary court of copiholders onely without freeholders, and then is the lord or his steward the judge (5). And when the court baron is of this double nature, the court roll containeth as well matters appertaining to the customary court, as to the court baron.

[d] Vid. 4 Co. 24. inter Murrell & Smith. Eodem lib. fol. 27. inter Clifton & Molineux. (1 Ro. Abr. 527.)

4 Co. 26. Melwitche's case. Britton, fol. 274.

(4 Co. 26. b.)

And for as much as the title or estate of the copiholder is entred into the roll whereof the steward delivereth him a copie, thereof he is called copiholder. [e] It is called a court baron,

[e] Lamb. fol. 128. and 136. Camden Brit. fo. 121. b. Britton, fo. 274.

because

(3) See ante 5. b. and note 1, there, and 6. a. and note 6, there.

(4) See acc. Cro. Cha. 367. But the lord may take a surrender out of the manor, because that may be done out of court; and so may the steward if there is a special custom, or according to latter authorities without. See 1 Salk. 184, and post. 59. a. 1 Watk. Cop. 253.—[Note 387.]

(5) *A steward* de facto *is sufficient.—The king constitutes A. and B. stewards of a manor by patent* sub sigillo scaccarii; *A. holds courts; and though the appointment ought to have been* sub magno sigillo, *and both ought to have holden the courts, yet it was ruled, that grant by one was good. So it is as to the lord's clerk or an under steward.* P. 22 Eliz. Scacc. Hal. MSS.—The doctrine in this case seems confirmed by the cases and authorities cited in Vin. Abr. *Steward*, F. G. J. K. and Com. Dig. *Copyhold*, C. 5. Note also particularly what is expressed in Co. Copyhold, sect. 45, in respect to the law's not being nice in examining the imperfections of the steward's authority, where his acts are *ordinary* and *necessary*, and not of a *judicial* kind.—[Note 388.]

because among the lawes of king *Edward the Confessor*, it is said, *Barones verò qui suam habent curiam de suis hominibus, &c.* taking his name of the baron who was lord of the mannor, or for that properly in the eye of law it hath relation to the freeholders, [*f*] who are judges of the court. And in ancient charters and records the barons of *London*, and barons of the Cinque Ports, do signify the freemen of *London* and of the Cinque Ports.

[*f*] Mirror, cap. 1. sect. 3.

"*Seised of a manor.*" *Manerium dicitur à manendo secundam excellentiam sedes magna fixa et stabilis. Lageman, i. habens socam et sacam super homines suos, &c.* [*g*] *Et sciendum est, quòd manerium, poterit esse per se ex pluribus ædificiis coadjuvatum sive villis et hamlettis adjacentibus. Poterit etiam esse manerium et per se et cum pluribus villis, et cum pluribus hamlettis adjacentibus, quorum nullum dici poterit manerium per se sed villæ sive hamlettæ. Poterit etiam esse per se manerium capitale, et plura continere sub se maneria non capitalia, et plures villas et plures hamlettas quasi sub uno capite aut dominio uno.* And afterwards, *Manerium autem fieri poterit ex pluribus villis vel unâ, plures enim villæ poterunt esse in corpore manerii sicut et unâ* (6). And in these [*h*] ancient authors you shall see the difference *inter mansionem, villam, et manerium.* Concerning the institution of this court by the lawes and ordi-

Domesday.

[*g*] Bracton, lib. 4. fo. 112. Fleta, lib. 4. c. 15. & lib. 6. cap. 49. Britton, fol. 124.

[*h*] Bract. lib. 5. fo. 434. Fleta, ubi supra. Mirror, cap. 1. sect. 3.

[58. b.] nances of ancient kings, and especially of king *Alfred*, it appeareth ☞ that the first kings of this realme had all the lands of *England* in demeane (1), and *les grand manors et royalties* they reserved to themselves, and of the remnant they, for the defence of the realme, enfeoffed the barons of the realme with such jurisdiction as the court baron now hath, and instituted the freeholders to be judges of the court baron. And herewith agreed the aforesaid law of Saint *Edward*. And it is to be observed that in those ancient lawes under the name of barons were comprised all the nobility.

3 Bos. 347.

There may be a customary manor granted by copy of court roll (2). So although the word be (*seised*) which properly betokeneth a freehold, yet tenant for yeares, tenant by statute merchant, staple, *elegit*, and tenant at will, gardian in chivalrie (3), &c. who are not properly seised but possessed, are *domini pro tempore*, not only to make admittance, but to grant voluntary copies of ancient copihold lands which come into their hands (4). And

(1 Co. 140. b. Cro. Jam. 260. Mo. 95. 8 Co. 63. b. 1 Ro. Abr. 499. 4 Co. 26. b. 23. b. Cro. Jam. 98.)

---

(6) For other explanations of the word *manor*, see in Cow. Interp. voc. *Manor*, and the books there cited, particularly Fulb. Paral. part 1. fol. 18. a. [Also Watkins on Copyholds, vol. 1. p. 12. 3d edit.]

(1) See as to this ante 1. b. and the authorities in note 1, there.

(2) This is denied in Cro. Jam. 260, and is a point which has been much controverted. See Vin. Abr. *Copyhold*, E. and Com. Dig. *Copyhold*, C. 1.

(3) *Guardian in socage may grant copies in his own name, nor can the heir hold courts during the interest of the guardian.* T. 1 Jac. Rot. 883. C. B. *Shopland and Ridler. Noy, n.* 372. *Clare's case.* Hal. MSS.—See the former case acc. in Cro. Jam. 55. 98. 1 Ro. Ab. 499. pl. 4. Ow. 115. Godb. 143. 4 Leon. 238. See also acc. 2 P. Wms. 122.—[Note 389.]

(4) *Custom to grant copies in reversion after estates for life. Ruled, that* dominus pro tempore *may make such grants; and they will bind, though the particular estate doth not determine during his interest.* P. 41 Eliz. B. R. n. 27.

And therefore there is a diversity between disseisors, abators, intruders, and others that have defeasible titles; for their voluntary grants of ancient copihold lands shall not bind the disseisees or others that right have (5). And voluntary grants by copie, made by such particular tenants as is aforesaid, shall binde him that hath the freehold and inheritance, because all these be lawfull lords for the time being; but so is not a tenant at sufferance, because he is in by wrong, as hath been said; and so [i] was it adjudged *P.* 29 *Eliz. inter Rouse et Arters* 4 *Co.* 24. But admittances made by disseisors, abators, intruders, tenants at sufferance, or others that have defeasible titles, stand good against them that right have, because it was a lawfull act, and they were compellable to doe them.

[i] 4 Co. 24. P. 29 Eliz. inter Rous & Artois.

[k] And yet in some speciall case an estate may be granted by copie, by one that is not *dominus pro tempore*, nor that hath any thing in the manor. As if the lord of a manor by his will in writing deviseth, that his executor shall grant the customary tenements of the manor according to the custome of the manor for the paiment of his debts, and dieth, the executor having nothing in the manor, may make grants according to the custome of the manor (6).

[k] Dier. Mich. 7 & 8 Eliz. Manuscript.

"*Within which mannor there is a custome, which hath beene used time out of minde of man, &c.*" Of this custome here spoken of there be three supporters. The first is time, and that must be out of memory of man, which is included within this word (custome) so as copihold cannot begin at this day. [l] The second supporter is, that the tenements be parcell of the manor or within the manor, which appeares by these words of *Littleton*, *that certaine tenants within the same manor, &c.* The third supporter is, that it hath beene demised and demisible by copie of court roll; for it need not be demised time out of mind by copie of court, but if it be demisible it is sufficient. For example: if a copihold tenement escheat to the lord, and the lord keepeth it in his hands by many yeares, during this time it is not demised but demisible, for the lord hath power to demise it againe (7).

[l] Vid. 4 Co. 24. inter Murrel & Smith.

"*At*

C. C. *Guy and Rey.* Hil. 26 Eliz. *Sir Peter Carew's case. More*, 147. Vide tamen H. 14 Eliz. ibid. 95, *the case of Com. Oxon.* contra. Hal. MSS.—Accord. that the lord *pro tempore* may grant in reversion, where reversions are grantable by copy. See Cro. Eliz. 66. 2 P. Wms. 122, and the case of Lade and Barker in 2 New Abr. 684. See also the subject enlarged upon in Gilb. Ten. 3d Lond. edit. 204.—[Note 390.]

(5) *If copyholder surrenders to disseisor to the use of I. S. disseisor may admit him, if the surrenderor be a copyholder in fee; but otherwise it is, if he be only copyholder for life, as it seems, for it is a new grant.* P. 41 Eliz. B. R. *Martyn and Rew.* Hal. MSS.—See Gilb. Ten. 3d Lond. edit. 201.—[Note 391.]

(6) *If heir before assignment of dower grants copies, it will not bind the wife.* P. 28 Eliz. B. R. *Rous and Arters.* Hal. MSS.—See further as to the persons by whom copyhold estates may be granted, in Vin. Abr. *Copyhold*, G. and Com. Dig. *Copyhold*, C. 3. 9 Gilb. Ten. 203.—[Note 392.]

(7) What thing destroys the custom of granting a copyhold. *One is lessee for life, or tenant in tail of a manor; a copyhold escheats; and lessee or tenant*

in

"*At the will of the lord according to the custome.*" So as he is not a bare tenant at will, but a tenant at will according to the custome of the mannor, as shall be spoken more hereafter in this Chapter.

"*Certaine tenements.*" What things may be granted by copy, is necessary to be knowne. First a manor may be granted by copy (8). Secondly, underwoods without the soile may be granted by copy to one and to his heires, and so may the herbage or vesture of land. Thirdly, generally all lands and tenements within the manor and whatsoever concerneth lands or tenements may be granted by copie: as a faire appendant to a mannor may be granted by copy, &c. (9). (1 Ro. Ab. 498.) 11 Co. 17. Sir H. Nevill's case. 4 Co. 30, 31. inter Hoe & Taylor.

"*Consuetudines.*" This word *consuetudo* being derived *à consueto*, properly signifieth a custome, as here *Littleton* taketh it:

---

in tail makes lease for years of the copyhold. Though quoad *himself the custom is gone, yet* quoad *the issue or reversioner the custom is not gone. So it is in case of a husband seised in right of his wife.* P. 38 Eliz. B. R. *Conesby and Ruskey. And accordingly agreed* per curiam P. 1650, *in Cremer and Burnet. But* vid. contra M. 14 Car. B. R. *Crook, n.* 22, *in Lee's case. Copyholder surrenders to the use of the lord, who makes a lease of the manor and of this tenement by name. Ruled, that the tenement is still grantable by copy; for it passes with the manor, and so continues demisable.* Tr. 10 Car. *Crook, n.* 4. *Lee and Boothby.—The king is seised of a copyhold manor, the copyhold escheats, and the king makes lease for years. Ruled, that though the lease is good, yet after the term the copyhold is grantable by copy, because the grant doth not enure to a double intent in the case of the king.* P. 1650. *Cremer and Burnet.* Hal. MSS.—See Conesby and Ruskey in Cro. Eliz. 459. Cremer and Burnet in Sty. 266. and 2 Ro. Abr. 196. pl. 34, and Lee's case in Cro. Cha. 521. W. Jo. 449, and 1 Ro. Abr. 498. pl. 1. See also the observations on the two latter cases in Vin. Abr. *Prerogative*, G. c. pl. 3, 4. See further on the destruction of copyhold estates in Com. Dig. *Copyhold*, B. 3. and L. and Vin. Abr. *Copyhold*, R.—[Note 393.]=Tanfield says, in the Exchequer, that this case was adjudged in 18 El. Copyhold escheats to the lord; lord makes lease for 3 years by indenture, and after end of that term he granted it by copy; and ill, because the prescription is gone, which is, that it was demised and all time was demisable by copy; but notwithstanding the escheat and the possession in the lord, a demise by copy after this is good, for then the prescription holds place. "If lord of a manor leases copyhold land by indenture, reserv- "ing rent and all other services due and accustomed within the same manor, "this is a good reservation for all: and the nature of the copyhold is altered "for the time, and after the term ended this shall be copyhold land again as "before. Molyneux, serj. thinks that if copyhold escheat to the lord of the "manor, or otherwise comes to the hands of the lord only to his own use, now "he cannot make such lands copyhold again, in regard that they were once "extinguished in the seigniory: but the opinion of Fitzherbert was to the con- "trary; and it seemed to him that if he demised them by copy again, the "copyhold is revived; for the unity of possession never destroys the custom." French's MSS. Rep. Temp. Eliz.

(8) See note 2, supra.

(9) *Tithes are grantable by copy.* P. 43 Eliz. B. R. *Sands and Drury* per curiam. Hal. MSS.—See as to the case here cited by lord Hale, Vin. Abr. *Copyhold*, E. pl. 1. See also as to things grantable by copy, Vin. Abr. *ubi supra*, and Com. Dig. C. 1.—[Note 394.]

Regist. F. N. B. 270. D. V. Mag. Carta. in cap. Itin. fol. 151. Bract. lib. 3. 117. Fleta, lib. 1. cap. 20.

it: but in legall understanding it signifieth also tolles, murage, pontage, paviage, and such like, newly granted by the king; and therefore when the king grants such things, the words be, *Concessimus, &c. in auxilium villæ prædict' paviand', &c. consuetudines subscriptas, viz. de quolibet sunnagio, &c.*

And it was an article of the justices in eire to inquire *de novis consuetudinibus levatis in regno, sive in terrâ, sive in aquâ, et quis eas levavit et ubi;* where *consuetudo* is taken for tolles and such like taxes or charges upon the subject.

Sect. 74.

AND such a tenant may not alien his land by deed, for then the lord may enter as into a thing forfeited unto him. But if he will alien his land to another, it behoveth him after the custome to surrender the tenements in court, &c. into the hands of the lord, to the use of him (A) *that shall have the estate, in this forme, or to this effect.*

A. *of* B. *commeth into this court, and surrendereth in the same court a mease, &c. into the hands of the lord* (in manus domini), *to the use of* C. *of* D. *and his heires, or the heires issuing of his body, or for terme of life, &c. And upon that cometh the aforesaid* C. *of* D. *and taketh of the lord in the same court the aforesaid mease, &c. To have and to hold to him and to his heires, or to him and to his heires issuing of his body, or to him for terme of life, at the lord's will, after the custome of the manor, to do and yeeld therefore the rents, services and customes thereof before due and accustomed, &c. and giveth the lord for a fine, &c. and maketh unto the lord his fealty, &c.*

(1 Ro. Abr. 509.) Lib. intrat. 131. 4 Co. 25. b. inter Kite & Queinton.

"*AND such a tenant may not alien his land, &c.*" And this is ☞ true in case of alienation (1), but when a man hath but a right to a copihold, he may release it by deed or by copie, to one that is admitted *tenant de facto* (2). [59. a.]

"*Alien*

(A) Copyholder mortgages his copyhold on condition of payment, and he surrenders into the hands of the lord to the same intent, and afterwards the condition is performed; and it was held by the justices that he is now tenant by the copy, as he was before, without new admission. But Fleetwood, serj. says that lord Wentworth hath a manor in which are copyholders, they use when such mortgage is made that he shall not become copyholder again without new admittance. Mead, J.: Then he does against law; for the surrender to him was only on condition, which being performed, the surrender is as null, and he immediately copyholder again.—French's MSS. Rep. temp. Eliz.

(1) *Parceners of copyhold cannot make partition without the lord's license.* P. 41 Eliz. B. R. *Fuller and Terry.* Hal. MSS.—The same case is in 1 Ro. Abr. 509. pl. 1, 2, but the points there are different.—[Note 395.]

(2) *If copyhold is granted to A. and B. who are admitted, A. may release to B. without fine or surrender. Adjudged* P. 19 Jac. *entered* H. 16 Rot. 735.

C. B.

"*Alien by deed.*" Here it appeareth by *Littleton*, that there must be an alienation; for the making of the deed alone, unlesse somewhat passe thereby, is no forfeiture. As if he make a charter of feoffment, or a deed of demise for life, and make no livery, this is no forfeiture, because nothing passeth, and therefore no alienation (3); but otherwise it is of a lease for yeares (4).

"*Forfeited*

C. B. *Wase and Pretty. So he may release condition.* T. 2 Jac. *But if he release to disseisor, it is holden void; but he may release all his right to him who is admitted.* M. 5 Car. C. B. per curiam. Hall. MSS.—See acc. Wase and Pretty in Winch. 3, and s. p. acc. by the court in Hetl. 150. See further as to the effect of a release on a copyhold, Vin. Abr. *Copyhold*, Z. a. and Com. Dig. *Copyhold*, I. i.—[Note 396.]

(3) But according to Rolle, though livery is not made, the feoffment is a forfeiture, if there be a letter of attorney to deliver seisin, because then the feoffee may at any time perfect the conveyance: and he thinks, that lord Coke ought to be understood with this distinction. 1 Ro. Abr. 508. pl. 12, 13. However, the distinction in Rolle may be doubted, for the criterion or forfeiture of a copyhold by alienation seems to be the *actual passing* of an unlawful estate to the lord's prejudice, and in the case of the feoffment no interest can pass till livery; nor is it strictly true, that the feoffee may at any time perfect the conveyance, for it is possible, that before livery the feoffer may revoke the power of attorney, or the attorney may die or refuse to execute his authority. See further on this subject, 3 Leon. 109, and Godb. 269.—[Note 397.]

(4) The *plural* number is here significant; for a lease for *one* year is not a forfeiture, such lease by copyholder being, as lord Coke in another place writes, warranted by the *general* custom of the realm. 4 Co. 26. See also acc. 9 Co. 75. b. W. Jo. 249, and Litt. Rep. 233. See also 1 And. 192, and Mo. 272, and 679, by which it appears that it was once doubted, whether to warrant a lease for one year without the lord's license, a *particular* custom was not necessary.—The following annotation is by lord Hale. Vid. *as to forfeiture by lease or alienation. A. is lessee of a manor for five years; copyholder grants bargains and sells his copyhold to A. and his heirs. Ruled, that this amounts to a full surrender; and if after the term he who hath the fee of the manor admits A. or his heir, it amounts to a new grant.* T. 21 Jac. C. B. *Hassel and Hamerton.—Copyholder in fee makes lease for a year, and so* de anno in annum *during the life of copyholder*, except one day at the end of every year; *and this was adjudged to be a forfeiture; and so if it was by covenant, for it amounts to a lease for two years, and the exception of a day doth not aid the case.* Vid. 10 Jac. B. R. *Bulstr. n.* 201. *Hamlen and Hamlen.* T. 10 Jac. ibid. *n.* 232. *Luttrell and Weston.—Copyholder makes lease by indenture for one year, and same day by another makes another lease for one year to commence after the former, and so a third lease by a third indenture for one year after the second, and then surrenders to the steward to the use of the lord. Ruled*, 1. *Though this be by several indentures, and two days interpose between the end of one lease and the beginning of another, it is a forfeiture.* 2. *The covin is apparent, though it was not found. Though he surrenders to the lord, not having notice, the lord shall be adjudged to be in point of forfeiture, and shall avoid the leases.* M. 7 Car. B. R. *n.* 15. *Matthew and Whetton.* Hal. MSS.—See the first case cited by lord Hale in Winch. 66. W. Jo. 41, and Hutton, 65, though in these books the name is different. See the second case in 1 Bulstr. 189, the third in 1 Bulstr. 215, and the fourth in Cro. Cha. 233. W. Jo. 249, and 1 Ro. Abr. 508. pl. 10.—It is observable, that accord-

"*Forfeited unto him.*" This adjective in *Latine* is *forisfactus*, the verbe is *forisfacere*, and the nowne *forisfactura*. They are all derived of *fores* (that is) *extra*, and *facere*, *quasi diceret*, *extra legem seu consuetudinem facere*, to do a thing against or without law or custome; and that legally is called a forfeiture. *Littleton* useth this word but once in all his booke. What shall be said [*k*] forfeitures of copiholds you may read at large in my Reports (5).

[*k*] 4 Co. inter les copihold cases, 21, 23. 25. 27. 28. 8 Co. 92. 99. 100. 9 Co. 75. 107. 10 Co. 131.

"*In court.*" [*l*] This is the generall custome of the realme, that every copiholder may surrender in court, and need not to alleage any custome therefore. So if out of court he surrender to the lord himselfe, he need not alledge in pleading any custome. But if he surrender out of court into the hands of the lord by the hands of two or three, &c. copiholders, or by the hands of the bayliffe or reeve, &c. or out of court by the hand of any other, these customes are particular, and therefore he must plead them (6).

[*l*] Bract. lib. 2. cap. 8. & lib. 4. 49. 15 H. 4. 34. 1 H. 5. 11. Gilb. Ten. 251. (1 Ro. Abr. 500. 9 Co. 76.)

[*m*] Bracton, lib. 4, fol. 209, speaking of these kind of customary tenants, saith, *Dare autem non possunt tenementa sue, nec ex causâ donationis ad alios transferre non magis quàm villani puri; et unde si transferre debeant, restituant* ☞ *ea domino vel ballivo, et ipsi ea tradant aliis in villenagium tinenda.* But although it be incident to the estate of a copihold to passe, as our author saith, by surrenders, [*b*] yet so forcible is custome, that by it a freehold and inheritance may also passe by surrender (1)

[*m*] Bract. lib. 4. fol. 209. & lib. 2 cap. 8. ac. 14 H. 4. 34.

[59. b.]

[*b*] Coram rege Mich. 31, E. 3. Ranulph. Huntingfield's case. 3 E. 3. Corona, 310. 11 H. 4. 83. per Thoring.

(without

---

ing to the third case cited by lord Hale a mere covenant that the lessee shall enjoy for a second year is a forfeiture; but the second case and other authorities are to the contrary; because, though *in general* a covenant amounts to a lease, yet it seems harsh to give such a construction, where a lease amounts to a forfeiture, and the intention of the parties may have effect by way of agreement. See Cro. Jam. 311, and 2 Keb. 267. See further as to leases by copyholders and forfeiture on that account, New Abr. tit. *Leases*, I. 6. Vin. Abr. *Copyhold*, G. c. H. c.—[Note 398.]

(5) See also tit. *Copyhold*, in Nin. Abr. D. c. to E. d. 2. New Abr. L. and Com. Dig. M.

(6) Nota, *by Rolle surrender into the hands of the stewards, though out of the court, is good without custom.* M. 24 Car. B. R. *Baker and Denham.* Hal. MSS.—See acc. 1 Ro. Abr. 500. pl. 3. 4 Leon. 111. 1 Salk. 184. Some make a distinction between stewards by *deed* and stewards by *parol*, and think that only the former can take surrenders out of court. Godb. 142, and 1 Ld. Raym. 159. But this distinction has been frequently denied, and indeed seems unsupported by any good reason. Cro. Jam. 526. Com. Rep. 85.—[See also 4 East, 271. 55 Geo. 3. c. 192, and Watk. Cop.]—[Note 399.]

(1) M. 9 Jac. C. B. n. 5. D. D. *Wilde and Francis. Adjudged accordingly, and the admittance is* tenendum, *but not* ad voluntatem domini. Hal. MSS.—Vid. acc. ante 49. a, and note 6, there, and also the books cited in Blackst. Law Tr. 8 vo. ed. v. 1. p. 144. From these authorities it appears, that estates held

(without the leave of the lord) in his court, and be delivered over by the baily to the feoffee, according to the form of the deed, to be inrolled in the court or the like,.

"*A. B. commeth into this court, and surrendreth, &c.*" Here *Littleton* putteth an example of a surrender in court, and in this example three [c] things are to be observed.

[c] Vide 4 Co. inter les cases de copiholds.

First, that the surrender to the lord be generall without expressing of any estate (2), for that he is but an instrument to admit *Cesty a que use*, for no more passeth to the lord, but to serve the limitation of the use (3); and *Ce' que use*, when he is admitted shall be in by him that made the surrender, and not by the lord (4).

Secondly, if the limitation of the use be generall, then *Ce' que use* taketh but an estate for life, and therefore here *Littleton* expresseth upon the declaration of the use, the limitation of the estate, viz. in fee simple, fee taile, &c.

Thirdly, the lord cannot grant a larger [*d*] estate than is expressed in the limitation of the use. *Littleton* here putteth his case of one. If two joyntenants be of copihold lands in fee, and the one out of court according to the custome surrender his part to the lord's hands, to the use of his last will, and by his will deviseth his part to a stranger in fee, and dyeth, and at the next court the surrender is presented, by the surrender and presentment the joynture was severed, and the devisee ought to be

[d] Mich. 2 & 3 Ph. & M. in Com. Banco, by the whole court in Constable's case of Pickenham in Norfolke.

---

held *by copy of court roll*, but not *at the will of the lord*, have been deemed *freehold* estates as well by others as by lord Coke, and in order to distinguish them from the ordinary kind, have been denominated *customary freeholds*. In consequence of the prevalence of this notion, a considerable number of *such* tenants some few years ago claimed a right of voting as *freeholders* at the election of knights of the shire. This gave occasion to a short but most excellent treatise on the subject, in which the learned author traces the origin or land held in this peculiar way, and proves by the most clear and forcible arguments, that though these tenures in some respects *resemble* freeholds, they are in *truth* nothing more than *a superior kind of copyhold*. (See however Vaughan *v.* Atkyns, 5 Burr. 2764. Gall *v.* Noble, Carth. 43. Perryman's ca. 5 Co. 84. And see 3 Burr. 1275; 2 Ves. 300.) Soon after the publication of this treatise, the doctrine inserted in it received confirmation from an act of parliament, declaring that no person holding *by copy of court roll* should be entitled to vote at the election of knights of the shire. See Blackst. Law. Tr. 8vo ed. v. 1. p. 105, and 31 G. 2. c. 14.—[Note 400.]

(2) *Copyholder for life surrenders to the use of D. the lord accepts the surrender and admits D. for his life, who dies. Adjudged, that the surrenderor shall not have the land, but the lord, for he who surrendered had not any reversion. But if copyholder surrenders to the use of B. there on B.'s death the surrenderor shall have, for he hath the remainder.* M. 6 Car. B. R. Crook, n. 10, *King and Lord.* Hal. MSS.—See Cro. Cha. 204, and S. C. 1 Ro. Abr. 504. 2 Ro. Abr. 462. See 9 Co. 107. Vin. Abr. *Copyhold*, P. 6 Mod. 68. 1 Salk. 188, and Gilb. Ten. 3d Lond. ed. 257.—[Note 401.]

(3) See post. 62. a. and Jefferies's case cited from Wils. in note 1.

(4) Acc. by wilmot, justice, in 3 Burr. p. 1543; and see further as to this, Yelv. 223. 4 Co. 27. b. Com. Dig. *Copyhold*, F. 14. and Gilb. Ten. 3d Lond. ed. 257.

be admitted to the moitie of the lands, for now by relation the state of the land was bound by the surrender (5).

"*Into the hands of the lord* (in manus domini)." *Dominus manerii*, the lord of a manor, is described [*e*] by *Fleta* as he ought to be, in these words: *In omnibus autem et supra omnia decet quemlibet dominum verbis esse veracem, et in operibus fidelem, Deum et justitiam amantem, fraudem et peccatum odientem, voluntariosque, malevolos, et injuriosos contemnentem, et apud proximus pietatem vultumque motibilem, et plenum; ipsius enim interest potiùs consilio quàm viribus uti, propriove arbitrio. Non cujuslibet voluntarii juvenis menestralli, vel adulatoris, sed jurisperitorum virorum fidelium et honestorum, et in pluribus expertorum, consilio debet faveri. Qui bene sibi vult disponere et familiæ suæ, scire veram executionem terrarum suarum necessarium erit, ut perinde sciat quantitatim suarum facultatum et finem annuarum expensarum.* And the residue is fit for every lord of a manor to know and follow, which were too long here to be recited; only his conclusion, having spoken of the lord's revenue and expences, I will adde, *Quæ omnia distinctè scribantur in membranis, ut perinde sagaciùs vitam suam disponat et facilius convincat mendacia compostariorum.*

[*e*] Fleta, lib. 2. c. 65 & 71.

[*f*] If the lord of the manor for the time being be lessee for life or for yeares, gardian, or any that hath any particular interest or tenant at will of a manor, (all of which are accounted in law *domini pro tempore*) and doe take a surrender into his hands and before admittance the lessee for life dyeth, or the yeare's interest or custody doe end or determine, or the will is determined, though the lord cometh in above the lease for life or for yeares, the custody or other particular interest or tenancy at will, yet shall he be compelled (6) to make admittance according to the surrender; and so was it holden in 17 *Eliz.* in the earl of *Arundel's* case, which I my selfe heard.

[*f*] See more of this 4 Co. the cases of copiholds. Trin. 1 Ja. Rot. 854. inter Shapland & Ridler in repl. in Com. Banco, the case of the gardian in socage adjudged. (Cro. Jam. 98. 8 Co. 60. b.)

"*And giveth the lord for a fine.*" For the signification of this word (*fine*), *Vide* Sect. 174. 182. 194. 441.

Of fines due to the lord by the copiholder, some be by the change or alteration of the lord (7), and some by the change or alteration of the tenant. The change of the lord ought to be by the act of God, otherwise no fine can be due; but by the change of the tenant, either by the act of God or by the act

---

(5) M. 3 Jac. B. R. *Crook*, n. 30. *Porter and Porter.* Hal. MSS.—See Cro. Jam. 100, by which the case appears to have been adjudged according to lord Coke's doctrine of relation. See further as to the relation of surrenders in Vin. Abr. *Copyhold*, T. b.

(6) Nota, *ruled, the action on the case doth not lie against the lord who refuses to admit, but the remedy is to compel him in chancery.* P. 13 Jac. B. B. Crook n. 1. *Ford and Hoskins.* Hal. MSS.—See Cro. Jam. 368, and S. C. Mo. 842. 2 Bulstr. 336. But it is said to have been adjudged, that though *surrenderee* cannot have action on the case against the lord for refusing to admit, yet the *surrenderor* may. 3 Bulstr. 217.—[Note 402.]

(7) Vid. *for tallages in Wales on change of the lord*, 34 *H.* 8. *c.* 26. Hal. MSS. —See Sect. 93.—[See also Watkyns on Copyholds, 3d edit.]

act of the party, a fine may be due: for if the lord doe alledge a custome within his manor to have a fine of every of his copiholders of the said manor at the alteration or change of the lord of the mannor, be it by alienation, demise, death, or otherwise; this is a custome against the law, as to the alteration or change of the lord by the act of the party, for by that meanes the copiholders may be oppressed by multitude of fines, by the act of the lord. But when the change groweth by the act of God, there the custome is good, as by the death of the lord. And this, upon a case in the chancery [g] referred to sir *John Popham* chiefe justice, and upon conference with *Anderson*, *Periam*, *Walmesley*, and all the judges of *Serjeants Inn* in *Fleet Street*, was resolved, and so certified into the chancery. But upon the change or alteration of the tenant (8), a fine is due unto the lord.

[g] T. 39 Eliz. betweene the copiholders of the mannor of Gilcruise in the county of Northumberland, and Armestrong lord of the manor, in chancerie. (11 Co. 44. a. Cro. Cha. 196. 2 Ro. Abr. 578.)

Of fines taken of copiholders some be certaine by custome, and some be incertaine, but that fine, though it be *incertus*, yet must it be *rationabilis*. And that reasonablenesse shall be discussed by the justices upon the true circumstances of the case appearing unto them; and if the court where the cause dependeth, adjudgeth the fine exacted unreasonable, then is not the

[60. a.] ☞ copiholder compellable to pay it (1). And so was it adjudged: [h] for all excessiveness is abhorred in law. See more concerning fines of copiholders in my Reports [i], which are so plainly there set downe, as they need not be rehearsed here.

[h] Pasch. 1 Jac. in Com. Banco, rot. 1845, inter Stallon & Brady.

[i] 4 Co. the cases of copiholds.

---

(8) See Vin. Abr. *Copyhold*, W. b. See also much curious learning on this subject in the case of the earl of Bath and Abney in 1 Burr. page 206. In that case the court held, that the executor of a copyholder, for a long term of years, was compellable to be admitted and to pay a fine. The great point of the case was, whether a fine became due on every *change of the tenant*, or on *change of the estate only*.—[Note 403.]

(1) *What shall be a reasonable fine. Two years and a half of racked rent adjudged unreasonable; and a year and a half is sufficient.* T. 6 Car. B. R. *Crook*, *n.* 8. *Dow and Golding. Two years value of racked rent adjudged unreasonable.* 2. *He who would take advantage of a forfeiture for non-payment of a fine uncertain, ought to assess a reasonable fine, and prefix a day and place within the manor for payment of it. Otherwise non-payment is not a forfeiture.* 3. *If it be doubtful whether the fine be reasonable or not, non-payment is not a forfeiture.* M. 6 Jac. C. B. *n.*-5. *D. D. Willowe's case.* Vide tamen, *for if in truth it be reasonable, non-payment at the day prefixed has been held a forfeiture.* M. 1650. *Parker's case.—Custom, that copyholder shall pay a fine of two years rent or under, held good.* M. 10 Jac. B. R. 2 *Bulstr. n.* 23. *Allen and Abraham. But* M. 36, 37. Eliz. *n.* 148, *in Green and Bury, it was ruled void for the uncertainty.* Hal. MSS.—See the first case in Cro. Cha. 196, the second in 13 Co. 3, the third in 2 Bulstr. 32, and the fourth in 2 Ro. Abr. 265, pl. 1. Note, that in the case in which two years rack rent was deemed an unreasonable fine, the admittance was on an *alienation* and not on a *descent*, and that on a *descent* two years value is generally understood to be reasonable. See Rep. temp. Finch, 464. See further on the *quantum* of fines, tit. *Copyhold*, in Vin. Abr. X. b. Com. Dig. H. 4, and New Abr. I. 3, and the case of the earl of Bath and Abney in 1 Burr. page 206.—[Note 404.]

Sect. 75.

AND these tenants are called tenants by copie of court rolle; because they have no other evidence concerning their tenements, but onely the copies of court rolles.

(4 Co. 25.)

"*THEY have no other evidence.*" This is to be understood of evidences of alienation; for a release of a right by deed a copiholder (that commeth in by way of admittance) may have, and that is sufficient to extinguish the right of the copyhold, which he that maketh the release had (2).

Sect. 76.

AND such tenants shall neither implead, nor be impleaded for their tenements by the king's writ. But if they will impleade others for their tenements, they shall have a plaint entered in the lord's court in this forme, or to this effect: A. *of* B. *complaines against* C. *of* D. *of a plea of land, viz. of one messuage, forty acres of land, four acres of meadow, &c. with the appurtenances, and makes protestation to follow this complaint in the nature of the king's writ of assise of mordancester at the common law, or of an assise of novel disseisin, or formedon in the discender at the common law, or in the nature of any other writ, &c. Pledges to prosecute* F. G. *&c.*

"*SUCH*

---

(2) Vid. hic *fol.* 59. *a. A. surrenders to the use of B. clearly the land is bound by the surrender, but B. hath nothing in the land till admittance.* M. 8. Car. B. R. *Burgoin and Spurling. But if the surrenderee dies, his heir shall be admitted. If the lord accepts rent of B. it is a good admittance.* M. 24 Car. B. R. *Baker and Denham. A. surrenders to the use of B. who before admittance surrenders to the use of C. and C. is admitted. Ruled, that C. takes nothing, for B. who surrenders hath not any interest to surrender till admittance.* 24 Eliz. *Alderman Dixe's case.* M. 6 Jac. B. R. *m. n.* 6. *Wilson and Woodhall. But yet it hath been ruled good, for the admittance of C. shall be implied to be an admittance of B. first, and so there shall be priority.* M. 24 Car. B. R. *Baker and Denham.* P. 41 Eliz. C. B. *Colchin and Colchin.* Vid. T. 15 Jac. B. R. 2 *Poph.* 5. Hal. MSS.—See the first case in Cro. Cha. 273, & 283, and 1 Ro. Abr. 473, & 500; the second in Sty. 145; the fourth case in Yelv. 144; the fifth in Cro. Eliz. 662, and 1 Ro. Abr. 499, pl. 1. See further as to the subject of the cases in this annotation, Com. Dig. *Copyhold*, F. 11, and Vin. Abr. *Copyhold*, U. W. Y and Q. b.—[Note 405.]

"*SUCH tenants shall neither implead, nor be impleaded, &c.*" This is evident, and needs no explanation. 14 H. 4. 34. adjudged in parliament.

"*But if they will impleade others, they shall have, &c.*" Put the case that the demandant in a pleint in nature of a reall action recovereth the land erroneously, what remedy for the party grieved? For he cannot have the king's writ of false judgement (A) in respect of the baseness of the estate and tenure, being in the eye of the law but a tenant at will. And the freehold being in another, he shall have a petition to the lord in the nature of a writ of false judgement, and therein assigne errors, and have remedy according to law. 14 H. 4. 34. 1 H. 5. 11. Vet. N. B. 18. 13 R. 2. tit. Faux judgment. 7 E. 4. 19. 21 E. 4. 80. (4 Co. 21. b.)

"*Formedon in the discender at the common law.*" By the opinion of *Littleton*, as there may be an estate taile by custome with the co-operation of the statute of *W.* 2, cap. 1, so may he have a *formedon in discender*; but as the statute without a custome extendeth not to copiholds (3), so a ☞ custome without the statute cannot create an estate tayle. 3 Co. 8, 9. in. Heydon's case. 4 Co. 22, 23. 15 H. 8. Br. tit. Taile. (3 Co. 8. b. 1 Ro. Abr. 838.)

[60. b.]

Now it is not a sufficient proofe, that lands have been granted in taile: for albeit lands have antiently and usually beene granted by copie to many men and to the heires of their bodies, that may be a fee simple conditionall, as it was at the common law. But if a remainder have been limited over such estates and enjoyed, or if the issues in taile have avoided the alienation of the ancestor, or if they have recovered the same in writs of *formedon* in the discender, these and such like be proofes of an estate taile. [y] But if by custome copihold may be intailed, the same by like custome by surrender may be cut off (1): and so hath it beene adjudged. [z] Some have holden (1 Ro. Abr. 506. 1 Sid. 267. 314. Cro. Eliz. 717.)

[y] P. 29 Eliz. inter Hill & Upcheic. Custome deins le manor de Overhall in Essex. 21 Eliz. Dier, 366. 23 Eliz. Dier, 373.

[z] 10 E. 2. Formedon, 55. 21 E. 3. 47. Pl. Com. 240. 4 E. 2. Formedon, 50.

(A) Gilb. Ten. 213. 4 Mo. 419. pl. 559. 2 Freem. 106. Co. Cop. 106. 2 Burr. 1047. Towns. 428. See 1 Roll. Ab. 385, where it is said, that a bill in chancery in nature of writ of false judgment lies on erroneous judgment in lord's ct.; Patteshull's case is cited: and of this a full account is cited in Lane, 98. Perhaps the first petition should be to the lord, and the next to the king in chancery. See however the case of Ash *v.* Rogle, 1 Vern. 367, where not only the lord's judgment, when given, was treated as ultimate, but chancery refused to compel the lord to review the errors. But then it was an unfavourable case, for it was to reverse a common recovery of a copyhold. See further Lord Nott. MSS. Prolegom. of Equity, ch. 3, s. 3.

(3) *It has often been adjudged accordingly; and in such case surrender is not a discontinuance, but there may be a bar by custom either by surrender or recovery, but not without custom.* M. 2 Car. C. B. *Crook, n.* 4. P. 37 Eliz. *Clun and Turner.* P. 1651. B. R. *Franklyn and Myn.* Hal. MSS.—See the case of M. 2 Cha. in Cro. Cha. 42. 3 Lev. 327. See also post. 60. b. and note 1 & 2, there.—[Note 406.]

(1) See 2 Ves. 603, the case of Carr and Singer, in which three judges against Willes chief justice held, that where copyholds are entailable, and the custom has not prescribed any mode of barring, the entail may be barred by surrender.

holden that there was a *formedon* in the discender at the common law (2).

Sect. 77.

AND although that some such tenants have an inheritance according to the custome of the manor, yet they have but an estate but at the will of the lord according to the course of the common law. For it is said, that if the lord doe oust them, they have no other remedy but to sue to their lords by petition; if they should have any other remedy, they should not be said to be tenants at will of the lord according to the custome of the manor. But the lord cannot breake the custome which is reasonable in these cases (3).

But Brian *chief justice said, that his opinion hath alwaies been, and ever shall be, that if such tenant by custome paying his services be ejected by the lord, he shall have an action of trespass against him.* H. 21 Ed. 4. *And so was the opinion of* Danby *chiefe justice in* 7 Ed. 4. *For he saith, that tenant by the custome is as well inheritour to have his land according to the custome, as he which hath a freehold at the common law* (1).

13 E. 3. tit. Prescript. 10. 13 R. 2. Faux judgment, 7. 32 H. 6. tit. Subpena, 2. 7 E. 4. 19.

Vide Sect. 81, 82. 84. 182.

"*FOR (it is said) that if the lord, &c.*" And here *Littleton* saith truly that it is said so, for so it is said in 13 *E.* 3. 13 *R.* 2. 32 *H.* 6. and 7 *E.* 4. 19.

But he setteth not downe his owne opinion, but rather to the contrary, as hereafter in this Chapter appeareth. But now *magistra rerum experientia* hath made this cleare and without question, that the lord cannot at his pleasure put out the lawful coppiholder without some cause of forfeiture, and if he do, the coppiholder may have an action of trespasse against him; for albeit he is *tenens ad voluntatem domini*, yet it is *secundum consuetudinem manerii* (4).

And

---

surrender. But Willes chief justice thought, that in such a case recovery was the proper mode. Note the three ways of barring entails of copyholds mentioned in this case; namely, recovery, surrender, and forfeiture and regrant.—[Note 407.]

(2) See further as to entails of copyholds in Vin. Abr. *Copyhold*, F. E. G. e. [also Watkins on Copyholds, 3d edit.]

(3) What follows in this Section is neither in L. & M.—Roh.—nor P.—The addition first appears in Redm.

(1) This must be understood with exception of such copyholds as by the custom are grantable for life only.

(4) *But trespass lies not against the lord for cutting trees.* Hil. 10 E. 1. Rot. 3. Casus prioris *of Anthony. But now the law is changed.* Hal. MSS. —[Note 408.]

[b] And *Britton* speaking of these kinde of tenants saith thus: *Et ceux sont priviledges en tiel maner, que nul de les doit ouster de ☞ tiels tenements, tant come ilz font les services que a lour tenements appendent, ne nul ne poet lour services acrestre ne change a faire autres services ou pluis.* And herewith agreeth sir *Robert Danby*, chiefe justice of the court of common pleas, *M.* 7 *E.* 4. 19, and sir *Thomas Brian* his successor, *M.* 21 *E.* 4. 80, viz. that the copyholder doing his customes and services, if he be put out by his lord, he shall have an action of trespasse against him.

[b] Vid. 42 E. 3. 25. Brit. fol. 165.

[61. a.]

Chap. 10. Tenant by the Verge. Sect 78.

TENANTS by the verge are in the same nature as tenants by copy of court roll. But the reason why they be called tenants by the verge, is, for that when they will surrender their tenements into the hands of their lord to the use of another, they shall have a little rod (by the custome) in their hande, the which they shall deliver to the steward (al seneschall) *or to the bailiffe according to the custome of the manor, and he which shall have the land shall take up the same land in court, and his taking shall be entred upon the roll, and the steward or bailife according to the custome shall deliver to him that taketh the land the same rod, or another rod, in the name of seisin; and for this cause they are called tenants by the verge, but they have no other evidence but by copy of court roll.*

"*TENANTS by the verge.*" This tenant *by the verge* is a meere copiholder, and taketh his name of the ceremony of the verge (2). Tenure in villenage, or by base tenure, is thus described by *Britton:* [a] *Villenage est tenure de demeines de chescun*

14 H. 4. 33. (Cro. Cha. 597.)

[a] Britton, fol. 165. a. F. N. B. fol. 12. Liberatio per Virgam.

(2) In Cro. Cha. 597, there is a case in which it was pleaded, that the custom was to surrender by a *knife*, and therefore that a surrender by the *verge* was void. This custom being alleged before the council of the marches of Wales, they proceeded to try it. On moving this matter in the king's bench, a prohibition was granted, because the custom was only triable at the common law; but it is not mentioned what the court thought of the operation of the surrender.—[Note 409.]

chescun seigneur baille, a tener a son volunt per villeines services, de enprover al opes le seignior, et liverie per verge et nient per title de escrit, ne per succession de heritage, dont gards de mariage ne auters services reals, come homage et reliefes nes poient des amnones de demeines ne de villenaye este demand.

"A le seneschal," (which we call a *steward*). *Seneschallus* is derived of *sein*, a house or place, and *schale*, an officer or governor. Some say that *sen* is an ancient word for justice, so as *seneschall* should signifie *officiarius justitiæ;* and some say that steward is derived of *stewe* (that is) a place, and *ward*, that signifieth a keeper, warden, or governor; and others, that it is derived of *stede*, that signifieth a place also, and *ward*, as it were the keeper or governor of that place. But it is a word ☞ of many significations. In this place it signifieth an officer of justice, viz. a keeper of courts, &c. *Fleta* describeth the office and duty of this officer at large most excellently. *Provideat sibi dominus de seneschallo circumspecto et fideli, viro provido et discreto et gratioso, humili, pudico, pacifico, et modesto, qui in legibus consuetudinibusque provinciæ et officio seneschalciæ se cognoscat, et jura domini sui in omnibus tueri affectet, quique subballivos domini in suis erroribus et ambiguis sciat instruere et docere, quique egenis parcere, et qui nec prece vel pretio velit à tramite justitiæ deviare, et perverse judicare; cujus officium est curias tenere maneriorum; et de subtractionibus consuetudinum, servitiorum, reddituum, sectarum ad cur', mercata, molendina domini et ad visus francpledg' aliarumque libertatum domino pertinentium inquirat, &c.* The residue pertaining to his office is worth your reading at large. Every steward of courts is either by deed or without deed (1); for a man may be retained a steward to keep his court baron and leet also belonging to the mannor without deed, and that reteyner shall continue until he be discharged. The lord of a mannor may make admittances out of court and out of the mannor also (2), as at large appeareth in my Reports.

[61. b.]

Vide Sect. 92, & 379. Fleta, lib. 2. cap. 66. Vide statut. de extent. maner. 14 E. 1. 2 Comyn. 424.

Vide 4 Co. Cases de Copiholds, fo. 26, 27. 30.

---

(1) But a patent is necessary to the making of stewards of the king's manors. See further title *Stewards of Courts*, in Vin. Abr. F. and Com. Dig. *Copyhold*, R. 5.—[Note 410.]

(2) See ante 59. a. and note 6, there.

Sect. 79.

AND also in divers lordshipps and mannors there is this custome, viz. if such a tenant, which holdeth by custome, will alien his lands or tenements, he may surrender his tenements to the bailife (a le baily), *or to the reeve, or to two honest men of the same lordship, to the use of him which shall have the land, to have in fee simple, fee taile, or for terme of life, &c. And they shall present all this at the next court, and then he, which shall have the land by copy of court roll, shall have the same according to the intent of the surrender.*

"*TO the bailife* (a le baily)." This word bailie, as some say, commeth of the *French* word *baylife*, in *Latin ballivus*; but in truth baily is an old *Saxon* word, and signifieth a safe keeper or protector, and *baile* or *ballium* is safe keeping or protection; and thereupon we say, when a man upon surety is delivered out of prison, *traditur in ballium*, he is delivered into bayle, that is, into their safe keeping or protection from prison: and the sherife that hath *custodiam comitatûs* is called *ballivus*, and the county *balliva sua*.

Vide Lamb, exposition of Saxon words.

"*Reeve*," is derived of the *Saxon* word *gerefa* or *gereve*; and by contraction or rather corruption *greve* or *reve*, and is in *Latine præfectus* or *præpositus*. It signifies as much as *appruator*, a disposer or director, as wood-reeve, sheepe-reeve, shire-reeve, &c. whereof more shall be said hereafter. Vide *Fleta*, lib. 2. cap. 67, where he treateth of the office [62. a.] of the bailife, and cap. 69, *de officio præpositi*, of the office of the reeve, and what belongeth of duty and right to either of them, which words are too long here to be inserted. Only this I will take out of him. *Ballivus autem cujuscunque manerii esse debet in verbo verax, et in opere diligens et fidelis, ac pro discreto appruatore cognitus plegiatus et electus, qui de communioribus legibus pro tanto officio sufficient' se cognoscat, et quòd sit ita justus, quòd ob vindictam seu cupiditatem non quærat versus tenentes domini nec alios, &c. Præpositus autem tanquam appruator et cultor optimus, &c. domino vel ejus seneschallo palam debet præsentari, cui injungatur officium illud indilatè. Non ergo sit piger aut somnolentus, sed efficacitur et continuè commodum domini adipisci nitatur et exarare, &c.* the residue concerning both the offices being worthy your reading.

2 Comyn, 424. (R) 5. 4 Comyn, 132. (M) 1.

Fleta, lib. 2. ca. 73. & 76.

"*To the bailife or to the reeve.*" *Littleton* intendeth into the hands of the lord by the hands of the bailiffe or the reeve.

"*Or to two honest men of the same lordship.*" The custome doth guide these surrenders out of court, and the custome must be pursued.

Vid. 4 Co. 25. Kite and Quaintin's case.

"*And*

"And they shall present all this at the next court, &c." By the surrender out of court, the copihold estate passeth to the
(4 Co. 29. b.) lord under a secret condition, that it be presented at the next (A) court according to the custome of the mannor. And therefore if after such a surrender, and before the next court, he that made the surrender dieth, yet the surrender standeth good (1); and if it be presented at the next court, *Ce' que use* shall be admitted thereunto; but if it be not presented at the next court according to the custome, then the surrender becometh void (2); and so was it cleerly holden, *Pasch.* 14 *Eliz.* in the court of common pleas, which I my selfe heard.

(A) 5 Burr. 2777; 1 Wms. 384; 2 Vern. 368. 564. See 2 Ves. 302. 602. Co. Cop. 105; Gilb. Ten. 280; according to which, special custom for presenting at a second or third court is good; so a special custom may be allowing a year and the first court after. Cro. El. 668; 3 Bulstr. 215; 5 Co. 84.

(1) But vide Trin. 7 Car. B. R. Rot. 373. *Adjudged* M. 8. *Crook, n.* 27. *Burgoin and Spurling. A. surrenders to the steward out of court to the use of B. on condition, and before the next court surrenders to the steward to the use of C. in fee; the condition is performed, and then he surrenders to the use of D. in fee by the hands of the steward, and at the next court all are present. Ruled, that C. shall have the land, for by the surrender the interest is bound, but the estate doth not pass* till presentment(*a*), *but remained fully in A. and so the surrender to C. is good, when the surrender to B. is avoided by performance of the condition before the court.* Hal. MSS.—See note 2, in 60. a. See also as to the commencement of the surrenderee's estate, Jeffereys' case, in Wils. vol. 1. part 2. page 13. In that case one having surrendered to the use of his will devised a copyhold to Miss Jeffereys in fee; and she being attainted of felony and hanged before admittance, the question was, whether her interest in the copyhold was such as to entitle the lord by forfeiture. The whole court inclined against the lord, but did not give an absolute opinion.—[See also 1 Watkins's Cop. 81. 3d edit.]—[Note 411.]——(*a*) (Till admittance of the surrenderee, according to the report of the case cited and the authorities in general. Cro. Car. 183.)

(2) See further as to the time of presenting surrenders, Vin. Abr. *Copyhold*, U. a. Com. Dig. *Copyhold*, F. 10.

Sect. 80.

AND so it is to be understood, that in divers lordships, and in divers mannors, there be many and divers customes in such cases as to take tenements, and as to plead, and as to other things and customes to be done; and whatsoever is not against reason may well be admitted and allowed.

"*THERE be many and divers customes.*" This was cautiously set downe, for in respect of the variety of the customes in most mannors, it is not possible to set downe any certainty, only this incident inseparable every custome must have, viz. that it bo consonant to reason; for how long soever it hath continued, if it be against reason, it is of no force in law. (4 Co. 31. Cro. Cha. 220.)

"*Against reason.*" This is not to be understood of every unlearned man's reason, but of artificiall and legal reason warranted by authority of law: *Lex est summa ratio.*

Sect. 81.

AND these tenants which hold according to the custome of a lordship or mannor, albeit they have an estate of inheritance according
[62. b.] *to the custome of the lordship or mannor, yet because* ☞ *they have no freehold by the course of the common law, they are called tenants by base tenure.*

"*THEY are called tenants by base tenure.*" Of this sufficient hath been spoken before.

Sect. 82.

AND there are divers diversities between tenant at will, which is in by lease of his lessor by the course of the common law, and tenant according to the custome of the manor in forme aforesaid. For tenant at will according to the custome may have an estate of inheritance (as is aforesaid) at the will of the lord, according to the custome and usage of the manor. But if a man hath lands or tenements, which be not within

within such a mannor or lordship where such a custome hath beene used in forme aforesaid, and will let such lands or tenements to another, to have and to hold to him and to his heires at the will of the lessor, these words (to the heires of the lessee) are void. For in this case if the lessee dieth, and his heire enter, the lessor shall have a good action of trespasse against him; but not so against the heire of tenant by the custome in in any case, &c. for that the custome of the mannor in some case may aid him to barre his lord in an action of trespasse, &c.

"*TENANT at will according to the custome may have an estate of inheritance, &c.*" Here note that *Littleton* alloweth, that by the custome of the manor the copiholder hath an inheritance, and consequently the lord cannot put him out without cause.

"*But if a man, &c. will let lands or tenements to another, to have and to hold to him and to his heirs at the will of the lessor, these words (to the heires of the lessee) are void. For in this case if the lessee dieth, and his heir enter, the lessor shall have a good action of trespass against him, &c.*" By which it is proved, that by the death of the lessee the lease is absolutely determined; which is proved by this, that if the heire enter, the lessor shall have an action of trespasse, *quare vi et armis*, before any entry made by the lessor.

10 E. 4. 18.
22 E. 4. 13.
2 R. 2. Barre, 237.
11 H. 7. 22.
21 H. 7. 12.

☞ *For that the custome of the manor in some case may aid him to barre his lord in an action of trespasse, &c.* Hereby it appeareth, that by the opinion of *Littleton* the lord against the custom of the manor cannot oust the copiholder. [63. a.]

Sect. 83.

ALSO, the one tenant by the custome in some places ought to repaire and uphold his houses, and the other tenant at will ought not.

"*BY the custome.*" For what a copiholder may or ought to doe, or not doe, the custome of the manor [*a*] must direct it, for *consuetudo manerii est observanda.* [*b*] But if there be no custome to the contrary, wast either permissive (1)

[*a*] Bracton, lib. 2. fol. 76.
[*b*] Vid. 4. Co. 21, 22, &c. in Cases de Copiholds.

or

(1) Formerly it was a question, whether waste *permissive* was a forfeiture by the *general* law in respect to copyhold estates, and according to a case in Noy a *special* custom is necessary. Noy, 51. But the principal authorities are with lord Coke. See Ow. 17. 1 Ro. Abr. 508. pl. 16, and the case of Eastcourt in Weekes in 1 Lutw. 799. 1 Freem. 516. and 1 Salk. 186. In this

or voluntary of a copiholder is a forfeiture of his copihold (2).

Sect. 84.

ALSO, the one tenant by the custome shall do fealty, and the other not. And many other diversities there be between them.

"*THE one tenant by the custome shall do fealty, and the other not.*" And the doing of fealty by a copiholder, proveth that a copiholder, so long as he observes the custome of the manor

Vide Sect. 132.

---

this last case the causes of forfeiture were making a lease without license and want of repairs, and it appears to have been agreed by all, that *permissive* waste was a forfeiture; and the great point was, whether after the death of one of two coparceners, who were seised of the manor at the time of the forfeiture, it was not too late to enter and take advantage of it. Three judges held, that it was, because according to them lease and waste do not operate like alienations by fine, recovery, or feoffment with livery, which are *immediate* forfeitures and extinguish the copyholder's estate without any act by the lord, but are only forfeitures at the election of the lord in whose time they happen, and unless he enters the copyholder's estate continues; and they thought, that the right of election was not in its nature either divisible or descendible, and therefore that in the case of coparceners all must join in the election, and if one of them dies it is too late to make it. But Powel justice differed. He assented to the distinction between forfeitures operating by immediate extinguishment of the copyhold and forfeitures at the lord's election, and agreed that waste *permissive* was of the latter kind; but then he thought, that the lease for years without license was as much an extinguishment of the copyhold as an alienation for a greater estate; and he seemed to be of the same opinion as to waste *voluntary*. Note, that Powel took another distinction between waste *voluntary* and waste *permissive*, and said, that if waste *permissive* is repaired before the lord's entry, the forfeiture is purged, and advantage cannot be taken of it. Note also, that in the same case Treby ch. j. doubted, whether lord Coke's doctrine, that if there be two coparceners of a reversion, and waste is committed, and one of them dies leaving a daughter, the aunt and nicce shall join in waste, is law. See ante 53. b. and 1 Lutw. 803. This observation of Treby ought to have been mentioned before. [See also 1 Watkins's Cop. 352.]—[Note 412.]

(2) But the court of chancery will sometimes relieve against a forfeiture for waste, and compel the lord to re-admit, on receiving satisfaction for the injury he has sustained. Such relief is particularly given, where the waste is committed through ignorance, or where the waste is merely *permissive*, and there has not been an obstinate perseverance in neglecting to repair after notice. 1 Cha. Cas. 95, and Prec. in Chanc. 568. Another instance, in which relief against forfeiture for waste is said to be proper, is where the lessee of a copyholder commits waste without his direction or privity. Toth. Cha. 237. But in this latter case it may be doubted whether the waste is a forfeiture. See Mo. 49.—[Note 413.]

(Post. 93. b.) manor and payeth his services, hath a fixed estate. For tenant at will, that may be put out at pleasure, shall not doe fealty. For to what end should a man sweare to be faithfull and true to his lord, and should beare faith to him which he claimeth to hold of him, and that lawfully he shall doe his customes and services, &c. when he hath no certaine estate, but may be put out at the pleasure of the lessor, or he himselfe may determine it at his pleasure. Of these kind of customary tenants, and of many things concerning them, you may read more in the Fourth Booke of my Reports, fol. 21, 22, 23, &c. Thus much, as I have here set downe, may suffice for the understanding of such cases and opinions as *Littleton* hath expressed (3).

4 Co. 21, 22, 23, &c.

Finis Libri Primi.

THE

---

(3) See further on the subject of *copyhold* estates Kitchin on Courts, Coke's Copyholder and the Supplement, the book intituled the *Surveior's Dialogue*, Calthorp's reading on Lord and Copyholder, Hughes on Original Writs, 247 to 259, the title *Copyhold* in the Abridgments, the *Lex Custumaria*, and the several other treatises on *copyhold* law, particularly those by Sheppard and Nelson. [And also Vidal's edition of Watkins on Copyholds.]

THE

SECOND BOOK

OF THE

FIRST PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND.

Chap. 1. Homage. Sect. 85.

HOMAGE is the most honorable service, and most humble service of reverence, that a franktenant may do to his lord. For when the tenant shall make homage to his lord, he shall be ungirt, and his head uncovered, and his lord shall sit, and the tenant shal kneele before him on both his knees, and hold his hands joyntly together betweene the hands of his lord, and shall say thus: I become your man (Jeo deveigne vostre home)(1)

* *The note below is part of 64. b. in the thirteenth and fourteenth editions. By comparing either of them with the present edition, the necessity of placing in 64. a. of the latter* the three notes *which are in 64. b. of the former, will obviously appear.*

from

(1) * Nota, *in ancient times by* hommes *or men*, homagers, *whom we now call* freeholders, *were intended; as in grants that he and his men should be free from toll.* 14 *H.* 6. 12. 12 *Ass.* 35. 33 *E.* 88. 31 *E.* 3. *Barr.* 261. Hal. MSS.—In the famous controversy, which began between Dr. Brady and others some few years before the Revolution, about the origin of the house of commons, one point in dispute was the sense of the words *homines* and *liberè tenentes* as used in writs of summons of parliament before the reign of Henry the third and in other ancient records; the doctor endeavouring to confine the word to the king's tenants *in capite*, and his competitors on the other hand being as strenuous to comprehend within the description of *homines* any free subjects of the king, and within that of *liberè tenentes* all freeholders in general, whether they held immediately of the king or not. See voc. *Liberi homines* in the Gloss. at the end of Brad. Introd. to English Hist. Tyrr. Biblioth. Politic. 300. 308. 322. 326. 352. 369. 587. and lord Lyttelt. Hen. 2. 8vo. ed. vol. 3. p. 337. However, Mr. Tyrrel allows the word *homines* to be equivocal, and to vary in the sense according to the occasion on which it is used.—[Note 2.]

from this day forward of life and limbe, and of earthly worship (2), *and unto you shall be true and faithfull, and beare to you faith for the tenements that I claime to hold of you, saving the faith that I owe unto our soveraigne lord the king; and then the lord so sitting shall kisse him* (3).

OUR author having taught us in the former booke the several distinct estates of lands and tenements as most necessary to be knowne, for the understanding of these two other bookes, doth in this second book treat of the tenures (1) and services whereby

* † *These are notes 2 and 3 of 64. b. in the 13th and 14th editions.*

the

(2) * The words *of life and limbe, and of earthly worship*, are not in L. and M. but the Roh. and subsequent editions have them.

(3) † Vid. in Rot. Parl. 18 H. 6. n. 58. *a special act of parliament to excuse the kissing in the case of homage made to the king, by reason of pestilence.* Hal. MSS.

(1) It is scarce possible to have a just and proper idea of our law of tenures, the greater part of which is founded on principles strictly feudal, without the aid of some previous information concerning the origin of feuds in general, and the time and manner of their introduction into this country. This interesting subject seems to have entirely escaped the attention of lord Coke; for though he writes so learnedly and minutely in explaining the nature of each tenure, and its fruits and incidents, yet there is not any thing like an historical illustration with the least reference to the *general* doctrine of feuds, or to the means by which they were established in England; a silence the more unaccountable, because the subject exercised the pens of several cotemporary writers; and the great antiquary of our English laws, sir Henry Spelman, had actually published the first part of his Glossary, in which he discourses largely on feuds, near two years before the first edition of the Commentary on Littleton. To supply the deficiency here imputed to lord Coke, as far as the compass of an annotation will allow, it shall be attempted to state shortly some of the principal opinions which occur on the subject, and to refer to some of the books in which they are respectively advanced or controverted.

As to the first institution of feuds, some writers deduce them from the earliest ages of the world, and suppose, that the idea of giving land on the terms of doing military service for it, which it must be confessed was the grand principle of the feudal system, must have been common to the most ancient nations, when they emigrated to form new settlements, and was the natural result of such a situation. See Niell. Disputat. Feud. cited in Voet. ad Pandect. lib. 38. Digres. de Feud. 1 Gen. 47. But this opinion has been generally disapproved of as fanciful, and founded on a narrow and incomprehensive notion of feuds, and depending on resemblances too faint and remote to warrant a just comparison. Itter. de Feud. Imper. c. 1. s. 2. Spelman. Posthum. 2.

Others think, that they discover the origin of feuds in the institution of *patron* and *client* by Romulus on the first founding of the Roman state. Zasius Epit. Feud. &c. cited in Itter. de Feud. Imper. c. 1. s. 3. But the slightest examination shows this connection to have been widely different from that between *lord* and *vassal;* the latter merely arising from *land*, and, according to the strict and pure notion of feuds, being ever accompanied with services of a *military* kind, and also with a *jurisdiction;* which circumstances are quite foreign to the former, and seem of themselves so essentially to distinguish the two, as to render the labour of seeking for other differences wholly unnecessary. See Bodin. de Repub. lib. 1. c. 7. Crag. Jus. Feud. lib. 1. Dieges. 5. et Duck. de Us. Jur. Civ. c. 6.

Others again have suggested, that the grants of forfeited lands to the veteran soldiers

the said lands and tenements be holden; which he divideth into twelve parts, viz. *Homage, Fealty, Escuage, Knight Service, Socage, Frankalmoigne, Homage Auncestrell, Grand Serjeanty, Petit Serjeanty, Tenure in Burgage, in Villenage*, and into *Rents*. Wherein his method is most excellent; for he beginneth with *Homage*, because it is the most humble service of reverence, expressing the duty of the tenant to his lord, and the affectionate love (4 Co. 8. a. Bevil's case.

---

soldiers of Sylla, Julius Cæsar, and the Triumvirs in the latter times of the Roman republic, gave rise to feuds. But it has been sensibly observed by a very ingenious writer, that such lands were given, not on the condition of *future* but as rewards for *past* military services, and after the donation of them were of the nature of other Roman estates. Sullivan's Lectures, 251. See also Clarke's Connect. of Roman, Saxon and English coins, 440.

Some compare the *coloni et glebæ adscriptitii*, of which there is such frequent mention both in the Theodosian code, and in that of Justinian, with feudatories. But nothing can be more strongly marked than the distinction between the two, for the former were adstricted to the soil, were employed in cultivating it, and in performing other *rural* services for the owner, and in short approached nearer to *slaves* than to *free-men, soldiers* and *feudal tenants*. See Itter. Feud. Imper. cap 1. sect. 3. 5.

One civilian of the first character seems to deduce fiefs from the *procuratores prædiorum*, the *emphyteuticarii*, and others of a similar description, who are well known to the Roman law. Cujac. Observ. lib. 8. c. 14, and De Feud. lib. 1. princip. But it should be recollected, that the *procuratores prædiorum* were properly only bailiffs and servants to the owners of the land, and that the *emphyteuticarii* were merely occupiers of land under contracts of hiring; and therefore one may differ from the great author of this opinion, without forgetting the respect justly due to so high an authority. In truth, the possessions of the *former* do not appear to have been like *any* fief, and those of the *latter* at the utmost only come near to a resemblance of fiefs of the *prædial* and *improper* kind, such as our *socage* tenure, and other deviations from the original feudal establishments. Consequently it is not in the least probable, that pure and genuine fiefs, which were the price of *military* service only, and gave rise to the great system of tenures, should be the offspring of such parents. —The same observation may be applied to the *prædia stipendiaria*, which some writers cite from the books of the Roman law as instances of fiefs, but which were, as I apprehend, only a species of the *emphyteusis*, or land let to hire. See Itter. de Feud. Imp. cap. 1. sect. 3. 5. Heinecc. Syntagm. Antiq. Rom. lib. 3. tit. 3. s. 13, and the word *stipendiaria* in the Lexicons of the Roman Law.

As to the *soldarii*, who were the companions and followers of the princes and chieftains amongst the *ancient Gauls*, and are by some writers considered as feudal vassals, their attachment was independent of land; and this of itself is sufficient to show, that the connection was not the same as that which is the result of *tenure*. However, it may be proper to observe, that a like sort of union between the princes of the *ancient Germans* and their *comites* is agreed by those who refer the origin of fiefs to a much later period, to have been one of the many causes which accelerated the progress of fiefs. Itter. de Feud. Imper. cap. 1. sect. 4, 5.

Another opinion as to the beginning of fiefs is, that the use of them may be dated from the time of the emperor Alexander Severus, who about the middle of the third century granted out large districts taken from the enemy on the frontiers of the Roman empire to the *duces limitanei* and others of his officers and soldiers, under the conditions of military service, and on those terms declared the land transmissible to heirs. Seld. Tit. of Hon. 2d. ed. c. 1. s. 23.

love and protection of the lord towards his tenant, as hereafter shall appeare. Secondly, *Fealty*, a sacred service, expressing by ☞ oath his fidelity to his lord. [64. b.]

Thirdly, *Escuage*, which is *servitium scuti*, the service of the shield.

Fourthly, *Knights service*, for the defence of the realme against outward hostility and invasions, which the better might be effected if such duty, fidelity and love were betweene lords and tenants, as ought to be, and as the law expecteth.

Fifthly, *Socage*, the service of the plough, aptly placed next knights service, for that the ploughmam maketh the best souldier, as shall appeare in his proper place.

Sixthly, *Frankalmoigne*, service due to Almighty God, placed towards the middest for two causes: first, for that the middest is the most worthy and most honourable place: and secondly, because the first five preceding tenures and services, and the other sixe subsequent, must all become prosperous and usefull, by reason of God's true religion and service; for *Nunquam prosperè succedunt res humanæ, ubi negligunter divinæ.* Wherein I would have our student follow the advice given in these ancient verses, for the good spending of the day;

Sex horas somno, totidem des legibus æquis.
Quatuor orabis, des epulisque duas.
Quod superet ultrà sacris largire camænis.

Seventhly, *Homage auncestrell* ancient familics enjoying, with their blood, the ancient inheritance of their forefathers, as a great blessing of the Almighty.

8, and 9. *Serjeanty grand et petit*, due to the king only, to whom the highest and most eminent honor, ligeance, and reverance of all kinde is due; which hath two notable effects. First, *imperii majestas est tutæle salus*, according to the old rule; and secondly, it

---

s. 23. p. 332. Duck. de Us. Jur. Civ. lib. 1. c. 6. Itter. de Feud. Imper. c. 1. s. 8, and Clarke's Connect. Rom. Sax. and Engl. Coins, 440. These grants, and some few others of a like kind, which are attributed to succeeding Roman emperors, give the semblance of probability to the conjecture of those, who consider the feudal estalishments, so common in the subsequent times, as mere imitations of these examples and extensions of the same policy; and it must be owned, that they at least seem to justify Mr. Selden in observing, that *some* use of fiefs may very properly be referred to the time of Alexander Severus.

But that opinion which seems to have the most probability, and is adopted by the generality of the best writers, particularly those of the present times, attributes the origin of the feudal establishments principally to the northern nations, which in the fourth and fifth centuries overran the western part of the Roman empire, and at length out of its ruins formed the principal of the various states and governments, into which we now see Europe divided. Many reasons might be adduced in favour of this opinion, and to evince that pursuing the history of these nations from their first successful irruptions into the Roman empire is the only true way of exploring the source of the feudal institutions; but this is not the place for a minute discussion of a subject so extensive and difficult.

☞ [*See this note continued at the commencement of Mr. Butler's notes, beginning*, 191. a.]—[Note 1.]

it is an assured means of long continuance of houses and families in prosperous estate, whereof our author speaketh in the Chapter before.

10. Then followeth the tenure of Burgage, of ancient burghes and cities, &c. which are to be supported for the honour of the king, and for the maintenance of trade and traffique, the life of all commonwealths, especially of islands.

11. Villenage, for the performance of service, yet necessary service, for the cleansing of cities, boroughes, mannors, &c. and for the better manuring of arable grounds, and increase of husbandry.

12. And lastly, tenure by rents, which are called *vivi redditus*, because the lords and owners thereof do live by them; which they shall enjoy the better, if trade and traffique be maintained, and our native commodities, which are rich and necessary, holden up and saleable at a reasonable value. And now understanding his method, let us peruse our author's words.

And as our author beganne his first booke with fee simple, which is the most principall and worthiest estate, so he beginneth his second booke with homage, which is the most honourable and humble service.

"*Homage,*" is derived of [a] *homo;* and it is called *homage,* because when he doth this service, he saith, *Jeo deveigne vostre home; I become your man.* And in English homage is called manhood, so as the manhood of his tenant and the homage of his tenant is all one. *Mutua quidem debet esse dominii et homagii fidelitatis connexio, ita quòd quantum homo debet domino ex homagio, tantum illi debet dominus ex dominio præter solam reverentiam.*

[a] Glanvil. li. 9. ca. 1. Bract. fo. 78. 80. Brit. fo. 170. 172, 173. Flet. li. 3. c. 16. Mir. c. 3. de Homage; et l. 5. sect. 1.

"*True and faithfull.*" These words are of great extent, for they extend to the observation of the lord's counsell in whatsoever is honest and profitable. [b] *Omnis homo debet fidem domino suo de vitâ et membris suis, et terreno honore, et observatione consilii sui per honestum et utile* (comprehended under these words *true and faithfull*) *salvâ fide Deo et terræ principi.*

[b] Lib. Rub. ca. 55.

[65. a.] ☞ "*Service.*" [c] *Servitium in lege Angliæ regulariter accipitur pro servitio, quod per tenentes dominis suis debetur ratione feodi sui.* But *servitium est duplex; spirituale,* whereof more shall be said in the Chapter of Frankalmoigne; *et temporale,* whereof our author here treateth. And he beginneth with homage, first, because it is most honourable, for *honor plus est in honorante, quàm in honorato.* 2. It is *most humble service of reverence,* and both of these for five causes on the part of the tenant. First, the tenant when he doth his homage is *discinctus,* disarmed or unguarded. Secondly, *nudo capite,* bare-headed. Thirdly, *ad pedes domini super genua projectus.* Fourthly, *ambas manus junctas inter manus domini porrigit.* Fifthly, *per verba omni supplici veneratione plena,* he saith, *I become your man, &c.* And for three causes on the part of the lord. First, the lord doth sit. Secondly, he incloseth his tenant's hands betweene his owne. Thirdly, the lord sitting kisseth the tenant. Prudent antiquity did, for the more solemnity and better memory and observation of that which is to bee done, expresse substances under ceremonies.

[c] 2 H. 4. 6.

Glanvil. et Mir. ubi supra.

Nil sine prudenti fecit ratione vetustas.

"*I become*

"*I become your man of life and limbe.*" And therefore he is *discinctus*, for that he must never be armed against, or opposite to his lord, but both life and member must be ready for the lawfull defence of his lord.

Bract. fol. 80. Britton, fol. 173. b. ac. Fleta, lib. 3. cap. 16.

2. "*Of earthly honor.*" Expressed by kneeling at the feet of his lord.

3. *Debet quidem tenens manus suas utrasque ponere inter manus utrasque domini sui, per quod significatur ex parte domini protectio defensio et warrantia, et ex parte tenentis reverentia et subjectio.* So as the holding up of the tenant's hands betokeneth reverence and subjection, and the lord's inclosing of his tenant's hands between his own betokeneth protection and defence.

4. "*And unto you shall be true and faithfull, and beare to you faith, &c.*" This faith, *fides*, or *fœdus perpetuum*, this perpetuall league between the lord and the tenant is expressed by the lord's kissing of the tenant. And some say, that *fœdus dicitur à fide, quia fides interponitur.* And so firme and strong was this league between them, that by the ancient law of *England, nihil facere potest tenens propter obligationem homagii, quod vertatur domino ad exhæredationem, vel aliam atrocem injuriam. Nec dominis tenenti è converso. Quòd si fecerint, dissolvitur et extinguitur homagium omninò et homœgii connexio et obligatio, et erit inde justum judicium cùm venerit contra homagium et fidelitatis sacramentum, quòd in eo in quo delinquunt puniantur, s. in personâ domini, quòd amittat dominium, et in personâ tenentis, quòd amittat tenementum.*

Bract. ubi supra. Brit. fol. 174.

"*For the tenements that I claime to hold of you.*" *Britton* saith, that [*a*] in doing of homage he must name the lands or tenements for which he doth homage in certaintie; and the reason is, *ne in captione homagii contingat dominum per negligentiam decipi vel per errorem.*

[a] Brit. ubi supra. Bract. ubi supra. Glanvil. lib. 9. cap. 1. Mir. cap. 3. de Homage.

For the better understanding of that which shall be said hereafter, it is to be knowne, that first, there is no land in *England* in the hands of any subject (as it hath been said) but it is holden of some lord by some kind of service, as partly hath been touched before (1).

Secondly,

(1) According to this position, of which the truth is undeniable, all the lands in England, except those in the king's hands, are feudal. This universality of tenures, if not quite peculiar to England, certainly doth not prevail in several countries on the continent of Europe, where the feudal system has been established; and it seems, that there are some few portions of allodial land in the northern part of our own island. In France they still have their *franc-aleu*, which is the name by which *allodial* land is distinguished, as well as their *fiefs;* and in some provinces, such as Provence, Languedoc, and others, which not having any *coutume* or system of customary law, adopt the *written* or *Roman* law, the country is so far from being wholly feudal, that all inheritances are presumed to be quite free from feudal dependance till the contrary is proved, and therefore are called *franc-aleu sans titre*, that is, free without the possessors being obliged to prove them so. Instit. Droit. Franc. par Argou, l. 2. c. 3. Decis. Nouv. par Denisart, tit. *Franc-aleu* and *Droit-ecrit.* Evan in Normandy, from which country our ancestors borrowed at least some parts of our law of tenures, and where the feudal policy with its utmost rigors is supposed to have been so early and so completely introduced, a remnant of allodial land is still

to

Secondly, all the lands [*b*] within the realme were originally derived from the crowne, and therefore the king is sovereigne lord, or lord paramount, either mediate or immediate, of all and every parcell of land within the realme (2).

[*b*] 18 E. 3. 35. 44 E. 3. 5. 48 E. 3. 9. 8 H. 7. 12.

Thirdly, that in ancient times lords upon the creation of their tenures did not only receive rents, services, and profit, &c. for which they might distreine and have other remedy, but also tooke an humble submission of his tenant by profit and oath (for to homage fealty is incident), to be true and faithfull to him for the tenements holden of him, which submission is called homage and fealty according to the tenure reserved.

"*Saving the faith that I owe unto our sovereigne lord the king.*" Both because there is *homagium ligeum*, which is due to the king onely and also because he is sovereign lord over all (3).

Glanvil. lib. 9. c. 1. Mir c. 3. de Fealty. Bract. ubi supra. Brit. ubi supra. Inter Inquis. apud Lanceston, anno 6 E. 1. Cornub. in Thes.

I have

---

to be found, and there reformed *coutoumier* expressly divides the estates into *franc-aleu* and *tenures*. Littlet. par Houard, v. 1. p. 196, and Cout. Reform. Norman par Berrault, art. 102. The German and Dutch lawyers make the like distinction with respect to lands in their countries; and they must almost necessarily have a considerable proportion of allodial land, as the rule of their courts of justice is to presume in favour of it, whenever the quality of the land appears doubtful. Heinecc. Elem. Jur. Germ. lib. 2. tit. 1. s. 35. Dar. Inst. Jur. Priv. German. sect. 705, 706, and Voet. ad Pandect. lib. 38. Digres. de Fend. sect. 4. As to Scotland, lord Stair expresses himself rather ambiguously on the subject; for he says that there remains *little of allodial land in Scotland*, but in a few years after observes, that the glebes of the clergy, which seem to come nearest to *allodials*, are more properly *mortified*, or as we should call them, *mortmain fees*. Stat. Inst. b. 4. t. 3. s. 4. However, other respectable authors rank the manses and glebes of the Scotch clergy amongst things allodial; and write as if they thought that the law of fiefs had not yet pervaded the Orkneys. Ersk. Princ. Law Scot. 126. Ess. Brit. Antiq. 19.—[Note 3.]

(2) See ante fol. 64. a. note 1. and fol. 1. b. note 1.

(3) Vid. *As to the homage by the king of England to the king of France, for the dutchy of Aquitain, &c. It was doubted, whether the homage ought to be* liege; *but at length it was resolved, that it should be liege; and for that purpose writs patent were made by the king of England settling it in this way*, viz. *that the king of England duke of Guyen should hold his hands between the hands of the king of France, and he who should speak for the king of France should address his words to the king of England duke of Guyen, and should say thus*, Do you remain a liege man of the king of France, my lord who is here, as duke of Guyen and peer of France, and promise to bear him faith and loyalty? say yes; *and that the said king duke and his successors dukes of Guyen should say* yes; *and that then the king of France should receive the said king of England and duke to the said homage and faith, and with a kiss saving his right and the other's.* 1 Pars. Pat. 5 E. 3. m. 19.—*For the homage done to the Pope by king John, see M. Paris*, 237. Hal. MSS.—For a full account of the circumstances which attended Edward's homage for Guienne, &c. see 1 Tind. Rap. fol. ed. 412. See also Froiss. l. 1. c. 25. and 4 Rym. Fœd. 383 to 390, there cited, and Du Fresn. Glos. voc. *Homagium*. Mr. Tindal in a note on Rapin observes, that liege or full homage is done with head bare and sword ungirt, as if that was the thing which chiefly distinguished homage *ligeum* from homage *non ligeum*. But in truth that *formality* was incident to *both*, and the difference between the two was of a more *essential* kind, and Philip de Valois of France and our Edward the Third knew this, or probably

I have seene an ancient record in *Anno* 6 *Edw.* 1, in these words. *Michael de North, qui sequitur pro rege, queritur, quòd cùm dominus rex ratione regiæ dignitatis et coronæ suæ tale habeat privilegium quòd nullus in regno suo de aliquo qui sit in regno Angliæ alicui homagium facere debeat, vel aliquis hujusmodi homagium ab aliquo recipere debeat, nisi factâ mentione de homagio domino regi debito eidem domino regi fideliter observand' Walterius Exon' episcopus, in contemptu domini regis, et ad manifestam quoàd privilegium prædictum ipsius domini regis exhæredationem, et at damnum et dedecus ipsius domini regis ad valentiam decem mill' librarum de Henrico de Pomeray, Thomâ de Kanc', Johanne de Bello Prato, Laurentio filio Ric' Johanne le Soer, Willielmo de Alex', ☞ Eudone de Tranael, Rogero le Gros, Johanne le Lunge, Rado de Bevill, Guidone Novant, Willielmo de Rouskerrek, et Hen. Cannel, accepit servitia contra privilegium prædict', nullâ factâ mentione de homagio et fidelitate domino regi debitis.* And judgement in the end was given against the said bishop. [65. b.]

"*King.* Our ancestors the *Saxons* termed him *Coning* or *Cyning*, a name signifying power and skill, which by way of contraction we now call King. This name the *Saxons* with a small alteration had from the *Brittaines*, who called him *Koningh* or *Koninck*. In *French* he is called *Roy*, in *Italian Re* in *Spanish Rey*, all derived from the *Latine* (*Rex*), of the true signification whereof you shall read, [*d*] plentiful matter in our old bookes.

So as homage is divided, first *in homagium ligeum, et non ligeum* (1).

2. *In homagium antecessorium, et non antecessorium* (2). It is here necessary to be knowne what tenant that holdeth by homage shall do homage. [*e*] *Item videndum, quis potest homagium facere. Sciendum est, quòd quilibet liber homo, tam masculus quàm fœmina, clericus et laicus, major et minor; dum tamen electi in episcopos post consecrationem homagium non faciant, quicquid facerint ante, sed tantùm fidelitatem* (3). *Conventus autem homa-*

[d] Mirror, ca. 1. sect 2. and ca. 2. sect. 1 & 2. Bract. fo. 5. 107. 368. 369. 340. Fleta, lib. 1. cap. 5. Fortescue, cap. 8. and 37. Staunf. Pl. Cor. 89, 99. and Præ 65.

[e] Glanvil. lib. 9. ca. 1. Bracton fol. 78. b. Britt. c. 68. fo. 170, 171. Fleta. lib. 3. cap. 16

gium

---

probably there would not have been so much difficulty in adjusting the ceremony between them. Homage *ligeum* was without any saving or exception of the faith due to the king or other lords; but homage *non ligeum* had such an exception. The former properly came from the *subject* to the *sovereign*; the latter from *one* subject to *another*. The former generally and in strictness included allegiance as a subject and could not be renounced; though sometimes, when done by one who was himself a sovereign prince as a mark of feudal dependance in respect not of his *whole* dominions but only of a *part* of them, it was not understood with so much latitude; but the latter never imported any thing more than a connection in the way of tenure, which the *homager* might at any time free himself from by renouncing the land he was invested with. See Du Fresn. Gloss. voc. *Hominium* et *Ligeus*, and Spelman, Gloss voc. *Homagium* et *Ligantia*.—[Note 4.]

(1) See note 3, in 65. a.

(2) That is *auncestral* and *not auncestral*, as to which see post. 109. b.

(3) *Homage done to the king by a bishop* salvo suo ordine. *M. Paris*, 101. Hal. MSS.—See what is said by lord Coke, *infra*.

gium non faciet de jure, sicut nec abbas, nec prior, eò quòd tenent nomine alieno, scilicet nomine ecclesiarum.

[*g*] One within the age of 21 yeares may doe homage; but *Bracton* saith he cannot doe fealtie, because in doing of fealty he ought to be sworne, which an infant cannot be (4). But some opinions be in our bookes to the contrary, viz. that an infant shall doe fealtie; but I take it to be meant of homage, and herewith [*h*] agreeth *Britton*, who saith, *et tout soit que enfant deins age fait homage, pur ceo ne volons nous my que il face serement de fealtie, jesque a taunt que il soit de pleine age; et tout soit ceo comon dit del people que fait de enfant fait deins age ne soit fait my a tener estable. Volons neque dent, que chescun home et chescun feme, de quel age que ils soient, facent homage a lour seigniour solonque l'estatut de la grand charter.*

Glanvill saith, [*i*] women shall not do homage; but *Littleton* saith that a woman shall doe homage, but she shall not say, *I become your woman, but I do to you homage;* and so is *Glanvill* to be understood, that she shall not doe compleate homage.

[*g*] Glanvil. lib. 9. cap. 1. Bracton, lib. 2. 78. Fleta, lib. 3. cap. 16. acc. 21 E. 3. 40. 24 E. 3. 63, 64. 32 E. 3. Age, 80. & tit. per quæ servit. 9. 13 H. 4. 5. 33 H. 6. 16. 20 E. 3. per quæ servic. 24. [*h*] Britton, fol. 171. [*i*] Glanvil. lib. 9. c. 1. F. N. B. 157. Regist. 296.

Britton, ubi supra. Mirror, ca. 1. sect. 3.

Sect. 86.

BUT if an abbot, or a pryor, or other man of religion, shall doe homage to his lord, he shall not say, I become your man, &c. for that he hath professed himselfe to be onely the man of God. But he shall say thus: I doe homage unto you, and to you I shall be true and faithfull, and faith to you beare for the tenements which I hold of you, saving the faith which I doe owe unto our Lord the king.

NO man of religion when [*k*] he doth homage shall say, *I become your man;* because he hath professed himselfe the man of God; yet shall he doe homage, and shall say, [*l*] *I do to you homage, and to you shall be true and faithfull, &c.* And note, that here religion is taken largely, for it extends not only to regular persons, as abbots and the like, but also to all ecclesiasticall persons, as bishops, deanes, or any other sole ecclesiasticall body politike; and so it is the use at this day, which also appeares in our old books.

And it is to be observed, that in old bookes and records, the homage which a bishop, abbot, or other man of religion doth, is called fealty, for that it wanteth these words (*I become your man.*) But yet in judgement of law it is homage, because he saith, I doe to you homage, &c. and so of a woman.

[*k*] Glanvil. lib. 1. cap. 9. in fine. Britton, lib. 2. 78. Bracton, cap. 68. Fleta, lib. 3. ca. 16. [*l*] Vid. Sect. 96. & 133.

Sect.

---

(4) *Infant casts essoin of being in the king's service for another.* 21 *E.* 3. 33. *He shall do fealty.* 24 *E.* 3. 63, 64. Hal. MSS.—In casting an essoin *de servitio regis*, the essoinor, that is, he who casts the essoin for the absent person, must swear to the truth of the essoin; and which explains the object of the case cited by lord Hale. See 2 Inst. 314. See further as to the swearing of an infant, post. 158. a.—[Note 5.]

☞ Sect. 87. [66. a.]

ALSO, if a woman sole shall doe homage, she shal not say, I become your woman; for it is not fitting that a woman should say, that she will become a woman to any man, but to her husband, when she is married. But she shall say, I do to you homage, and to you shall be faithfull and true, and faith to you shall bear for the tenements I hold of you, saving the faith I owe to our sovereigne lord the king.

[m] For like reasons ab inconvenienti, vid. Sect. 138, 139. 231. 269. 440. 478. 665. 722. 730. 21 H. 7. 13. F. N. B. 230. D. 16 H. 7. 9.

"*FOR it is not fitting, &c.*" By this it appeareth, [m] that *argumentum ab inconvenienti plurimum valet in lege*, as often shall be observed hereafter. *Non solum quod licet sed quid est conveniens est considerandum. Nihil quod est inconveniens, est licitum* (1).

Sect. 88. (2).

ALSO, a man may see a good note in M. 15 E. 3, *where a man and his wife did homage and fealtie in the common place, which is written in this forme. Note, that* I. Lewkner *and* Eliz. *his wife did homage to* W. Thorpe *in this manner: the one and the other held their hands joyntly betweene the hands of* W. T. *and the husband saith in this forme: We doe to you homage, and faith to you shall beare for the tenements which we hold of* A. *your conusor, who hath granted to you our services in* B. *and* C. *and other townes, &c. against all nations* (encountre touts gents)(3), *saving the faith which we owe to our lord the king, and to his heires, and to our other lords; and both the one and the other kissed him. And after they did fealtie, and both of them held their hands upon the booke, and the husband said the words, and both kissed the booke.*

IN

---

(1) Arguments from inconvenience certainly deserve the greatest attention, and where the weight of other reasoning is nearly on an equipose, ought to turn the scale. But if the rule of law is clear and explicit, it is in vain to insist upon inconveniences; nor can it be true that nothing which is inconvenient is lawful, for that supposes in those who make laws a perfection which the most exalted human wisdom is incapable of attaining, and would be an invincible argument against ever changing the law.—[Note 6.]

(2) In the Rohan edition, and in those of Pynson and Redman, this Section is transposed to the Chapter of Fealty.

(3) Lord Coke's translation of the word *gents* is erroneous; for as Mr. Madox justly remarks, though the *Roman* word *gens* signifies sometimes a *nation*, and sometimes a *family*, and *gens* is *Romanick* or *bastard Roman*, and derived from *gens*, yet like many other *Romanick* words it acquired a new import, and according to that denotes *men* or *persons*. See Mad. Bar. Angl. 167, and Hist. Exchcq. in Pref. p. 13.—[Note 7.]

IN this [n] record three things are to be observed.

1. How necessary and profitable records and observations are, albeit they were not published in print: for at the time when *Littleton* wrote, this record was not printed.

[n] Mich. 15 E. 3. tit. Avowrie, 109.

2. That the husband and wife doing homage, the husband shall speake the words for them both, viz We doe to you homage, &c.

3. That the homage which the husband and wife doe, is the very homage which the wife should doe alone. But this joint homage, done by the husband and wife, is intended to be before issue had between them, whereof more shall be sayd hereafter. And it is to be observed, that very few cases ruled or resolved in the reigne of *Edward* the third, but the same or the like ☞ had been ruled or resolved in the raignes of *Edward* the second, *Edward* the first, or before, as for example for warrant hereof, *vide* Hill. 17 *E.* 2. Rot. Parl, &c.

[66. b.]

Hill. 17 E. 2. Rot. Parl. &c.

Sect. 89.

NOTE, if a man hath severall tenancies, which he holdeth of severall lords, that is to say, every tenancy by homage; then when he doth homage to one of his lords, he shall say in the end of his homage done, Saving the faith which I owe to our lord the king, and to my other lords (1)

"*AND to my other lords.*" This saving for other lords is good for explanation, albeit the homage is referred onely to the tenements which he holdeth of him to whom he doth the homage.

Sect. 90.

NOTE, none shal do homage but such as have an estate in fee simple, or fee taile, in his owne right, or in the right of another. For it is a maxime in law, that he which hath an estate but for terme of life shal neither do homage or take homage. For if a woman hath lands or tenements in fee simple, or in fee taile, which she holdeth of her lord by homage, and taketh husband, and have issue, then the husband in the life of the wife

(1) This express saving of the faith due to the king was formerly of consequence, being calculated to prevent that entire dependance of the tenant on his immediate lord, the idea of which in times when the feudal institutions were in their full vigour, operated very strongly, and tended to depress the authority of the sovereign. See a sensible note on this subject in Litt. par Houard, v. I. p. 114, and 121. In another place lord Coke cites an instance of an information on the part of the crown against a bishop, for receiving homage from his tenants without any saving of the faith due to the king; but it doth not appear by the extract which lord Coke gives of the record, how this contempt of the royal authority was punished. See ante 65. a.—[Note 8.]

wife shall doe homage (2), *because he hath title to have the tenements by the custesie of England if he surviveth his wife, and also he holdeth in right of his wife. But if the wife dies before homage done by the husband in the life of his wife, and the husband holdeth himselfe in as tenant by the curtesie, then he shall not doe homage to his lord, because he then hath an estate but for terme of life.*

More shall be said of homage in the tenure of homage ancestrell.

"*IN the right of another.*" As the husband and wife in the right of his wife, the bishop in right of his bishopricke, &c. the abbot or prior in right of his monastery, &c. But no corporation aggregate of many persons capable, [*p*] be the same ecclesiasticall or temporall, can doe homage, as a deane and chapter, maior and commonalty, and such like, albeit they be seised in fee of lands holden by homage, yet shall not they doe homage. And the reason is, because that homage must be done in person, and a corporation aggregate of many cannot appeare in person; for albeit the bodies naturall, whereupon the bodie politique consist, may be seene, yet the bodie politique or corporate itselfe cannot be seene, nor do any act but by atturney, and homage must ever be done in person, &c. (3) And albeit an ☞ abbot and covent is a corporation aggregate of many, yet because the covent are all dead persons in law, the abbot alone in nature of a sole corporation shall doe homage.

[*p*] 33 H. 8. tit. Fealtie, Br. 15. 4 Co. 11. 7 Co. 10. 10 Co. 31.

[67. a.]

(Ante 10 b. Post. 343. a.)

"*A maxime in law.*" A maxime is a proposition, to be of all men confessed and granted without proofe, argument, or discourse. *Contra negantem principia none est disputandum.* But of this somewhat hath beene said before.

"*He which hath an estate but for terme of life.*" [*q*] A parson or vicar of a church, that hath a qualified fee, [*r*] and yet to many intents upon the matter but an estate for life, can neither receive (1) homage nor do homage, as a bishop, an abbot, or any such like, that hath a fee absolute, may. [*s*] So if a man and his wife be seised in fee of a seigniorie in the right of his wife, the husband shall not receive homage alone, but he and his wife together. [*t*] But if the husband in that case hath issue by his wife, then he shall receive homage alone during the life of his

[*q*] Granvil. lib. 9. cap. 2. Britton, fol. 170. Temps E. 1. tit. Juris utrum, 13. (Post. 341. b.) [*r*] 8 E. 4. 28. 39 E. 3. 15. 3 E. 3. Avowrie, 175. [*s*] 2 E. 2. Avowry, 183.

F. N. B. 257. 13 E. 3. Gard. 39. [*t*] 27 Ass. p. 51. F. N. B. 257. 13 H. 6. Avowrie, 21. 43 E. 3. 13. 44 E. 3. 41. 3 E. 3. Avowrie, 175. 13 E. 3. 2. Gard. 39. 22 E. 3. fol. 19. Gard. 44.

wife;

(2) F. N. B. 257. *Husband alone doth fealty before the having of issue.* Nota, *before issue the avowry for homage shall be on the husband and wife, and not only on the wife.* 29 *E.* 3. 15. *But after issue the avowry for homage shall be on the husband. But till the lord have notice of the having issue, he may avow upon both.* 7 *E.* 4. 27. *The husband only shall do the homage,* quia si dominus adiret prælium, vir consecuturus esset eum, non mulier. 13 *E.* 1. *Avowry,* 234. Hal. MSS.—[Note 9.]

(3) 2 *E.* 3. 10. *accord.* Hal. MSS.—[See also Peake's Evid. 157. 169.]

(1) Lord Coke in another place, where he explains for what purposes a parson hath a fee, and for what an estate for life only, says, that he may receive homage, and cites Bro. Abr. temps E. 1. Incumbent, 19. But the book referred to agrees with the doctrine here.—[Note 10.]

wife; and the reason is, because he by having of issue is intitled to an estate for terme of his owne life, in his owne right, and yet is seised in fee in the right of his wife, so as he is not a bare tenant for life. But if his wife dye, then he hath onely but an estate for life, and then he cannot receive homage. Yet tenant for life or years of a seigniory [u] shall have ward, marriage, and reliefe, and shall suppose that the tenant died in the fealty of the pl. [x] *Fieri possunt homagia libero homini tàm masculo quàm fœminæ, tàm majori quàm minori, tàm clerico quàm laico.*

[u] 6 E. 2. Gard. 122. 13 E. 3. Gard. 39. 22 E. 3. Gard. 44.

[x] Glanvil. lib. 9. cap. 3.

18 E. 3. 7. 43 E. 3. 13. 44 E. 3. 41. 13 H. 6. Avowrie, 21. 8 H. 6. 13. 7 E. 4. 27. F. N. B. 257.

"*And have issue, then the husband in the life of the wife shall doe homage.*" The reason hereof is rendred before, and also that after the death of his wife he being but a bare tenant for life shall doe no homage; for regularly it is true, that he that cannot receive homage in respect of the weaknesse of his estate in the seigniory, shall not doe homage, if he hath a like estate in the tenancy.

If a man hold of the king, and hath issue divers daughters, and dyeth, the king shall have homage of every one of these daughters. And this [a] appeareth by the statute *De Hibernià anno* 14 *H.* 3. to be the common law; for that act saith, *In regno nostro Angliæ talis est lex et consuetudo, quòd si quis tenuerit de nobis in capite, et habuerit filias hæredes, ipso patre defuncto, antecessores nostri habuerunt et semper nos habuimus et cepimus homagium de omnibus hujusmodi filiabus, et singulæ earum tenent de nobis in capite in hoc casu.* And therefore where by the [b] statute *De Prærogativâ Regis*, it is provided, *Si una hæreditas, &c.* that is but an affirmance of the common law. [c] But this is to be understood where the coheirs be of full age; for if they be within age and in ward to the king, *Primogenita tantùm faciet homagium pro se et sororibus suis, et aliæ sorores, cùm ad ætatem pervenerint, facient servitia dominis feodorum per manum primogenitæ.* [d] And therefore if a man hold of a common person by the service of homage, and hath issue divers daughters and dyeth, the eldest daughter onely shall doe homage for her and all her sisters. And this appeareth also by the statute of *Hibernia*. *Primogenita tantùm faciet homagium domino pro se et omnibus sororibus suis.* And the reason is there rendered afterward, *Quia omnes sorores sunt quasi unus hæres de unâ hæreditate.* [e] But if the coparceners in that case make partition, then every one shall doe homage, because now it is not *una sed diversa hæreditas.* [f] And so it is if one make a feoffment in ☞ fee (which is a partition in law for that part) the feoffee shall do homage for every tenant in common shall doe severall services. And it hath been adjudged [g] in our bookes, that if the eldest coparcener doe homage to the lord, and afterward the younger

[a] 14 H. 3. tit. Prærog. 5.

[b] Prærog. Regis, cap. 5.

[c] Statut. de homagio capiendo Temps E. 1. (2)

[d] Glanvil. lib. 7. cap. 3. & lib. 9. cap. 2. Bract. lib. 1. de homagio capiendo, & lib. 2. fo. 78. 80. Britton, fol. 168. b. 171, 172. Fleta, lib. 3. cap. 16. & lib. 2. ca. 60. & lib. 5. cap. 9. F. N. B. 161. 150. 259. Staunf. Prær. 23. 24. (Post. 164. b.)

[67. b.]

[e] F. N. B. 162.

Vide 11 E. 3. Avowrie, 101. [f] 45 E. 3. 23. 24 E. 3. 73. Marlbridge, cap. 9. F. N. B. 162. [g] 2 E. 2. Avowrie, 179. 2 Ro. Abr. 514. (F. N. B. 135.)

sister

(2) This seems to be the same as is now called 17 E. 2. st. 2, and is printed in our statute books by the title of *Modus faciendi homagium et fidelitatem*. But Mr. Madox with reason observes, that it is not a statute, but only a precedent of the form of doing homage. Mad. Bar. Ang. 272. A like remark is made by Mr. Barrington. See Observat. on Ant. Stat. 2d ed. p. 159.—[Note 11.]

sister maketh a feoffment in fee of her part, the lord shall have homage for the part of the younger sister; for that which was *una hæreditas*, one inheritance by law, by the alienation, which is her act, is, (as hath beene said) divided and become in grosse, and the coparcenary defeated.

[h] 7 E. 4. 27, 28. 14 H. 4. 38. 1 H. 5. Grant, 43. 31 E. 3. Gard. 116.

But if a tenant infeoffe divers men in fee joyntly, [h] all these jointenants shall joyntly doe their homage, and their fealty also.

[i] 48 E. 3. 8. 15 E. 4. 13. 5 E. 4. 3.

[i] If homage be due by the tenant, and he maketh a feoffment in fee, the feoffor shall not doe homage; because albeit he is supposed to be tenant in some cases, *quant al avowrie*, yet the feoffee is very tenant, and homage shall ever be done by the very tenant; but that very tenant needeth not to be very tenant of the land, and therefore the mesne because he is very tenant to the lord paramount (though he be not tenant of the land) shall doe homage. And so it is of the disseisee, and of tenant in taile, after a feoffment in fee, for in that case the donee is very tenant to the donor.

[k] 22 E. 4. 22.

If a tenant that holdeth my homage maketh a feoffment in fee of part, [k] that feoffee shall doe homage, and so shall every feoffee of what part soever.

[l] 3 E. 2. Avowrie, 187. 13 H. 4. 5. 13 R. 2. tit. Avowrie, 89. 8 H. 3. tit. Prescription, 38. Hill. 22 E. 1. coram Rege Rot. 43. (Post. 73. a.)

If there be two coparceners or jointenants of a seigniory, if the tenant doth homage and fealty to one of them, [l] he shall be excused against the other.

If homage be parcell of a tenure, it is a presumption that the tenure is by knights service, unlesse the contrary be proved, but of itselfe it maketh not knights service. And yet by custome the heire of him that holds by homage onely may be in ward.

More shall be said of homage in the title of Homage Ancestrell (1).

CHAP.

(1) See post. 100. b.—The statute of 12 Cha. 2. c. 24, which was made to free the subject from the burthen of *knights service*, and the oppressive consequences of tenures *in capite*, amongst other provisions wholly discharges all tenure from the incident of homage; not because homage itself was any grievance, but because, though not *wholly* yet it was more *properly* an incident to knights service, which the statute abolishes. But whilst homage continued, it was far from being a mere ceremony, for the performance of it, where it was due, materially concerned both lord and tenant in point of *interest* and *advantage*. To the lord it was of consequence, because till he had received homage from the heir he was not entitled to the wardship of him and of his land; unless the lord had the seigniory for life or years only, in which case he could not take homage, and therefore was allowed wardship without. *Dominus* (as Magna Charta expresses it) *non habeat custodiam ejus nec terræ suæ, antequam homagium ceperit;* which words it is said import, not that the lord could not have the wardship of the heir unless he had actually received homage from the ancestor, but only that he could not have it till it was received from the heir. See 9 H. cap. 3, and 2 Inst. 10. To the tenant the homage was scarce of less importance; for anciently *every* kind of homage when received, but not before, bound the lord to acquittal or warranty, that is, both to keep the tenant free from distress, entry or other molestation for services due to the lords paramount, and to defend his title to the land against all others; though in subsequent times this implication of acquittal and warranty became peculiar to homage *auncestrel*. See post. fol. 100. a. 101. a. 2 Inst. 11. Such being the effect of homage, it was necessary to provide the means of compelling the tenant to *do* and the lord to *receive* it; and accordingly our law gave the remedy by *distress* for the *former* purpose, and the writ *de capiendo homagio* for the *latter*.

Chap. 2. Fealty. Sect. 91.

FEALTY is the same that fidelitas *is in Latine. And when a freeholder doth fealty to his lord, he shall hold his right hand upon a booke, and shall say thus: Know ye this, my lord, that I shall be faithfull and true unto you, and faith to you shall beare for the lands which I claime to hold of you, and that I shall lawfully doe to you the customes and services which I ought to do, at the termes assigned, so help me God and his saints; and he shall kisse the book. But he shall not kneele when he maketh his fealty, nor shall make such humble reverence as is aforesaid in homage.*

FEALTY in *French* is *feaulty*, and is [*a*] derived of the *Latin* word *fides* or *fidelitas*. [a] Bract. lib. 2. fol. 80. Britton, Regist. origin. 302, Mirror, cap. 3, de serement & de fealt. Statut. de 17 E. 2. tit. Homage.

"*And when a freeholder.*" Every freeholder except tenant in frankalmoigne shall do fealty. [*b*] And yet some that are not tenants of any freehold shall do fealty, as a tenant for years shall do fealtie(2). *Bracton* saith, *De nullo tenemento quod tenetur ad terminum, fit homagium, fit tamen inde fidelitatis sacramentum.* [b] Bracton, lib. 2. fol. 80. a. Brit. fol. 173. Fleta, lib. 3. ca. 16. Littleton, fo. 29. nu. 132. 4 E. 3. 34. 9 H. 6. 43. 10 H. 6. 13. 5 H. 5. 12. 9 E. 4. 1. 21 E. 4. 29. 5 H. 7. 11.

"*That I shall be faithfull and true unto you, &c. and faith to you shall beare for the lands which I claime to hold of you, and that I shall lawfully doe to you the customes and services, &c.*"

[68. a.] [*c*] ☞ Fealtie is a part of homage (1), for all the [c] Mirror, cap. 3. de ser. & de fealtie. (4 Co. 8. b.)

words

---

latter. Post. 105. a. 2 Inst. 11. However, when it was settled, that *implied* acquittal and warranty were only incident to homage *auncestrel*, the writ *de capiendo homagio* fell into disuse; for it did not lie in the case of other homage, the reason of the law, which gave it to the tenant that he might entitle himself to acquittal and warranty, having ceased with respect to *that*, and homage *auncestrel* being very rare, if not entirely worn out, in the time of lord Coke. See 2 Inst. 11.—See further on the effect of homage in Littlet. par Houard, v. 1. p. 519. Mad. Baron. Angl. 269. and Sulliv. Lect. 128, particularly the latter book. See also as to homage in general, Spelm. Gloss. voc. *Hominium*, and Du Fresn. Gloss. voc. *Hominium* et *Vassalaticum*, and post. 68. b.—[Note 12.]

(2) Tenant at will should be added to the exception. See post. 93. Also according to 5 H. 5. 12. and 10 H. 6. 13. tenant for years is not compellable to do fealty; but Littleton, Sect. 132, is expressly with lord Coke. See too the other authorities cited in the margin, and an observation on the 10 H. 6. 13. in Kitch. on Courts, ed. 1592. fol. 132. a.—[Note 13.]

(1) In some countries on the continent of Europe homage and fealty are blended together so as to form *one* engagement, being so *entire* that one cannot be without the other; and therefore foreign jurists frequently consider them

as

words of fealtie are comprehended within homage (2), and therefore fealtie is incident to homage.

"*So help me God.*" As homage is the more honourable service, so fealtie is a service more sacred, because he is sworne thereunto. And the reason wherefore the tenant is not sworne in doing his homage to his lord is, for that no subject is sworne to another subject to become his man of life and member but to the king onely, and that is called the oath of allegiance, or *homagium ligeum* (3). And those words for that purpose are omitted out of fealtie, which is to be done upon oath. And *Littleton* said well (when a freeholder doth fealtie); [*d*] for the fealtie of him that holdeth in villenage, differeth from the fealtie of the freeholder. For the villeine holding his right hand upon the booke shall say thus to his lord: Hear you, my lord *A.* that I *A. B.* from this day forward shall be to you true and faithfull, and shall owe you fealtie for the land that I hold of you in villenage, and shall be justified by you in bodie and goods, so help me God, &c. as by the act (4) appeareth.

(7 Co. Calvin's case.)

[*d*] Stat. de 17 E. 2. tit. Homage, in le Abridgement. 3 Jac. c. 4. 25 Cha. 2. c. 2. 1 W. & M. c. 8. s. 2, 3. 1 G. 1. st. 3. c. 13.

Sect.

---

as synonymous. But lord Coke, notwithstanding his saying that fealty is a *part* of homage, apparently doth not mean to confound them; for in our law, whilst *both* continued, they were in some respect distinct; and though fealty was an incident to homage, and ought always to have accompanied it, yet fealty, as lord Coke himself tells us, might be by itself, being sometimes done where homage was not due and would have been improper; and in the two next Sections Littleton strongly marks the difference between the two. In short, by our law homage was inseparable from fealty, but fealty was not so from homage*. See ante 67. b. post. 150. b. 151. a. and Wright's Ten. 55. note (*o*), and Du Fresn. Gloss. voc. *Hominium* et *Fidelitas*.—[Note 14.]

(2) This is not strictly accurate; for the words *So help me God and the saints*, which constitute the oath, and are therefore of the essence of fealty, were not comprehended in the form of homage, nor were the words *I will lawfully do to you the customs and services which I ought to do to you at the terms assigned*. Another difference between the two in point of expression was, that the person doing fealty did not say, *I become your man*, words so significant of the nature of the engagement by homage. Also in fealty there is not any exception of faith to the king or other lords, which seeming to be intended as a qualification of the peculiar words of homage, *I become your man*, might perhaps on that account be thought unnecessary in fealty.—[Note 15.]

(3) See ante 65. a. and note 1. in 66. b. and post. n. 1. in 68. b.—In note 1. of 66. b. it is observed, that it doth not appear by the extract from the record of the bishop of Exeter's case, what punishment was inflicted on the bishop for receiving homage without the exception of faith to the king. But this was a mistake, for the extract mentions the suit to have been for 10,000*l.* and so Dr. Sullivan states it to have been; though in his book no authority is vouched. See Sulliv. Lect. 129. It is observable, that there is a want of reference to authorities through the whole of the same ingenious book; a deficiency very much to be lamented, as it renders that work, which is particularly valuable for the copiousness of the author's historical deductions in respect to fiefs, much less useful than it would otherwise be.—[Note 16.]

(4) See the note on this supposed statute, in 67. b. ante.

* *This is apparently a contradiction to part of the preceding sentence, and still more so to what is said by lord Coke in* 150. *b. viz. that* fealty is an incident inseparable to homage. *Yet Mr. Hargrave's meaning is probably no more than this, that where there was homage the same was so far only inseparable from fealty, that the homage could not exist without the fealty; although the ealty might be separated from the homage by the extinguishment of the latter.*

Sect. 92.

AND there is greate diversitie betweene the doing of fealty and of homage; for homage cannot be done to any but to the lord himselfe; but the steward of the lord's court, or bailife, may take fealty for the lord.

BRACTON, lib. 2, fo. 80, saith thus: *Sciendum est, quòd non per procuratores nec per literas fieri poterit homagium; sed in propriâ personâ, tam domini quàm tenentis capi debet et fieri.* Bracton, lib. 2. fo. 80. 21 E. 4. 17 acc. 2 E. 3. 10. 32 H. 6. 23. 9. Co. 76.

"*But the steward* (le seneschal), *&c. or bailife, may take fealty.*" This is so evident, as it needeth no explanation. Vid. for the signification of Seneschal and Bailife, Sect. 78, 79. 248. & 379.

Sect. 93.

ALSO, tenant for terme of life shall do fealtie, and yet he shall not doe homage. And divers other diversities there be betweene homage and fealty.

THE tenant must doe fealtie in person; because he must be sworne unto it, and no man can sweare by the common law by attorney or proctor (5). 9 Co. 76.

Sect. 94.

ALSO, a man may see in 15 *E.* 3, *how a man and his wife shall doe homage and fealty in the common place, which is written before in the tenure of homage.*

More shall be said of fealtie in the tenure in socage, and in franke-almoigne, and in the tenure by homage auncestrell.

THIS

---

(5) Vid. *fealty done by attorney.* Patricius de Graham miles regis Scotiæ sacramentum fidelitatis fecit regi Angliæ in nomine ipsius regis Scotiæ pro omnibus terris de Penreth Tindal at Sourby. Parl. E. 1. 137. Hal. MSS.—This amongst us is a singular instance of fealty by attorney, and certainly by our law was an irregularity; for even in Bracton's time homage could not be done by attorney, and much less could an oath be taken in that way. See *supra*. However, in some countries they are not so strict, particularly in France, where both homage and fealty may be done by proxy, if the lord gives his consent, and by the custom of some of the French provinces without. See tit. *Foy et Homage*, in Denis. Nouvel. Decis.—[Note 17.]

THIS is evident, and appeareth before; and if lords knew what benefit they may reape by receiving of homage and fealty, they would not neglect them; [e] for by the receiving of either of them, it is a sufficient seisin of all manner of services, as by the words [f] of either of them appeareth (6).

[e] 4 Co. 8. & 9 Co. Bevil's case. 13 E. 4. 5.

[f] Vid. Sect. 118. 130, 131. 138.

Now if it be demanded ☞ what difference is betweene the oathe of fealtie, when it is done to the king in respect of a tenure, and the oath which every subject ought to take in respect of his allegiance, *Littleton* here setteth downe the oath of fealtie. Now the [g] oath of allegiance is thus, You shall sweare, &c. (1) Then it may be demanded, Where and when is this oath to be taken? And it is answered, that whosoever is above the age of twelve yeares, is to be sworne in the tourne, unless he be within some leet, and then in the leet (2): and I reade amongst the lawes of Saint *Edward* (3), *Quòd hanc legem invenit Arthurus, qui quondam fuit inclitissimus rex Britannorum, et ita consolidavit et confœderavit regnum Britanniæ universum semper in unum. Hujus legis authoritate expulit Arthurus prædictus Saracenos et inimicos à regno. Lex enim ista diu sopita fuit et sepulta, donec Eadgarus rex Anglorum excitavit, et erexit in lucem, et illam per totum regnum observari præcepit.* Which law in some manner is observed at this day (4). But to return to *Littleton* (5).

[68 b.]

[g] Brit ca. 29. Calvin's case. 7 Co. 6. b. 12 H. 7. 18.

Lambert, 135.

CHAP.

(6) Vid. *that seisin of fealty doth not estop the tenant from traversing the seisin of other services*, 41 *E.* 3. 25. 50. *John Lilburne's case.* Hal. MSS.—See further as to the advantages accruing from the receiving of homage and fealty, ante 67. b. and post. 92. a. and b. and note 3, in 68. b.

(1) The form of the *old* oath of allegiance may be seen in the books cited in the margin; but it has been changed by several statutes made since the Revolution; and these indulge quakers with signing a declaration of fidelity instead of taking the oath. See Burn's Justice, tit. *Oaths*, and Com. Dig. tit. *Allegiance.* In lord Hale's History of the Pleas of the Crown, there is a very learned dissertation on the old oath of allegiance, in which his lordship explains how it differs from the oath of fealty to the king by reason of tenure. He also discourses largely on the subject of homage, and points out the several distinctions between *homagium simplex*, *homagium ligeum*, and *homagium mixtum.* See 1 Hal. Hist. P. C. 61, to 75. This curious part of lord Hale's works did not occur till it was too late to give the benefit of it to the notes in the Chapter of Homage.—[Note 18.]

(2) How the taking of the oaths of allegiance is regulated by modern statutes, see Com. Dig. tit. *Allegiance*, and Burn's Just. tit. *Oaths.*

(3) As to the laws of Edward the Confessor, the authenticity of those in print is controverted by the famous Dr. Hickes. See Hick. Thesaur. Ling. Septentrion. Dissert. Epist. 95.

(4) Mr. Lambard, who published the first edition of the Anglo-Saxon Laws, informs his reader, that those called Edward the Confessor's were printed from two manuscripts, and that one of them was very ancient, but the other not so old; and it appears, that this strange tale, about King Arthur's consolidating the whole island of Britain into one kingdom, was not in the more ancient manuscript. See Lamb. Archaionom. 124. a. A learned writer on British Antiquities, who appears to have taken great pains to point out the real transactions of Arthur, though a warm advocate for great part of his history, doth not profess to vouch for this tradition concerning him. See Whitak. Manchest. 4to ed. v. 1. p. 31.—[Note 19.]

(5) The law with respect to fealty continues the same as when lord Coke wrote;

Chap. 3. Escuage. Sect. 95. (6).

ESCUAGE is called in Latine Scutagium, *that is, service of the shield; and that tenant, which holdeth his land by escuage, holdeth by knights service. And also it is commonly said, that some hold by the service of one knight's fee, and some by the halfe of a knight's fee. And it is sayd, that when the king makes a voyage royall into Scotland to subdue the Scots, then he, which holdeth by the service of one knight's fee, ought to be with the king fortie dayes, well and conveniently arrayed for the war. And he, which holdeth his land by the moitie of a knight's fee ought to be with the king twentie dayes; and he which holdeth his land by the fourth part of a knight's fee, ought to be with the king ten dayes; and so he that hath more, more, and he that hath lesse, lesse.*

"*ESCUAGE,*" [a] in *Latine Scutagium* (*id est*) *servitium scuti*, service of the shield. Hereby it appeareth that right interpretations and etymologies are necessary: for, *ad rectè docendum oportet primùm inquirere nomina, quia rerum cognitio à nominibus rerum dependit.*

[a] Mir. ca. 1. sect. 3. Br. fo. 162, &c. Ockam, cap. Quid sit scutagium. (F. N. B. 83. C. 2 Bo. Abr. 507. 4 Inst. 192. Post. 87. a. 106. b.)

(Post. 86. b.) 177. a.) *Nomina si nescis, perit cognitio rerum.*

And herewith agreeth that which is said, *Primò excutienda est verbi vis, ne sermonis vitio obstruetur oratio, sive lex sine argumentis.*

Scutum in *French* is *Escue*, and thereof commeth the *Escuer*, (*i.*) *Scutifer*,

---

wrote; for † is not varied as I apprehend by the 12 Ch. 2. c. 24, or any other statute made since his time. But it is no longer the practice to exact the performance of fealty. In the case of copyholders, it is become a thing of course on admitting them to enter a respite of fealty; but with respect to such as hold by other tenures, it is never thought of. However, it may not be amiss to remember, that the title to fealty still remains; that it is due from all tenants except tenants by frankalmoigne, and such as hold at will or by sufferance, and if required must be *iterated* on *every* change of the lord, it differing in this respect from homage, which except in special cases is only due *once;* that the receiving of it is at least attended with the advantage of preserving the memory of tenures, which though perhaps sufficiently done in the case of *copyholds* by the admittances, and by the payment of fines and quit-rents, and continual render of other services, may be very necessary in cases where fealty is the only service due; and lastly, that the law for compelling the performance of fealty has provided the remedy by distress, which is an inseparable incident to all services due by *tenure*, and in the case of fealty cannot, as it is said, be *excessive*. See ante 68. a. and post. 103. b. 104. a. b. 152. b. and Kitch. ed. 1592. fo. 70. b. and 131. b. 2 Inst. 107, and 4 Co. 8. b.—See further as to fealty, Sulliv. Lect. 68, where the oath of fealty is learnedly commented upon, and the words *fidelitas* et *sacramentum* in the Gloss. by Spelman and Du Fresne.—[Note 20.]

(6) Mr. Madox in his Baron. Angl. 227, animadverts upon this Section of Littleton; as to which see note 2, of 64. a. ante, and the note at the end of this Chapter of Escuage, post. 74. b.

Scutifer, which we usually call *Armiger*. [b] Of this *Bracton* saith, *Item scutagium dicitur, quòd talis præstatio pertinet ad scutum, quod assumitur ad servitium militare.* And *Fleta*, saith, *Sunt quædam servitia forinseca, et dici possunt regalia, quæ ad scutum præstantur, et inde habemus scutagium et ratione scuti pro feodo militari reputantur:* and *Ockham* saith, *Hæc itaque summa, quia nomine scutorum solvitur, scutagium nuncupatur* (7).

[b] Bract. li. 2. fo. 36. a. Flet. l. 3. c. 14. Ockam, ubi sup. 27 Ass. 52. 31 Ass. 38.

(Post. 74 b.)

[c] ☞ *And that tenant, which holdeth his land by escuage, holdeth by knights service.*" [d] For as fealty is incident to homage, so homage and knights service be incident to escuage, and by the grant of services escuage passeth with the rest. Every tenure by escuage is a tenure by knights service; but every tenant that holdeth by knights service, holdeth not by escuage, as shall be said hereafter (1). But note here the wisedome of antiquity, [e] *Mavult enim princeps domesticos quàm stipendiarios bellicis apponere casibus*, that is, to be served in his warres by his owne subjects, rather than by stipendiary forainers.

[69. a.]

[c] Mirr. ca. 1. sect. 3. [d] 2 E. 3. 8. b. 19 E. 3. Avowry, 294. 26 H. 8. 1. a. 20 E. 3. Per quæ servic. 11. 43 E. 3. 22. F. N. B. 83, 84. (4 Inst. 192.) (Post. 82. b.) [e] Lib. Rub.

"*The service of one knight's fee.*" [f] There is great diversity

[f] 9 Co. 123, in Lowe's case.

---

(7) In a former place, a doubt is expressed as to the book by Ockam, to which lord Coke so frequently refers. See ante 58, note 2. But on looking into the Dialogue of the Exchequer I find the passage here attributed to Ockam *verbatim* in the chapter *quid sits cutagium*, which lord Coke himself cites a little above in this page; from which it seems very plain, that by Ockam's book lord Coke means that Dialogue. Mr. Madox, who first published the Dialogue of the Exchequer, thinks that it was written or finished soon after the 24th year of Hen. 2, and that Richard bishop of London, and son of Nigell, who was bishop of Ely and treasurer to Hen. 1, was the author; and this opinion he supports with his usual learning and accuracy. See Dissertat. Epist. ad. fin. Mad. Hist. Exch. What was lord Coke's reason for attributing this Dialogue to Ockam, it is not easy to guess.—Note, that there seems to be great confusion in most books, when the *Black Book*, the *Red Book* and the *Dialogue of the Exchequer* are mentioned; and this proceeds from the want of a settled distinction between the *three*. Even bishop Nicholson, to whose labours all who study either our history or the antiquities of our laws are so greatly indebted, expresses himself with inaccuracy on the subject of these three books. He writes, as if he took the *Black Book* and the *Dialogue* to be the same; for writing of the former he says, *Mr. Madox, who has given us a correct edition of this treatise, is of opinion that Richard* Nigelli filius, &c. *was the author*. Nichols. Eng. Histor. Libr. 2d ed. p. 215. But this is a misconception of Mr. Madox's words, the sum of his account being, that the *Dialogue* is both in the *Red* and *Black* Book, but is only a part of each, and that though Alexander de Swereford was *compiler* of the Red Book, not he but Richard son of Nigel was author of the *Dialogue*. As to the name of the compiler of the *Black Book*, Mr. Madox is wholly silent. Another thing proper to mention is, that it seems uncertain whether the *Black* and *Red* Book are not in point of contents the same. Mr. Hearne, who first published a copy of the *Black Book*, thinks, that they partly differ and partly agree in their contents, but he doth not write quite positively, or pretend to say, that he had seen the two originals in the Exchequer. Hearn. Lib. Nig. ed. 1771. Præf. 17. As to Mr. Madox, he is silent on the subject.—[Note 21.] ═See 1 Rep. of Record Committee, 41. 137. 139. Mad. Exch. in the Disceptatio Epistolaris at the end, p. 14. Intro. to cur militar. 8 & 9.

(1) See as to this, post. 82. b.

diversity of opinions concerning the contents of a knight's fee, that is, how much land goeth to the livelyhood of a knight. For some say that a knight's fee consisteth of eight hides, and every hide containeth an hundred acres, and so a knight's fee should containe 800 acres. Others say that a knight's fee containeth 680 acres. Others say, that an oxgange of land containeth 15 acres, and eight oxgangs make a plowland; by which account a plowland containes 120 acres; and that *virgata terræ*, or a yardland, containeth 20 acres. But I hold, that a knight's fee, an hide or plowland, a yardland or oxgange of land, doe not containe any certaine number of acres (2); but a knight's fee is properly to be esteemed according to the qualitie, and not according to the quantity of the land, that is to say, by the value and not by the content (3). And therefore it is very true, which master *Camden* in his *Britannia*, page 136, saith, viz. *Subsequenti ætate ex censu ut colligitur facti fuerunt equites, &c.* And antiquity thought, that twenty pound land was sufficient to maintaine the degree of a knight, as appeareth in the ancient treatise *de modo tenendi parliamentum* (4) *tempore regis Edw. filii regis Etheldredi;* where it appeareth that *comitatus* (to wit), an earledome, *constat ex viginti feodis unius militis, quolibet feodo computato ad viginti libratas; baronia constat ex* 13. *feodis, et* 3. *parte unius feodi militis* (5) *secundum computationem prædictam; unum feodum militis constat ex terris ad valentiam* 20*l.* Which antiquitie I cite, for that it concurreth with the act of parliament *anno* 1 *E.* 2, *de militibus* (6); by which act *Census militaris* the state of a knight is measured by the value of xx pound *per annum*, and not by any certaine content of acres; and with this agreeth the statute of *W.* 1. cap. 35, and *F. N. B.* fol. 82, where twenty pound of land in socage is put in equipage of a knight's fee; and this is the most reasonable estimate, for one acre may be better than many others, so as he which hath 680 or 800 acres of some barren land, had not, according to the ancient account, a sufficient revenue to maintaine the degree of a knight, and he which

Vide 7 Co. 33, 34. Nevil's case, (Sid. 128.)

(2) T. 21 E. 1. Rot. 26. Ebor. coram rege. *Eight acres make an oxgang in the fields of Doncaster.* Hic. *fol.* 5. *a.* Vid. *Seld. Tit. Hon.* pars. 2. c. 5. s. 4. *In Cranfield* 48 *acres make a yard-land, and* 4 *yard-lands make a hide; so that oxgang, yard-land, and hide or plow-land, are altogether uncertain according to the diversity of places.* Hal. MSS.—See further infra and also ante 5. a. and note 11, there. In fol. 5, lord Hale gives the following note on the uncertainty of the word *oxgang*.—Breve de unâ bovatâ marisci *is ill*, 13 *E.* 3, *Briefe*, 241. Hal. MSS.—See *infra* a like case as to the uncertainty of *virgata*.—[Note 22.]

(3) Mr. Selden insists, that a knight's fee was estimable neither by the value nor the quantity of the land, but by the services or number of knights reserved. Seld. Tit. Hon. 2d ed. part. 2. c. 5. s. 26.

(4) See a note on this treatise, post. 69. b.

(5) This notion of there being a certain number of knights fees in an earldom and barony is controverted by Mr. Selden; and he cites instances of earldoms and baronies with a less as well as with a greater number than lord Coke mentions. Seld. Tit. Hon. 2d ed. part 2. c. 5. s. 26. What was considered a barony by tenure, is considered in West's Inquiry as to making Peers, 18. See also Spel. Gloss. 66, and Cruise on Dign. 7.

(6) Lord Coke in another place observes, that the 1 *E.* 2, *de militibus*, though called a statute, was only a writ granted by the king in time of parliament, and therefore entered of record. 2 Inst. 593.

(2 Ro. Abr. 515, 516. F. N. B. 82. C.)

which had a lesse number of acres of some land of the value of xx pound *per annum*, had a sufficient livelihood in those daies for the maintenance of a knight (7). So antiquity thought that 400 markes of land *per annum* was a competent livelihood for a baron, and 400 pound *per annum ad sustinendum nomen et onus* of an earle, and of late time 800 markes *per annum* of a marquesse, and 800 pound *per annum* of a duke; so that their yearly revenue was estimated by the value and not by the content. And one plowland, *carucata* (A) *terræ*, or a hide of land, *hida terræ*, (which is all one) is not of any certain content, but as much as a plow can by course of husbandry plough in a yeare. And therewith agreeth *Lambard verbo Hide.* And a plowland may containe a messuage, wood, meadow, and pasture, because that by them the plowmen and the cattell belonging to the plow are maintained. *Vide Temps E.* 1. tit. Briefe, 860. 4 *E.* 3. 47. Pl. Com. in *Hill* and *Grange's* case, fol. 168. *Vide* 6 *E.* 3. fol. 42, and 39 *H.* 6. 8. a. And the venerable *Beda* calleth a plowland *familiam*, a family; because it containeth necessary things for the maintenance of a family. And *Prisot* well saith in 35 *H.* 6. fol. 29, that a plow may till more land in a yeare in one country than in another; and therefore it stands with reason, that a plowland should be lessee in one place than in another. 41 *E.* 3. tit. Fine, 40, and 13 *E.* 3. Fine, 67. A fine shall not be received *de undâ vergatâ terræ* for the uncertainty, *vide* 39 *H.* 6. 8. But an acre of land is certaine by the statute *de terris mensurandis.* Note also (reader) that every plowland of ancient time was of the yearly value of five nobles *per annum*, and this was the living of a plowman or yeoman; and *ex duodecim carucatis constabat unum feodum militis*, which amounts to 20 pound *per annum*. And this you may see *Termino Pasch. anno* 3 *E.* 1, *coram Rogero de Seyton et sociis suis justitiariis apud* ☞ *Westm. Ebor. Ro.* 10 *Radolphus de Normanville petens in brevi de medio queritur contra Luciam de Kyme, quòd cùm ipsa teneat de ipso duas carectatas terræ in Coningston per homagium et servitium militare unde duodecim carucatæ terræ faciunt unum feodum militis* [69. b.]

(7) Nota quoad perceptum de militibus faciendis variatim se habet census communis militaris. Omnes laici qui tenent integrum feodum militis fiant milites. 1 pars. Claus. 9 H. 3. m. 24. dors. Claus. 16 H. 3. m. 4, dorso. Postea fiant milites qui habent 15*l.* per annum vel feodum militis. Rotulo respect. militiæ 40 H. 3, tempore E. 1. Qui habent viginti librat. fiant milites. Rot. hundredi 3 E. 1. Et sic continuavit usque 2 E. 2, et postea. Sed demum qui habent 40 librat. terræ fiant milites. Claus. 6 E. 2. m. 27. Et sic continuavit usque 17 regis Caroli. Vid. Rot. Parl. 18 H. 6. n. 43. 28 H. 6. n. 12, and Vid. Claus. 6 E. 2. m. 27. 19 E. 2. m. 9 E. 3. m. 17. Hal. MSS. —Before and in the time of Charles the first it was apprehended, that the king might lawfully compel all men, who were of full age and seised of lands to the value of 40*l.* a-year, either to take upon them the order of knighthood, or to pay fines for being excused. An attempt to exercise this power, which lord Coke himself allows to have been a prerogative of the crown, was one of the many expedients used by that unfortunate prince to raise a revenue without the aid of parliament; and it terminated accordingly, for it was the occasion of a statute, which provided against the *future* exercise of any such power. See 18 Cha. 1. c. 20. 2 Inst. 593. Blackst. Comment. ed. 5. v. 1. p. 404. v. 2. p. 61, and Barringt. Ant. Stat. 2d ed. 144.—[Note 23.]

(A.) Ante, 5. a. post. 86. b. See also Carucata and Hide in Gloss. at end. of Ken. Parooh. Antiq.

militis pro omni servitio, ipsa distrinxit ipsum ad faciendam sectam ad curiam suam de Thorneton in Craven, &c. (1).

And it is to be observed, that the reliefe of a knight and all above him which be noble, is the fourth part of their yearly revenue, as of a knight five pound, which is the fourth part of 20 pound. So *una baronia constat ex* 13 *feodis militum et de* 3. *parte unius feodi militis*, which amount to 400 markes, and therefore his reliefe is the fourth part of this, viz. 100 markes: and an earledome consists of twenty knights fees, which amount to 400 pound (as before it appeareth by the said ancient record *de modo tenendi parliamentum, &c.*) (2), and therefore his reliefe is 100 pound. And this also appeareth by the statute of *Magna Charta*, cap. 2, and by the equity of this statute, insomuch as a marquisdome, which consists of the revenue of two baronies, (Post. 76. a. 83. b.)

(1) 4 E. 2. Avowry, 200. Viginti virgatæ terræ faciunt unum feodum militis. M. 13 & 14 E. 1. Rot. 17. Glouc. Quadraginta carucat. terræ faciunt unum feodum militis. 8 E. 3. 49. Duodecim carucatæ et duæ bovatæ terræ faciunt unum feodum militis. Vid. apud Matth. Paris in Vitis 23. Abbatum fol. 131. Abbas Sancti Albani debet regi sex milites. Et ibi recensentur numeri hidarum ad quodlibet feodum militis. Alibi quinque, alibi sex, alibi septem hidæ faciunt feodum militis. Hal. MSS.—See further as to the contents of a knight's fee, post. 76. a. and 83. b. and 2 Inst. 596.—[Note 24.]

(2) Vid. Seld. Tit. Hon. part 2. c. 5. s. 26, ubi authoritas authoris libri modi tenendi parl. et ista opinio de certâ proportione annui valoris feodi militaris, baroniæ, et comitatûs, optimè refutantur. Vid. infra 83. b. Hal. MSS. —The *modus tenendi parliamentum*, according to the title as given in lord Coke's preface to his ninth book of Reports, imports to be an account of the manner of holding the English parliaments in the time of Edward the Confessor, and that it was approved of by the first William, and conformed to in his time and in that of his successors. To this *modus* lord Coke frequently refers as to a most undoubtedly genuine piece of antiquity; and in his fourth Institute he tells us, that Henry the second after having conquered Ireland sent a transcript of this *modus* into that country as a model for parliaments there; and that in the reign of Henry 4, this transcript, which is known by the name of the *Irish modus*, fell into the hands of sir Christopher Preston, and was then exemplified by *inspeximus* under the great seal of Ireland. But notwithstanding all this, the reasons of Mr. Selden and Mr. Prynne, of whom the former supposes it to have been an imposture of the time of Edward the third, and the latter makes it an invention as late as the 31 H. 6, seem to furnish insurmountable objections against the authority of the *English modus;* and so convinced of their force was an able advocate for the existence of the commons as a constituent part of parliament before the 49 Henry 3, that he candidly gives up its antiquity, though if it could have been defended, it would have decided the controversy in his favour, for it expressly mentions citizens and burgesses as well as knights of the shire. See 4 Inst. 12. Seld. Tit. Hon. 2d ed. part 2. c. 5. s. 26. Pryn. on 4 Inst. 1, and Tyrr. Biblioth. Polit. 270. 406. However Dr. Dopping bishop of Meath, who in 1692 first published the *Irish modus*, feebly endeavours to defend the antiquity of the supposed transcript in the time of Hen. 2, and two other writers deservedly of great credit seem inclined the same way. See Molyn. Case of Ireland; and Harr. Edit. of Ware's Hist. and Antiq. of Ire. 84. M. Selden mentions, that in his time there were many copies of the *English modus;* but I am not aware that one is in print.—As to lord Coke's account of the computation of reliefs by the yearly revenue, which lord Hale observes to have been also refuted by Selden, see post. 83. b.—[Note 25.]

baronies, which amount to 800 markes, shall pay according to that just proportion for his reliefe 200 markes; and because a dukedome consists of the revenues of two earledomes, viz. 800 pound *per annum*, a duke shall pay 200 for a reliefe, which is also the fourth part of his revenue; and with this agree the records of the Exchequer.

Note (reader) at the time of the making of the statute of *Magna Charta*, 9 *H.* 3, there was not any duke, marquesse, or vicount, in *England*, and therefore the statute could not make mention of them, and *Edward* the eldest sonne of king *E.* 3, called the Black Prince, was the first duke in *England* after the Conquest, and *Robert* earle of *Oxford* in the reigne of *R.* 2, was the first marquesse. *Sic enim inter ordines Angliæ in suâ Britanniâ testatur Camden ubi supra. Et titulus Marchionis seriùs ad nos devenit, nec ante R.* 2. *tempora cuiquam delatus; ille enim Robertum Vere Oxoniæ comitem delicias suas primum Marchionem Dubliniæ designavit, merumque erat honoris nomen. Hæc ille.* And before the reigne of *H.* 6. there was not any viscount. *Sic enim idem author ubi supra asserit. Post comites vicecomites ordine sequuntur. Viscounts nos vocamus. Hæc vetas officii sed nova dignitatis appellatio, et H.* 6. *tempore ad nos primùm audita. Hæc ille. Et dominus de Bello Monte* was the first viscount created by king *H.* 6. *Vide Cassianeum in gloriâ mundi parte* 4, *consid.* 55, *that* this dignity of a viscount is of great antiquity in other realmes.

7 H. 4. 9.
31 Ass. 30.
26 Ass. 66.
27 Ass. 52.
8 E. 3. 154.
7 E. 3. 29.
11 H. 4. 7.
F. N. B. 28. B. & 83. G.
3 H. 4. 16.
28 H. 6. 1. b.
39 H. 6. 38.
6 R. 2. Protection, 46.
19 R. 2. Gard. 165.
17 H. 6. Protect. 56.
7 E. 4. 27.
11 H. 4. 7.
3 H. 4. 16.
(F. N. B. 84. F. 2 Ro. Ab. 508.)

Bracton lib. 2. 36. *Item sunt quædam servitia, quæ dicuntur forinseca, quamvis sunt in cartâ de feoffamentis expressa et nominata, et quæ ideo dici possunt forinseca, quia pertinent ad dominum regem, et non ad dominum capitalem, nisi cùm in propriâ personâ profectus fuerit in servitio, vel nisi cùm pro servitio suo satisfecerit domino regi, &c.*

"*A voyage royall.*" A voyage royall is not onely, when the king himselfe goeth to warre, as *Littleton* here saith, but also when his lieutenant or deputy of his lieuterant goeth. And what shall be said a voyage royall shall be adjudged in this case by the judges of the common law as an incident to escuage, and not by the constable and marshall, or any other: *et sic de similibus.*

There is also another kind of voyage royall, viz. when one goeth with the king's daughter beyond sea to be married, &c. for such a voyage is for the good of the whole realme (for more profit for the realme cannot be than to make alliance with another nation); but of this voyage royall *Littleton* speaketh not here, but onely of the voyage royall to warre; so as there is a voyage royall of warre, and a voyage royall of peace and amity. And it is to be observed, that he that holdeth by castle gard or cornage holdeth by knights service, and yet he shall pay no escuage, because he holdeth not to goe with the king to warre (3).

"*Into*

(3) Vid. sæpissimè temporibus H. 2. R. 1. Johann. H. 3. 1 E. 2. Scutagium pro exercitu regis *in Ireland, Wales, Poictou, Bretagne, Normandy, Gascony, &c. though territories of the king.* Quoad *escuage* nota. *Though in some cases the subject was chargeable for defence of the realm, yet clearly for foreign invasion none were chargeable but by tenure, and therefore service of chivalry was called* forinsecum servitium. Rot. parl. 20 *E.* 3. *n.* 13. 21 *E.* 3. *n.* 16. 44. 25 *E.* 3. *n.* 23. 5 *R.* 2. *n.* 67, *&c.* 1 *H.* 5. *n.* 17. 5 *H.* 5. pars 2. *n.* 9. *The first thing requisite*

"*Into Scotland.*" *In Scotiam.* This is put but for an example, for if the tenure be to goe *in Walliam, Hiberniam, Vasconium, Pictaviam, &c.* it is all one. See an ancient record, *Rot. de finibus Termino Mich.* 11 *E.* 2. Sir *Rich. Rockesley* knight did hold lands at *Seaton* by serjeantry to be *Vantrarius regis*, that is to be the king's fore-foot-man when the king went into *Gascoigne, donec perusus fuit pari solearum pretii* 4 *d.* that is, untill he had worne out a paire of shoes of the price of foure pence. And this service being admitted to be performed when the king went to *Gascoigne* to make warre, is knight's service.

Lib. Rub. in Scacc. 47, 48. 19 R. 2. Gard. 95. 6 R. 2. Protection, 46. 6 H. 3. Avowry 242. Vid. Rot. Claus. 8 H. 3. & Fin. 8 H. 3. & Patent. 9 H. 3. multi solverunt scutagium pro exercit. in Walliam, memb. 30. & ante Claus. 6 H. 3. memb. 3.

"*He which holdeth by the service of one knight's fee, ought to be with the king fortie dayes.*" But this is to be understood of a tenant that holdeth of the king immediately; for every man is bound by his tenure to defend his lord, and both he and his lord the king and his country; and therefore if the lord goeth not, his tenant is excused. But yet if the tenant peravaile goeth with the king, it excuseth all the mesnes.

And it is to be observed, that for every pound of the ancient value of a knight's fee accounting twenty pound land, the tenant must goe with the king two dayes, which commeth just to 40 dayes for a whole knight's fee. By the statute of *Magna Charta* it is provided, that *scutagium de cæter' capiatur sicut capi consuevit tempore Hen. regis avi nostri.*

Magna Charta, cap. 37. Fleta, lib. cap. 60.

Sect.

---

requisite to escuage was the proclamation and summons of service, which prefixed the day and place of rendezvous of the army, and commanded the lords, &c. nominatim *and others by proclamation* quòd ad diem et locum veniant ad regem cum equis et armis et toto servitio regi debito, *which is called* summonitio servitii vel summonitio exercitus. Claus. 1 E. 2. m. 2. Claus. 3 E. 2. m. 1. Claus. 7 E. 2. m. 14, et sæpissimè alibi. Vide pro scutagiis captis occasione diversarum expeditionum. Tempore H. 2, scutagium bis assessum ante annum quintum tertium scutagium 7 H. 2, pro exercitu Tholosæ duas marcas, quartum pro eodem exercitu unam marcam, quintum 18 H. 2, pro exercitu Hiberniæ 20 s. sextum pro exercitu Galloway 20 s. Tempore Richardi primi, primum scutagium pro exercitu Walliæ anno secundo ad 10 s. secundum anno sexto ad 20 s. pro quolibet feodo pro redemptione regis, tertium 8 R. 1, pro exercitu Normanniæ ad 20 s. Tempore Johannis anno primo scutagium assessum ad duas marcas, secundum anno tertio pro exercitu Normanniæ ad duas marcas, tertium consimile pro consimili, quartum consimile pro consimili, quintum consimile pro consimili, sextum consimile pro consimili, septimum consimile, octavum anno duodecimo regis pro Hiberniâ duas marcas, nonum anno decimo tertio pro exercitu Walliæ ad duas marcas, decimum pro exercitu Scotiæ, undecimum anno decimo sexto Johannis pro exercitu Bretaniæ ad tres marcas sed non solutum. Nota temporibus Henrici tertii scutagium Ludowici duas marcas anno secundo, Byham 10 s. anno quinto, Montegomery duas marcas anno octavo, Bedford duas marcas anno octavo, Kerry duas marcas anno decimo tertio, Bretanny 40 s. anno decimo quarto, Pictaviæ 40 s. anno decimo quinto, Elam 20 s. anno decimo sexto, Gascoigny 40 s. anno vicesimo secundo, Guyen 40 s. anno vicesimo nono, Walliæ 40 s. anno quadragesimo secundo, Hal. MSS.—For a more particular account of the scutages assessed in the several reigns mentioned by lord Hale, see Mad. Hist. Exch. chap. 16, where the whole subject of escuage is fully explained from the records. See also post. 72. a. and b.—[Note 26.]

☞ Sect. 96. [70. a.]

BUT it appeareth by the pleas and arguments made in a plea upon a writ of detinue of a writing obligatorie brought by one H. Gray, *Tr.* 7 E. 3, *that it is not needfull for him which holdeth by escuage, to goe himselfe with the king, if he will finde another able person for him conveniently arranged for the warre to goe with the king. And this seemeth to be good reason. For it may be, that he which holdeth by such services is languishing, so as he can neither go nor ride. And also an abbot or other man of religion, or a feme sole, which hold by such services, ought not in such case to goe in proper person. And sir* William Herle, *then chiefe justice of the common place* (de common bank), *said in this plea, that escuage shall not be granted but where the king goes himselfe in his proper person. And it was demurred in judgment in the same plea, whether the* 40 *dayes should be accounted from the first day of the muster of the king's host made by the commons* (per les commons)* *and by the commandement of the king, or from the day that the king first entered into Scotland. Therefore enquire of this* (1).

Tr. 7 E. 3. fol. 29. (9 Co. 130. 2 Ro. Abr. 509.)

TR. 7 *E.* 3. *&c.* This is the first booke at large that our author has cited. And it is to be observed, that this point is not debated in the said booke, but onely is there admitted, and yet is good authority in law; for our author saith, that it appeareth by this booke. Now both by *Littleton* himselfe, and by the booke of 7 *E.* 3, it appeareth, that albeit the tenure is, that he which holdeth by a whole knight's fee ought to be with the king, &c. to do a corporeall service, yet he may finde another able man to do it for him.

(4 Co. 88.)

By the statute of *Magna Charta*, cap. 20, it is provided, that no knight, that holdeth by castle-gard, shall be destreyned to give money for the keeping of the castle: *Si ipse eam facere voluerit in propriâ personâ suâ, vel per alium probum hominem faciet, si ipse eam facere non possit propter rationabilem causam.*

(6 Co. 20.)

Some have thought, that he that holdeth by escuage is taken by the equity of this statute, that speaketh onely of castle-gard. But it is holden, that this statute is but an affirmance of the common law. For where that act saith, (*propter rationabilem causam*) that reasonable cause is referred to the tenant's own discretion and choyce, and the cause is not material or issuable no more than in the case that *Littleton* here putteth, as hereafter appeareth. And I would advise our student, that when he shall be enabled and armed to set upon the yeare bookes, or reports of law, that he be furnished with all the whole course of the law, that when he heareth a case vouched and applyed either in *Westminster-hall*, (where it is necessary for him to be a diligent hearer, and observer of cases of law) or at readings or other exercises of learning,

* commons *seeme to be inserted for* commissioners. *See Mr. Ritso's Intr. p.* 115, *and lord Coke's commentary on the word* muster, *post.* 71. *a.*

(1) Mr. Madox observes, that sir William Herle's position, that escuage should not be granted but where the king goes to the war in person, is fallacious. Mad. Baron. Angl. 226.

[70 b.] learning, he may finde out and reade the case so ☞vouched; for that will both fasten it in his memory, and be to him as good as an exposition of that case. But that must not hinder his timely and orderly reading, which (all excuses set apart) he must binde himselfe unto; for there be two things to be avoyded by him, as enemies to learning, *præpostera lectio*, and *præpropera praxis*. But let us now heare what our author will say.

"*And this seemeth to be good reason, &c.*" Here *Littleton* sheweth three reasons wherefore the tenant should not be constrained to doe his service in person.

First, it may be the tenant is sicke, so as he is neither able to goe nor ride. And ever such construction must be made in matters concerning the defence of the realme, or common good, as the same may be effected and performed. To the former disability may be added where a corporation aggregate of many, as deane and chapter, maior and commonalty, &c. or an infant being a purchaser, for these also must finde an able man. But it may be objected, that in these particular cases the tenant might finde a man, but not when he himselfe is able without all excuse or impediment. To this it is answered, that *Sapiens incipit à fine*. And the end of this service is for defence of the realme, and so it be done by an able and sufficient man, the end is effected.

Secondly, seeing there are so many just excuses of the tenant, it were dangerous, and tending to the hindrance of the service, if these excuses should be issuable: *Multa in jure communi contra rationem disputandi pro communi utilitate introducta sunt.*

Lastly, both *Littleton*, and the booke in the seventh of *Edward* the third, giveth the tenant power, without any cause to be shewed, to finde an able and sufficient man, and oftentimes *jura publica ex privato promiscuè decidi non debent.*

"*An abbot or other man of religion.*" Note, that if the king had given lands to an abbot and his successors to hold by knights service, this had beene good, and the abbot should doe homage and find a man, &c. or pay escuage, but there was no wardship or reliefe or other incident belonging thereunto. And though the law saith, that this was a mortmaine, that is, that they held fast their inheritance, yet if the abbot, with the assent of his covent, had conveyed the land to a naturall man and his heires, now wardship and reliefe and other incidents belonged of common right to the tenure. And so it is, if the king give lands to a maior and communalty and their successors, to be holden by knights service, in this case the patentees (as hath beene said) shall doe no homage, neither shall there be any wardship or reliefe, onely they also shall find a man, &c. or pay escuage. But if they convey over the lands to any naturall man and his heires, now homage, ward, marriage, and reliefe, and other incidents belong thereunto. And yet this possibility was *remota potentia*: but the reason hereof is, *Cessante ratione legis cessat ipse lex*; the reason of the immunity was in respect of the body politique, which by the conveyance over ceaseth, which is worthy of observation. (Post. 99. a.) Ante. 66. b.

And it is to be observed, that every bishop in *England* hath a baronie

baronie (2), and that barony is holden of the king *in capite*, and yet the king can neither have wardship or relief.

If two joyntenants be of land holden by knights service, if one goeth with the king, it sufficeth for both, and both of them cannot be compelled to goe, for by their tenure one man is onely to goe.

6 H. 3. Avowry, 242. F. N. B. 83, 84.

If the tenant peravaile goeth, it dischargeth the mesne; for one tenancy shall pay but one escuage.

"*Or other man of religion.*" Here this word (religion) is taken largely, viz. not onely for regular, or dead persons, as abbots, monkes, or the like, but for secular persons also, as bishops, parsons, vicars, and the like; for neither of them are bound to goe in proper person. For *nemo militans Deo implicetur secularibus negotiis.*

"*Languishing.*" So it may be said of an ideot, a mad man, a leper, a man maymed, blind, deafe, of decrepit age, or the like.

"*Or a feme sole.*" Seeing that a fem sole, that cannot perform knights service, may serve by deputy, it may be demanded, wherefore an heire male being within the age of 21 yeares may not serve also by deputie, being not able to serve himselfe. [71. a.]

To this it is answered, that in cases of minoritie, all is one to both sexes, viz. if the heir male be at the death of the ancestor under the age of one and twenty, or the heire female under the age of 14, they can make no deputy, but the lord shall have wardship as an incident to the tenure: therefore *Littleton* is here to be understood of a feme sole of full age, and seised of land holden by knights service either by purchase or descent.

"*Conveniently arrayed for the warre.*" So as here are foure things to be observed.

First, (as hath been said), that he may find another.

Secondly, that he that is found must be an able person.

Thirdly, he must be armed at the costs and charge of the tenant: and herein is to be noted, *quod non definitur in jure*, with what manner of armor the souldier shall be arrayed with, for time place and occasion doe alter the manner and kind of the armour (1).

Fourthly,

---

(2) Lord chief justice Hale, in a manuscript treatise on the *Jura Coronæ*, gives it as his opinion, that the bishops do not hold their possessions *per baroniam*, and that they sit in the house of peers by *custom* and usage, and not as barons by *tenure*. But the propriety of this doctrine has been ably controverted by a writer of very great eminence now living. See Warburt. *Alliance between Church and State*, 4th edit. 149.—[Note 27.]

(1) Vide pro assisâ armorum.—27 H. 2. Quicunque habet feodum unius militis, habeat loricam cassidem clipeum et lanceam. Quicunque liber laicus habuerit in catallo vel redditu ad valentiam sexdecim marcarum, habeat loricam lanceam clipeum et cassidem. Quicunque liber laicus habuerit in catallo ad valentiam decem marcarum, habeat haubergellum et capelet ferri et lanceam. Omnes burgenses, et tota communia liberorum hominum, habeat wanbais, et capelet ferri, et lanceam. Et si quis hæc arma habens obierit, arma sua remaneant hæredi; et fiat inquisitio de his, qui has habent facultates, et faciant eos jurare

Fourthly, he must have such armor as shall be necessary, and so appointed in readinesse.

Ferdwit is a *Saxon* word, *et significat quietanciam murdri in exercitu.* *Worscott* is an old *English* word, and signifieth *liberum esse de oneribus armorum.* Fleta, lib. 1. cap. 42.

It

jurare ad ista arma habenda et ad ea tenenda in servitio regis. Hoveden, 614. *This assise continued till the time of king John, and then was a little altered. And this assize made in the time of king John was repealed and again commenced, and men were compelled to be sworn to it.* Claus. 14 H. 3. m. 5. dorso. *Commissioners were assigned to cause men to be sworn and assised to arms, as they were sworn in the time of king John, in this form.* Quisquis habet feodum militis integrum, habeat loricam; qui habet dimidium feodi militis, habeat haubergellum; qui habet catalla ad valentiam quindecim marcarum, habeat loricam; qui habet catalla ad valentiam decem marcarum, habeat haubergellum; qui habet catalla ad valentiam decem librarum, habeat capellum ferreum perpunctum et lanceam; qui habet ad valentiam viginti solidorum, habet arcum et sagittas. In quâlibet villâ sit *unus* constabularius, in quolibet burgo *plures,* ad quorum summonitionem omnes ad arma jurati in wardâ suâ conveniant ad imbreviandum distinctè nomina et arma singulorum, ita quòd singuli habeant prompta sua arma ad defensionem regni. *This assise, as it seems, continued till the* 26 *of Hen.* 3, *and then another assise was ordained. In* Claus. 26 Hen. 3. pars 2. m. 10, *many articles are ordained, which differ little from the statute of Winton. Amongst others there is this article.* Singuli vicecomites, cum duobus militibus ad hoc assignatis, faciant cives, burgenses, liberos homines, villanos, et alios à quindecim ad sexaginta annos, assideri et jurari ad arma secundum quantitatem terrarum et catallorum, scilicet, ad quindecim librata terræ, unam loricam unum capellum ferreum gladium cultellum et equum; ad decem librata terræ, unum haubergellum capellum ferreum gladium lanceam et cutellum; ad quinque librata terræ, unum perpunctum capellum ferreum gladium lanceam et cultellum; ad quadraginta solidos et amplius ad quinque librata, gladium arcus sagittas et cultellum; qui minus habet, quàm quadraginta solidos, falcem gisarmas et cultellos et alia minuta arma; ad catalla sexaginta marcarum, unam loricam capellum gladium et equum; ad catalla quadraginta marcarum, unum capellum haubergellum gladium et cultellum; ad catalla decem marcarum, gladium cultellum arcum et sagittas; ad catalla quadraginta solidorum et infra decem marcas, falces gisarmas et alia minuta arma. Omnes item alii, qui possunt habere, arcus et sagittas habeant. In singulis civitatibus et burgis jurati ad arma sint intendentes majori, vel ballivis ubi non sunt majores. In singulis villis aliis constituantur unus vel duo constabularii secundum numerum inhabitantium. In singulis verò hundredis unus capitalis constabularius, ad cujus mandatum omnes jurati ad arma de hundredo conveniant, et ei sint intendentes ad faciendum ea quæ spectant ad conservationem pacis. Omnes verò constabularii capitanei intendentes sint vicecomiti et duobos militibus prædictis, ad veniendum ad mandatum eorum, et faciendum per præcepta eorum ea quæ spectant ad conservationem pacis nostræ, &c. *And so two knights were assigned in every county to perform the premises. The next assise of arms was in the* 13 *of Edw.* 1, *by the statute of* Winton, *which commands, that every one shall be sworn to armor according to the value of their lands and goods, viz. from lands of fifteen pounds and chattels of* 40 *marks,* ad haubergellum capellum ferreum gladium cultellum et equum; *from land of* 10*l. and goods of* 20 *marks,* ad haubergellum capellum ferreum gladium et cultellum: *from land of* 5*l.* ad gladium cultellum et capellum ferreum; *from* 40*s. to land of* 5*l.* ad gladium cultellum arcum et sagittas; et qui minus, juratur ad gisarmis cultellos et alia minuta arma; et qui minus habuerit quàm viginti marcas bonorum, habeat gladios cultellos et alia minuta arma; et omnes alii arcum et sagittas; et in

quolibet

Livius. It is truly said, *quòd miles hæc tria curare debet, corpus ut validissimum et pernicissimum habeat, arma apta ad subita imperia, cætera Deo et imperatori curæ esse.*

Vegetius. *Sapiens non semper it uno gradu, sed unâ viâ, non se mutat sed aptat. Qui secundos optat eventus, dimicet arte non casu. In omni conflictu non tam prodest multitudo, quàm virtus.*

Est

---

quolibet hundredo duo constabularii eligantur ad faciendum visum armorum. *This assise was observed in the times of Edward the* 1*st and Edward the* 2*d. In* 9 *E.* 2. *the statute of Winton was put into execution* sub pœnâ forisfacturæ omnium bonorum et catallorum pro primâ vice, et secundâ vice sub pœnâ captionis terrarum in manus regis et imprisonamento corporum: *and it was also commanded,* quòd citra festum, &c. in formâ prædictâ armati parati sint ad proficiscendum cum rege versus Scotos cum victualibus necessariis pro quadraginta diebus, suorum et aliorum de partibus suis sumptibus providendis. Vid. Claus. 9 E. 2. m. 25. dorso. *This assise received some change about the* 8 *of E.* 3, *and in* Claus. 8 E. 3. m. 3. dorso, *there is the following precept.* Proclamationem facias, quòd omnes de ballivâ tuâ, qui habent quadraginta librata terræ vel redditus, licet milites non sunt, equiturâ et armis competentibus juxta statum suum, viz. unusquisque eorum pro se et altero ad minus; et omnes, qui habent viginti librata terræ, cum equiturâ et armis pro seipsis ad minus, faciant sibi provideri; et illi, qui minus habent, assideantur juxta statutum Wintoniæ. *But in progress of time the statute of Winton fell into disuse, and commissions issued to array men* juxta status sui exigentiam et facultates. Vid. Claus. 43 E. 3. m. 24. et sæpissimè. *This commission was afterwards regulated and confirmed in parliament.* Rot. Parl. 5 H. 4. n. 24. *And now the statute of Winton is repealed by the* 21 *Jam. chap.* 28. *But this doth not relate to military service, and is only a certain military provision for the peace of the kingdom, and concerned burgesses and sockmen as well as tenants by knight service. And according to this difference, the commission of array extended both to tenants by knights service, and others; but the writ which is called* summonitio servitii, *respected tenants by knights service only. And as to this latter,* 1. *It is to be observed, that the service was estimated by the number of fees; and so he, who held* per baroniam vel comitatum, *was attendant only according to the number of knights fees by which the barony or earldom was held, as clearly appears in Selden's Titles of Honour, part* 2, *cap.* 5, *sect.* 26, *where it is mentioned, that the barony* de Veteri Ponte *was holden by* 5 *knights fees, and that Clifford, who had married one of the coheirs, acknowledged the service of two knights and an half.* 2. *On summons of the army on service at a place and day certain, every knight by himself or his deputy came before the constable and marshal, and presented the number of his fees and the persons by whom they were to be performed, and their names, which were registered before them.* 3. *He, who held by a whole knight's fee ought to perform his service by one knight, or by himself in person, or* per duos servientes sive armigeros, *who in value are equal to a knight. Seld.* ubi supra. *So he, who held by the moiety of a knight's fee, might perform all the service either* 40 *days* per servientum *or* 20 *days* per seipsum vel militem. *And so it was done by the abbot of Saint Alban, who held six knights fees of the king, and performed the service* per duos milites galeatos et lege militari decenter armatos et octo armigeros, *four of whom were* equites cum lineis et ferreis armis muniti, *and two were* ballistarii; *and they were presented to the constable and marshal, and* in constabulariis positi, *that is, listed in their several companies. And note, that* hi milites et servientes *were at their own proper expenses in going, staying for* 40 *days, and returning. Note also, that the* 40 *days are accounted from the day prefixed for the assembling of the army in the destined place, wherever it shall be, whether in the kingdom or out of the kingdom; and the day and place of the assembly of the army were prefixed in the writ* de summonitione servitii.

Observe,

Est optimi ducis scire et vincere, et cedere prudenter tempori. Multum potest in rebus humanis occasio, plurimum in bellicis. Polibius.

Quid tam necessarium est quàm tenere semper arma, quibus tectus esse possi. Vegetius. But I will take my leave of these excellent authors of art military, and referre them to those that professe the same, and will returne to *Littleton*.

"*Muster.*" I find this word in the statute of 18 *H.* 6. cap. 19, and the ancient military order is worthy of observation; for before and long after that statute, when the king was to be served with souldiers for his warre, a knight or esquire of thec ountry that had revenues, farmors and tenants, would covenant with the king, by indenture inrolled in the exchequer, to serve the king for such a terme with so many men (specially named in a list) in his warre, &c an excellent institution that they should serve under him, whom they knew and honoured, and with whom they must live at their returne. These men being mustered before the king's commissioners, and receiving any part of their wages, and their names

---

Observe, that great fines were frequently imposed on those, who were deficient in doing their service on the summons of the army. Vid. Claus. 27 H. 3. parte 1. m. 12. *Thomas de Berclay was fined* 60 *marks for default of service* in transfretando cum rege. Claus. 16 E. 2. m. 36. *The barons of the exchequer were commanded to compound with the archbishops, bishops, religious men and others, for the remission of their service in the next army summoned at Newcastle on the vigil of St. James next ensuing, and to take for a fine forty pounds for every fee, and so* pro rata. *By* Pat. 13 *E.* 2, *it was directed that twenty pounds should be taken for a fine on every fee of a knight who should make default. Vid. Fines* 7 E. 2. m. 4. 5. *On the summons of service for the army of Scotland, it was proclaimed, that ecclesiastical persons and women should do their service at the day, or come before A. and B. and pay a fine, viz. twenty marks for every fee. So observe, that they were not fines imposed, but voluntary fines.* Hal. MSS. In reading the preceding annotation by lord Hale, it is very requisite to attend to the distinction between the two subjects of it. The *first* part of the annotation, which states the progressive changes in the assize of arms between the 27 of Hen. 2, and the 21 of Jam. 1, and refers to the commissions of array during the same period, is applicable to the *general* military service *all* the king's subjects are liable to for the internal defence of the realm. The *remainder* relates to the performance of that *particular* military service, which was due by reason of tenure, and might be required on *foreign* expeditions. With respect to the *latter* it may be sufficient to add, that military service by tenure was wholly abolished by the 12 Cha. 2. c. 24, which in *express* terms discharges all estates from services on *voyages royall*, and that long before this statute it had fallen into disuse, as appears from there not being any instance of assessing escuage since the reign of Edward the second. As to the *former*, lord Hale ends his historical deduction about the assize of arms and commissions of array with the 21 of James; but the reader will find the same subject very accurately continued to the present times, together with some particulars relative to the previous period not adverted to by lord Hale, in an admired work, to which we have such frequent occasion to refer. See 1 Blackst. Comment. 5th ed. 411. It is observable, that lord Hale avoids taking the least notice of the great contest between Charles the first and the long parliament about the king's power over the *militia*, which arose in consequence of some commissions of array issued by him, and was the immediate prelude to the civil wars in his reign. Of the arguments used by each party on this occasion, there is a very full account in Rushworth. See 4 Rushw. 655.—[Note 28.]

names so recorded, if they after departed from their captaine within the terme contrary to the forme of that statute, it was felony. But now that statute is of no force; because that ancient and excellent forme of military course is altogether antiquated: but later statutes have provided for that mischiefe.

(3 Inst. 86. Cro. Cha. 71.) 6 Co. 27, the souldier's case.

To muster is to make a shew of souldiers well armed and trained before the king's commissioners in some open field; *ubi se ostendentes prœludunt prœlio.* In *Latine* it is *censere, seu lustrare exercitum.*

(Lamb. fo. 135. b.)

By the law before the Conquest musters and shewing of armour should be *uno eodem die per universum regnum, ne aliqui possint arma familiaribus et notis accommodare, nec ipsi illa mutuò accipere, ac justitiam domini regis defraudere, et dominum regem et regnum offendere.*

Concerning the point in law, demurred in judgment, in the seventh of Edward the third, here mentioned by our author, the law accounteth the beginning of the fortie days after the king entreth into the foreine nation; for then the war beginneth, and till he come there, he and his host are said to goe towards the warre, and no militarie service is to be done till the king and his host come thither.

"*Sir William Herle.*" A famous lawyer, constituted chiefe justice of the common pleas by letters patents dated 2 *die Martii anno* 5 *E.* 3. It appeareth by *Littleton*, and by the records, that he was a knight, against the conceit of those, that thinke, that the chiefe justices of the court of common pleas were not knighted till long after.

Our student shall observe, that the knowledge of the law is like a deepe well, out of which each man draweth according to the strength of his understanding. He that reacheth deepest, he seeth the amiable and admirable secrets of the law, wherein, I assure you, the sages of the law in former times (whereof sir *William Herle* was a principall one) have had the deepest reach. And as the bucket in the depth is easily drawn to the uppermost part of the water, (for *nullum elementum in suo proprio loco est grave*) but take it from the water, it cannot be drawne up but with great difficultie; so albeit beginnings of this study seem difficult, yet when the professor of the law can dive into the depth, it is delightfull, easie, and without any heavy burthen, so long as he keepe himselfe in his own proper element.

Glanville, lib. 2. cap. 6. &c.

☞ "*Justice.*" In *Glanvil* he is called *justitia in ipso abstracto*, as it were justice itselfe; which appellation remaines still in *English* and *French*, to put them in mind of their dutie and functions. But now in legall *Latin*, they are called *justiciarii tanquam justi in concreto*, and they are called *justiciarii de banco, &c.* and never *judices de banco, &c.* [71. b.]

"*The common place* (common banke)." *Banke* is a *Saxon* word, and signifieth a bench or high seat, or a tribunall, and is properly applyed to the justices of the court of common pleas, because the justices of that court sit there as in a certaine place: for all writs returnable into that court are *coram justiciariis nostris apud Westmon.* or any other certaine place where the court sit; and legall records tearme them *justiciarii de banco.* But writs returnable into the court called the king's bench are *coram nobis* (*i. e. rege*) *ubicunque fuerimus in Angliâ*; and all judiciall records there are

are styled *coram rege*. But for distinction's sake it is called the king's bench; both because the records of the court are styled (as have been sayd) *coram rege*, and because kings in former times have often personally sate there (1). For the antiquity of the court of common pleas, they erre, that hold that before the statute of *Magna Charta* there was no court of common pleas, but it had its creation by or after the charter; for the learned know, that in the sixe and twentieth yeare of *Edward* the third, the abbot of *B.* in a writ of assise brought before the justices in eire claimed conusance and to have writs of assise and other originall writs out of the king's court by prescription, time out of mind of man, in the raignes of Saint *Edmond*, and Saint *Edward* the Confessor before the Conquest. And on the behalfe of the abbott were shewed divers allowances thereof in former times in the king's courts, and that king *Henry* the first confirmed their usages, and that they should have conusance of pleas, so that the justices of the one bench or the other should not intermeddle. And the statute of *Magna Charta* erecteth no court, but giveth direction for the proper jurisdiction thereof in these words: *communia placita non sequantur curiam nostram, sed teneantur in aliquo certo loco.* And properly the statute saith, *non sequantur*, for that the king's bench did in those dayes follow the king *ubicunque fuerit in Anglid*, and therefore enacteth that common pleas should be holden in a court resident in a certaine place. In the next chapter of *Magna Charta* (made at one and the same time) it is provided; *et ea, quæ per eosdem (s. justiciarios itinerantes) propter difficultatem aliquorum articulorum terminari non possunt, referanter ad justiciarios nostros de banco et ibi terminentur.* And in the next to that, *Assisæ de ultimâ præsentatione semper capiantur coram justiciariis de banco, et ibi terminentur.* Therefore it manifestly appeareth, that at the making of the statute of *Magna Charta* there were *justiciarii de banco*, which all men confesse to be the court of common pleas. And therefore that court was not erected by or after that statute (2). For the authority of this court

26 Ass. p. 24. 4 E. 3. fol. 19. Bracton, lib. 3. fol. 105. b. Britton, fol. 1. and 2. Fleta, lib. 2. cap. 2. Mirror, cap. 5. sect. 1. Fortescue, cap. 51. See in the preface to the third part of my Reports.

Mirror, cap. 5. sect. 2. Fleta, lib. 2. cap. 54.

(1) But though formerly our kings did *actually* sit in the court of king's bench, and the law still intends that the king is present there, yet the *judicature* belongs to the judges *only*, as lord Coke elsewhere observes. 4 Inst. 73. See further on the subject, 3 Blackst. Comm. 5th ed. 41, and Mad. Hist. Exchcq. fol. ed. 58. 64. 68. and 553.—[Note 29.]

(2) From the whole of lord Coke's observations here and in his preface to his eighth book of Reports, it seems to have been his opinion, that the *court of common pleas* was not only a *distinct* court at the time of making the Magna Charta of the 9th of Hen. 3, but also existed as such before the Conquest. But according to Mr. Madox, whose inquiries into the subject were certainly more minute and particular, the origin of the *court of common pleas* is of a much later date. He so far agrees with lord Coke, as to admit that the *Magna Charta* of Henry the 3d rather *confirmed* than *erected* the *bank* or *common pleas*, and that such a court was in being several years before the *Magna Charta* of the 17th of king John, though it was then first made *stationary*. But in other respects lord Coke and Mr. Madox differ widely; for the latter thinks, that for some time after the Conquest there was *one* great and supreme judicature called the *curia regis*, which he supposes to have been of *Norman* and not *Anglo-Saxon* original, and to have exercised jurisdiction over *common* as well as *other* pleas; that the *common pleas* and *exchequer* were gradually separated from the *curia regis*, and became jurisdictions wholly distinct

court, it is evident by that which hath beene said, that it hath jurisdiction of all common pleas. But let us returne to *Littleton*.

(Doct. Pla. 115. 5 Co. 114.)

"*Demurred in judgment.*" A demurrer commeth of the *Latine* word *demorari* to abide; and therefore he which demurreth in law, is said, he that abideth in law: *Moratur* or *demoratur in lege*. Whensoever the councill learned of the party is of opinion, that the court or plea of the adverse party is sufficient in law, then he demurreth or abideth in law, and referreth the same to the judgment of the court; and therefore well saith *Littleton* here, *demurred in judgment;* the words of a demurrer being, *quia narratio, &c. materiaque in eâdem contenta minus sufficiens in lege existet, &c.* and so of a plea, *quia placitum &c. materiaque in eodem contenta minus sufficiens in lege existit, &c. unde pro defectu sufficientis narrationis sive placiti, &c. petit judicium, &c.* But if the plea be sufficient in law, and the matter of fact be false, then the adverse partie taketh issue thereupon, and that is tried by a jury; for matters in law are decided by the judges, and matters in fact by juries, as elsewhere is said more at large.

(5 Co. 69. Hob. 164.)

Now as there is no issue upon the fact, but when it is joyned betweene the parties, so there is no demurrer in law, but when it is joined; and therefore when a demurrer is offered by the one party, as is aforesaid, the adverse party joyneth with him, (for example) saith, *quòd placitum prædictum, &c. materiaque in eodem contenta bonum et sufficiens in lege existunt, &c. et petit judicium*, and thereupon the demurrer is said to be joyned, and then the case is argued by counsell learned of both sides; and if the poynts be difficult, then it is argued openly by the judges of that court, and if they or the greater part concurre in opinion, accordingly judgement is given; and if the court be equally divided, or conceive great doubt of the case, then may they adjourne it into the exchequer chamber, where the case shall be argued by all the judges of *England;* where if the judges shall be equally divided, then, (if none of them change their opinion) it shall be decided at the next parliament by a prelate, two earles, and two barons, which shall have power and commission of the king in that behalfe, and by advice of themselves, the chancellor, treasurer, the justices of the one bench and the other, and other of the king's counsell as many and such as shall seeme convenient, shall make a good judgement, &c. And if the difficulty be so great that they cannot determine it, then it shall be determined by the lords in the upper house of parliament (1). See the statute, for it extends not onely to the case abovesaid,

Vid. Bract. lib. 5, fo. 352. b.

14 E. 3. cap. 5. Statut. 1. Pet. Jur. Parl. Ch. 2. &c.

Rot. Parlia. 14 E. 3. nu. 31. a proceeding in sir John Stanton's case upon difficulty in the court of common pleas.

[72. a.]

Vide Britton, fol. 41. 21 E. 3. 37. 38. 39 E. 3. fo. 1. 21. 35. 40 E. 3. 34. 13 H. 4. 3, 4.

but

---

distinct from it; and that the separation of the *common pleas* began in the reign of the first Richard, or early in the reign of John, and was completed by Henry the third. See Mad. Hist. Excheq. fol. ed. 63, and the chapter on the division of the king's courts, 539.——See p. 176 of Const. and Laws of E. by Mr. P—y, who I take it was Mr. Pudsey. See further 3 Black. Comment. 5th ed. 37. 4 Inst. 99. Lamb. Archaion. ed. 1635, p. 24 to 34, and the books cited in Pryn. on 4 Inst. 52.—[Note 30.]——See Hale incep. de juribus Coronæ, MSS.

(1) See further as to the adjourning of causes into the exchequer chamber in order to have the opinion of all the judges, 4 Inst. 110. 118, and *Warraine* and *Smith*, 2 Bulstr. 146, in which case the court refused to grant a motion for such adjournment.

but also where judgments are delayed in the chancery, king's bench, common bench, and the exchequer, the justices assigned, and other justices of oyer and terminer, some time by difficulty, sometime by divers opinions of justices, and sometime for other causes. [a] Before which statute, if judgements were not given by reason of difficulty, the doubt was decided at the next parliament, (which then was to be holden once every yeare at the least) (2). [b] *Si autem talia nunquam prius evenerint, et obscurum et difficile sit eorum judicium, tunc ponatur judicium in respectum usque ad magnam curiam, ut ibi per concilium curiæ terminentur.* But hereof thus much shall suffice. [c] He that demurreth in law confesseth all such matters of fact as are well and sufficiently pleaded. If there be a demurrer for part and an issue for part, the more orderly course is to give judgement upon the demurrer first; but yet it is in the discretion of the court to try the issue first, if they will. After demurrer joyned in any court of record, the judges shall give judgment according as the very right of the cause and matter in law shall appeare, without regarding any want of forme in any writ, returne, plaint, declaration, or other pleading, proces, or course of proceeding, except those onely which the party demurring shall specially and particularly set downe and expresse in his demurrer (3). [a] Now what is substance and what is forme you shall read in my Reports.

[a] 4 E. 3. ca. 14.

[b] Bracton, lib. 1. cap. 2. nu. 7. Brit. fol. 41. 1 E. 3. 7. 8. 2 E. 3. 6. 7.

[c] 17 E. 3. 50. b. 47 E. 3. 13, 14. 5 H. 7. 1. 13 E. 4. 7. b. Pl. Com. 85. 411. 172. (5 Co. 69. b. 1 Sid. 10. Post. 125. Hob. 232, 233. Doc. Pla. 115, 116.) 48 E. 3. 15. 2 R. 2. Inquest, 2.

38 E. 3. 25. 11 H. 4. 5. 75. 3 E. 4. 2. [a] 3 Co. 57. Linc. Coll. case. 5 Co. 74. Wymek's case. 10 Co. 88. usque 98. Doctor Leyfield's case. (1 Leon. 178. Doc. Pla. 116, 117.)

And in some cases a man shall alledge special matter, and conclude with a demurrer; [b] as in an action of trespasse brought by *I. S.* for the taking of his horse, the defendant pleads that he himselfe was possessed of the horse until he was by one *I. S.* dispossessed, who gave him to the plaintife, &c. the plaintife saith that *I. S.* named in the barre and *I. S.* the plaintife were all one person, and not divers; and to the plea pleaded by the defendant in the manner, he demurred in law, and the court did hold the plea and demurrer good, for without the matter alledged he could not demurre. Now as there may be a demurrer upon counts and pleas, so there may be of aid prier, voucher, receit, waging of law, and the like. [c] By that which hath been said it appeareth, that there is a generall demurrer, that is, shewing no cause, and a speciall demurrer, which sheweth the cause of his demurrer. Also by that which hath beene said, there is a demurrer upon pleading, &c. and there is also a demurrer upon evidence. [d] As if the plaintife in evidence shew any matter of record, or deeds or writings, or any sentence in the ecclesiasticall court, or other matter of evidence, by testimony of witnesses, or otherwise, whereupon doubt in law ariseth, and the defendant offer to demurre in law thereupon, the plaintife cannot refuse to joine in demurrer, no more than in a demurrer upon a count, replication, &c. and so *è converso* may the plaintife demurrer in law upon the evidence of the defendant.

[b] 13 E. 4. 7. 31 E. 3. Estoppel. 244. 33 H. 6. 9. 10. 22 E. 4. 50. 1 H. 7. 21.

[c] 14 H. 4. 31. 37 H. 6. 6.

[d] 5 Co. 104. a. Baker's case.

But if [e] evidence for the king in an information or any other suit be given, and the defendant offer to demurre in law upon the evidence,

[e] 38 H. 8. Dyer, 53. (Cro. Eliz. 752.)

(2) See 4 Inst. 9. Com. Dig. *Parliament*, C. and 2 Inst. 408.
(3) See 27 Eliz. c. 5. 4 An. c. 16. and Plow. 85.

evidence, the king's counsell shall not be inforced to joyne in demurrer; but in that case, the court may direct the jury to finde the speciall matter.

"In judgment." For the signification of this word, *Vide* Sect. 366.

Sect. 97.

AND after such a voyage royall into Scotland, it is commonly said, that by authority of parliament the escuage shall be assessed and put in certaine; scil. *a certaine summe of money, how much every one, which holdeth by a whole knight's fee, who was neither by himselfe, nor by any other, with the king, shall pay to his lord of whom he holds his land by escuage. As put the case, that it was ordained by the authoritie of the parliament, that every one, which holdeth by a whole knight's fee, who was not with the king, shall pay to his lord fortie shillings; then he which holdeth by the moietie of a knight's fee, shall pay to his lord but twentie shillings; and he which holdeth by the fourth part of a knight's fee, shall pay but* x *s. and he which hath more, more, and which lesse, lesse* (5).

"AFTER a voyage royall, &c. it is commonly said, that by authority of parliament the escuage shall be assessed." *Nota,* here is a secret of law included, that albeit escuage incertaine be due by tenure, yet because the assessment thereof concerned so many and so great a number of the subjects of the realme, it could not be assessed by the king or any other but by parliament: [*a*] ☞ and this was by the common law (1). [72. b.]

[*a*] 13 H. 4. 5.

[*b*] No escuage was assessed by parliament since the reigne of *Edward* the second, and in the eighth yeare of his reigne escuage was assessed (2).

[*b*] 8 H. 3. Rot. Claus. & Rot. finium, memb. 30 & ante.

If the tenant goeth with the king, and dyeth *in exercitu*, in the host or armie, he is excused by law, and no escuage shall be demanded.

Staff. P. 14 E. 1. de banco.

And

* *This is note 5 of 72. b. in the 13th and 14th editions.*

---

(5) * *It seems, that if A. held land of the king by 4 knights fees, and A. before the statute of* quia emptores *had created divers mesnalties and reserved* 20 *knights fees, and A. had done the king's service, he should have had the escuage of* 20 *fees. But if A. did not do the king's service, the king should have had the escuage of* 4 *fees, and also of* 20 *fees, or at least of* 16. Vid. Rot. Parl. 8. m. 4. dorso, et lib. Parl. 14 E. 2, petitiones magnatum inde. Claus. 16 H. 3. m. 17. Rex vicecomiti Cornubiæ præcepit, quòd nullum distringat nisi pro tot feodis, quod regi tenetur reddere. Hal. MSS.—[Note 34.]

(1) The Magna Charta of king John provides, that escuage shall not be imposed except by the consent of parliament; but some respectable writers think, that it was an arbitrary payment before. Blackst. Comment. 5th ed. v. 2. p. 74. Wright's Ten. 128. 133.—[Note 31.]

(2) See ante 69. b. note 3.

And it is to be observed, that if he, that holds of the king by escuage, goeth, or findeth another to goe for him with the king, &c. then he shall have escuage of his tenants that hold of him by such service (3), which must be assessed by parliament. F. N. B. 84. Bract. lib. 2. 36. a.

But if the king's tenant goeth not with the king, then he shall pay for his default escuage, and shall have no escuage of his tenants (4). *Richard* the second making a voyage royall into *Scotland*, at the petition of his commons pardoned the payment of escuage. F. N. B. 84. Rot. Parl. 9 R. 2. nu. 40.

Sect. 98.

AND some hold by the custome (6), *that if escuage be assessed by authoritie of parliament at any summe of money, that they shall pay but the moitie of that summe, and some but the fourth part of that summe. But because the escuage that they should pay is uncertaine, for that it is not certaine how the parliament will assesse the escuage they hold by knights service. But otherwise it is of escuage certain, of which shall be spoken in the tenure of socage.*

"*SOME hold by the custome, &c.*" *Nota*, that escuage is directed by the custome. Vide Sect. 120. 15 E. 2. tit. Avow. 215. 29 Ass. 65. 30 E. 3. 23. b. 4 Co. 88. in Luttrel's case.

"*But otherwise it is of escuage certain.*" Here it appeareth, that escuage is two-fold, viz. escuage incertaine, whereof *Littleton* here speaks; and escuage certain. *Quemadmodum incertitudo scutagii facit servitium militare, ita certitudo* ☞ *scutagii facit socagium.* But more of this in the Chapter of Socage, Sect. 120. [73. a.]

"*By Parliament.*" Of the antiquitie and authoritie of this court, see Sect. 164.

Sect.

---

(3) Vid. Claus. 26 H. 3. part 2. m. 10. dors. Rex vicecomiti. Præcipimus, quòd de omnibus feodis militum quæ tenentur de tenentibus de nobis in capite, qui brevia nostra non tulerint de habendo scutagio suo, et similiter de feodis militum quæ tenentur de wardis in manu nostrâ, scutagium nostrum colligi facias, ita quòd habeas ad satisfaciendum, &c. Hal. MSS.—[Note 32.]

(4) According to Mr. Madox's account it seems, that the lord, though he did not go in person, or send a deputy, was entitled to escuage from his tenants, if he paid or was duly charged with essuage to the king; and perhaps lord Coke did not mean to intimate the contrary. Mad. Hist. Exchcq. fol. ed. 469. See however note 5, *ante*.—[Note 33.]

(6) The words in L. and M. and Roh. are *and some tenants hold, &c.* and the words *by the custome* are omitted.

Sect. 99.

AND if one speake generally of escuage, it shall be intended by the common speech of escuage incertaine, which is knights service. And such escuage draweth to it homage, and homage draweth to it fealtie; for fealtie is incident to every manner of service, unlesse it be to the tenure in frankalmoigne, as shall be said afterward in the tenure of frankalmoigne (1). *And so he, which holdeth by escuage, holds by homage, fealty, and escuage* (2).

(2 Inst. 485. 6 Co. 20. Post. 78. b. 189. a. 381. b. 1 Sid. 265. 11 Co. 39. a.) Entendments en Ley. Sect. 100. 110. 367. 377. 393. 406. 462, 463. 5 E. 2. Resceit, 165. 20 H. 6. 23. 21 H. 6. 8. 37 H. 6. 29. 13 H. 4. 4. 6 El. Dyer, 236. 10 E. 4. 11. 32 E. 3. Gard. 31. Brit. fol. 163.

AND if one speake generally of escuagi, it shall be intended by the common speech of escuage incertaine."

Verba æquivoca et in dubio posito intelliguntur in digniori ei potentiori sensu. Tenure *in capite ex vi termini* is a tenure in grosse, and it may be holden of a subject; but being spoken generally, it is *secundum excellentiam* intended of the king, for he is *caput reipublicæ.*

40 E. 3. 21. 8 H. 7. 4.

" And such escuage draweth to it homage, and homage draweth to it fealtie; for fealtie is incident to every manner of service, unless it be to the tenure in frankalmoigne." This is gathered by the effects of their tenure, for essences are found out by properties, fountains by rivers, and causes by effects: for amongst others, the lords shall have escuage of their tenants, &c. as it followeth.

Sect.

---

(1) See acc. Mad. Baron Angl. 166.

(2) From this and the next preceding Section it seems, that notwithstanding Littleton's expressing himself in other places as if *escuage* was a distinct tenure or service, he did not consider it as such. Escuage must be either *certain* or *uncertain*, and Littleton expressly writes, that being the *former* it is *socage*, and being the *latter* it is *knights service*. This tends to confirm the propriety of the observation by Mr. Madox, who will not allow escuage to be a tenure or service of itself, and insists, that, wherever it was payable, like homage and fealty, it was a mere *incident* to tenure. See note 2, of fol. 64. a. However, a late learned judge was not satisfied with considering *escuage* in this limited way, and endeavours to show, that though in general escuage uncertain was a fine or sum of money payable as a commutation for personal service; yet anciently a payment in money, bearing a certain proportion to the escuage assessed from time to time on tenants by knights service, and on that account called escuage, was sometimes a service originally reserved, and then escuage was itself the tenure, and so denominated to distinguish it from the genuine and proper tenure by knights service. See Wright's Ten. 121, to 127. But this distinction, it is allowed, is not hinted at by Littleton: and it is even conjectured, that in his time it might be lost in the *general* notion of escuage, to which only Mr. Madox meant to apply his animadversion on Littleton and Coke for considering it as a tenure. See further 2 Blackst. Comm. 5th ed. 75. —[Note 35.]

Sect. 100.

AND it is to be understood, that when escuage is so assessed by authoritie of parliament, everie lord, of whom the land is holden by escuage, shall have the escuage so assessed by parliament; because [78. b.] *it is intended by the law, that at the beginning such tenements were given by the lords to the tenants to hold by such services, to defend their lords as well as the king, and to put in quiet their lords and the king from the Scots aforesaid.*

Sect. 101.

AND because such tenements came first from the lords, it is reason that they should have the escuage of their tenants. And the lords in such case may distriene for the escuage so assessed, or they in some cases may have the king's writs (briefe le roy) *directed to the sheriffs of the same counties, &c. to levy such escuage for them, as it appeareth by the Register. But of such tenants as hold of the king by escuage, which were not with the king in Scotland, the king himselfe shal have the escuage.*

F. N. B. 84. Register, 88. de Scutagio habendo.

"*THE lords shall have the escuage, &c.*" This is evident.

"*The king's writs* (briefe le roy)." This cometh of the *Latine* word *Breve.*

Fitzh. in his preface to his *N. B.* saith of them, that they be those foundations, whereupon the whole law doth depend.

[a] Bracton, lib. 5. fol. 413. Fleta, lib. 2. cap. 12. Britton, fol. 122. 227. (1 Sid. 187.) (7 Co. 4. a. 4 Inst. 10.)

[*a*] *Bracton* describeth a writ thus: *Breve quidem, cùm sit formatum, ad similitudinem regulæ juris; quia breviter et paucis verbis intentionem proferentis exponit, et explanat, sicut regula juris rem quæ est, breviter enarrat. Non tamen ita breve esse debeat quin rationem et vim intentionis contineat.*

Of writs some be original, *brevia originalia*, and some be judiciall, *brevia judicialia.*

Also of originals, *quædam sunt formata sub suis casibus et de cursu, et de communi consilio totius regni concessa et approbata quæ quidem nullatenus mutari poterint absque consensu et voluntate eorum; et quædam sunt magistralia, et sæpe variantur secundum varietatem casuum, factorum et quærelarum;* as for example, actions upon the case, which varie according to the varietie of everie man's case, and the like; and these being not of course, the masters being learned men did make: *Item brevium originalium, alia sunt realia, alia personalia, alia mixta: Item brevium originalium, alia sunt patentia sive aperta, et alia clausa.* Certaine it is, that the originall writs are so artificially and briefely compiled, as there is nothing redundant or wanting in them, of which an honourable secretary of state once said, that it was not possible to comprehend so much matter so perspicuously in fewer words. Of all these kinds of writs you shall read plentifully in the *Register*, whereof *Littleton* maketh mention in this place, and also in *Fitzh. N. B.*

"*As*

(Plowd. 228. a. 4 Inst. 79.) Bracton, ubi supra. Britton, ubi supra. Regist. 88. F. N. B. 84.

"*As it appeareth by the Register.*" *Register* is the name of a most anciente booke, and of great authority in law, containing all the originall writs of the common law; of which booke see more in the preface to the ninth part of my Reports, and containeth also *brevia judicialia, quæ sæpiùs variantur secundum varietatem placitorum proponentis et respondentis* (1).

Also it appeareth by the *Register*, that the king shall have escuage of his tenants, which hold of him as of a mannor which he hath in ward (2), or by reason of a vacation of a bishopricke.

F. N. B. 84.

And so shall a common person, if he hath an estate for life or for yeares of a seigniory.

☞ Sect. 102. [74. a.]

ITEM, in such case aforesaid, where the king maketh a voyage royall into Scotland (1)†, *and the escuage is assessed by parliament, if the lord distraine his tenant, that holdeth of him by service of a whole knight's fee, for the escuage so assessed, &c. and the tenant pleadeth, and will aver, that he was with the king in* Scotland, *&c. by* 40 *dayes, and the lord will averre the contrary, it is sayd, that it shall be tryed by the certificat of the marshall of the king's host* (2)‡ *in writing under his seale* (3)‖, *which shall be sent to the justiciary.*

"*AND*

---

(1) See further as to the Register of Writs, Nichols. Engl. Histor. Libr. 2d ed. 205.

(2) See ante 72. b. note 3.

(1) † It is very clear, that escuage was due for service *out of the realm*, which was the reason of its being called *servitium forinsecum;* but I do not find it precisely ascertained by any writer, whether it could be claimed on *all foreign* expeditions, or whether it was confined to expeditions into *particular* countries. When indeed on the creation of the tenure the personal service, in lieu of which escuage became payable, was *expressly* limited to *certain* places, there could be no room for doubt; but the difficulty is to know, what the construction of the law was when knight's service was reserved *generally*. Littleton mentions only Scotland, other writers add Wales; but in generall *both* are named merely as instances. Lord Coke observes as much, and says, that escuage was also due on expeditions into Ireland, Gascony, Poictou, &c. *if the tenure was to go into those countries:* but there is a shortness in this manner of expression, which leaves an obscurity; for the words do not explain what the rule of law was, when no place was named. See ante fol. 69. a. One ancient author *absolutely* restrains escuage te Scotland and Wales, and in direct terms excludes *all other* territories. Old Ten. tit. *Escuage.* But of this restriction it is sufficient to say, that the records concerning escuage, which mention Ireland, Normandy, Poictou, Bretagne, and Toulouse, as well as Scotland and Wales, are full evidence to the contrary. See the records cited by lord Hale in note 8, of fol. 69. b. and also Seld. Notes on Hengham, 12 mo. ed. 114.—[Note 86.]

(2) ‡ In L. and M. the words are *constable of the king's host.*

(3) ‖ In L. and M. there is an *&c.* after *seale,* and the words *which shall be sent to the justices* are omitted.

"AND will aver, that he was with the king in Scotland by 40 dayes, &c. [a] it is sayd, that it shall be tryed by the certificat of the marshall." This is a tryall appointed by the law, ne curia regis deficeret in justitiâ exhibendâ. [b] Herewith agreeth the *Register*, where the marshall is called *constabularius exercitûs nostri*. (6 Co. 21.) [a] 2 E. 4. 11. 4 E. 4. 10. 21 E. 4. 10. F. N. B. 85. 11 H. 7. 5. 9 Co. 32. Case de Strat. Marc.

[b] Regist. 88. F. N. B. 84. 2 E. 4. 1. 4 E. 4. 10. 9 H. 4. 3. 11 H. 7. 5. 21 H. 6. 50. 33 H. 6. 1. 45.

"*The marshall of the king's host.*" *Mareschallus exercitûs*, in *Saxon Marischalk*, *i. e. equitum magister*. This word *Marshall* is either derived of *Mars*, or of *marc* an horse, and *schalc*, which signifieth in the *Saxon* tongue, a master or governor. [c] In the lawes before the Conquest it is said, *Mareschalli exercitûs seu ductores exercitûs Heretoches per Anglos vocabantur. Illi ordinabant acies densissimas in præliis et alas constituebant, prout decuit, et prout ei meliùs visum fuerit ad honorem coronæ et ad utilitatem regni.* [d] And here it is to be observed, that his certificate in this case is a triall in law. I read of sixe kinds of certificates allowed for trials by the common law; the first whereof *Littleton* here speaketh of, in time of warre out of the realme. 2. In time of peace out of the realme. [e] As if it be alledged in avoydance of an outlawrie, that the defendant was in prison at *Burdeaux* in the service of the maior of *Burdeaux*, it shall be tryed by the certificate of the maior of *Burdeaux*. 3. For matters within the realme, [f] the custome of *London* shall be certified by the maior and aldermen by the mouth of the recorder. 4. By certificate of the sherife upon a writ to him directed [g] in case of privilege, if one be a citizen or a forreiner. 5. Triall of records by certificate of the judges in whose custody they are by law. All these be in temporall causes. 6. In causes ecclesiasticall, as loyalty of marriage, general bastardie, excommengement, profession; these and the like are regularly to be tried by the certificate of the ordinarie (4).

[c] Lamb. fol. 136.

[d] 2 E. 4. 1. b. 4 E. 4. 10. 23 E. 4. 47. F. N. B. 85. (2 Inst. 428.

[e] 4 E. 4. 10. Post. 261. a.)

[f] 5 E. 4. 30. 21 E. 4. 16. (2 Ro. Ab. 579.)

[g] 10 H. 6. 10. (Fortes. cap. 32.) (12 Co. 67.)

And there be divers other trialls allowed by the common law, than by a jury of 12 men, which you may reade at large in the ninth booke of my Reports, fol. 30, 31, &c. in the case of the abbot of *Strata Marcella*, which are as plainly set down there, as they can be here. And in this case, if the triall should not be by certificate, it should want triall, which should be inconvenient. Onely in this place I will adde something of a foreine triall which I finde not in any of the treatises lately published against single combats; because it may deterre men from that ungodly and unlawful kinde of revenge, whereupon many murders have ensued, and prevent all hope of impunity for default of triall in that case.

(4 Inst. 124.)

If a subject of the king be killed by another of his subjects out of *England* in any forreine country, the wife or he that is heire of the dead may have an appeale for this murder or homicide before the constable and the marshall, whose sentence is upon testimony of

Stat. de 1 H. 4. cap. 14. 13 H. 4. fol. 5. Vid. Rot. Parliam. 8 H. 6. nu. 38. Staunf. Pl. Cor. fo. 65.

---

(4) See further as to trial by certificate, Com. Dig. tit. *Certificate*; and title *Trial*, in Viner and the other Abridgments.

of witnesses or combate. And accordingly, where a subject of the king was slaine in ☞ *Scotland* by others of the king's subjects, the wife of the dead had her appeale therefore before the constable and the marshall. And so it was [*] resolved in the raigne of queen *Elizabeth* in the case of sir *Francis Drake*, who strook off the head of *Dowtie in partibus transmarinis*, that his brother and heire might have an appeale. *Sed regina noluit constituere constabularium Angliæ, &c. et ideo dormivit appellum.* [74. b.]

[*] Anno 25 Eliz. (Post. 261. Hut. 3.) 2 Hawk. P. C. 12. c. 4. s. 9.

If a man be mortally wounded in *France*, and dieth thereof in *England*, it is said that an appeale doth lie upon the said statute; for it is not punishable by the common law, and the proceeding there (as hath beene said) is upon witnesses or combate, and not by jurie, and the mortal wound was given out of the realme (1).

---

(1) The office of high constable became extinct in the reign of Henry the eighth by the attainder of Stafford duke of Buckingham, in whom it was hereditary; and since his death there hath not been any permanent high constable, the practice having uniformly been to keep the office vacant except on particular occasions. In consequence of this it hath frequently been a subject of great controversy whether during the vacancy of the office of high constable, the jurisdiction incident to the court of chivalry can be exercised by the earl marshal only. Lord Coke's manner of stating sir Francis Drake's case imports, that an appeal could not be prosecuted against him for want of a high constable; and Dr. Duck, in his excellent treatise on the use and authority of the civil law, says, that the judges being consulted by Elizabeth were of that opinion. Duck, lib. 2. cap. 8. pars 3. s. 16. In the reign of Charles the first the lord keeper and judges of the king's bench were advised with on a like occasion, and held that the earl marshal could not take an appeal without a high constable; and accordingly the king appointed the earl of Lindsey twice to the office; once to try an appeal by lord Rea against Mr. Ramsey for treason committed in Germany; and a second time to try an appeal by the widow of William Wise against William Holmes for the murder of her husband in the island of *Terra Nova* in America. See Rushw. vol. 2. p. 106. 112, and Duck, ubi supra. Hitherto only the right of the earl marshal to *criminal* judicature had been denied; but in 1640 the house of commons went farther, for they resolved that the *earl marshal can make no court without the constable.* See Rushw. vol. 3. p. 1056. However, notwithstanding this declaration of the law by the house of commons, the court of king's bench soon after the Restoration distinguished between the several branches of jurisdiction belonging to the court of chivalry, and held, that as to matters relative to *arms* and *honour* the court may be before the earl marshal only, but that as to matters of ordinary justice touching *life* and *limb* there must be a high constable as well as an earl marshal. 1 Lev. 230. But in a subsequent case before the house of lords, the counsel arguing against the earl marshal insisted *generally*, that by himself he could not hold *any* court; though it doth not appear from the printed report whether the judgment, which was there given against the jurisdiction of the earl marshal, was founded on that proposition, or on the other points of the cause. Such is the state of the authorities against the judicature of the earl marshal without a high constable. See Dr. Oldis's case, Show. Parliam. Cas. 58. On the other hand, many strong arguments, drawn from the practice immediately after the attainder of the last hereditary high constable down to the latter end of the reign of James the first, as well as from the opinions of judges and others of high name, have been urged in its favour. These are well

well digested in a letter written soon after the Revolution by Dr. Plott, to lord Somers whilst he was attorney general, and appear to have been collected by his desire. See Hearn. Disc. of Emin. Antiq. 2d edit. vol. 2. p. 250. One authority much relied on by Dr. Plott is an opinion of the lord keeper, the master of the rolls, and a great number of the privy council in the 20th of James the first, who after a solemn hearing declared, that the earl marshal had all the powers of judicature without the high constable during the vacancy of that office. Upon report of this to the king, he issued his commission under the great seal to Thomas earl of Arundel the then earl marshal, which, after reciting that the earl marshal had delayed to proceed in some causes before him on account of doubts of his authority, contains the following strong declaration of his judicial power. *We held it fit*, says the king, *in a case of so great weight, to proceed with extraordinary deliberation, and having now both by ourself and the whole body of our council received ample satisfaction by many and clear proofs, that the constable and marshal were joint judges together, and several in the vacancy of either, we do hereby authorize, will, and command you our earl marshal, that from henceforth you proceed in all causes whatsoever, whereof the court of constable ought properly to take cognizance, as judicially and definitively as any constable or marshall of this realm, either jointly or severally, heretofore have done.* A more explicit recognition of the earl marshal's jurisdiction could not be penned, nor one more full and unreserved: for it declares his judicial power to extend to *all cases whatsoever of which the court of the constable and marshal ought properly to take cognizance*, without one exception. How it happened, that so soon after this solemn hearing and declaration concerning the earl marshal, the lord keeper and judges of the king's bench should advise the king that lord Rea's appeal could not be taken without a high constable, seems very extraordinary and unaccountable. To attribute their advice to that jealousy of jurisdictions conforming so much to the civil law, which our judges of the courts of common law sometimes may have indulged to an illiberal excess, would be unjust; because we are not now possessed of the reasons assigned for the opinion thus given to the crown; and on the other hand, the same want of information greatly lessens its weight and authority. Having thus exhibited a view of the controversy about the earl marshal's judicial powers, it may be proper to apprise the reader, that there is not the least intention of advancing any opinion in respect to it, further than by observing upon the distinction between the cases of *honour* and *arms*, and those of *life* and *limb*, so far as it is founded on the 1 Hen. 4. c. 14. Though that statute provides, that *all appeals to be made of things done out of the realm shall be tried and determined before the constable and marshal*, yet it is apparent from the other parts of the same statute, that it was made, not to declare or regulate by *whom* the judicature of the court of chivalry should be exercised, but *when* appeals should be brought *there* and *when* in the *courts of common law*, and further to put an end to the bringing appeals in parliament; and therefore it seems wholly unwarrantable to lay any stress on the statute's incidentally mentioning constable as well as marshal, who as all agree are *joint judges*, when both offices are full. As to the mode of trial in the case of appeals in the court of chivalry, some have apprehended, that it is ever by duel, if the party appealed elects that mode, and the appellant is not priviledged from the duel by age, sex or profession. But this, though it *may be* very true in respect to appeals in the courts of common law, is a mistaken notion as to appeals in the court military; for *there* duel is only the *ultimate* trial; and never resorted to unless there is a want of sufficient testimony to prove the offence, and even then it is said to be in the discretion of the court to grant or refuse the duel. See Rushw. v. 2. p. 113. In lord Rea's appeal against Ramsay in the 7 Cha. 1. being the last in which the *duel* was directed, the day of combat was prorogued; and in the meantime the king signifying his desire of not having the affair

affair decided by duel, the court met and committed both the appellant and appellee till they should give security to the satisfaction of the king not to attempt anything against each other, and immediately afterwards was dissolved by a revocation of the commission which had been granted for trial of the appeal. Rushw. v. 2. p. 127.—Before we leave this subject, it may not be amiss to hint the necessity of having the *criminal* jurisdiction of the court of chivalry, which is really of importance, duly regulated and reformed. From the preceeding account it appears to be doubtful who can lawfully act as the judges; and besides, the want of a trial by jury may be deemed a reasonable objection to the form of proceeding; and in consequence of these two circumstances the *criminal* jurisdiction of the court of chivalry hath long been in a dormant state, and is likely to continue in it, unless the legislature applies a remedy*. This it would be easy to effect; for nothing more would be necessary, than to ascertain who should constitute the court in cases of appeals, to abolish the present mode of trial, and to substitute in its room the trial by jury on a plan like that, which has already been adopted by statute in respect to the *criminal* jurisdiction of the admiralty court. However, it must not be taken for granted, that this court is the *only* jurisdiction for the trial of crimes committed in *foreign* countries, or that without resorting to it, there would be an absolute defect of justice in the case of *all* such crimes. For, 1, the 33 of Hen. 8. c. 23, provides, that treason, misprision of treason, and murder, in whatever place committed, whether *within the king's dominion or without*, shall be triable before commissioners of *oyer and terminer* to be appointed for that purpose; and this statute, we are told, stands unrepealed as to murder, and hath accordingly been sometimes put into use. 2. As to treasons and misprisions of treason committed out of the realm, they by the 35 H. 8. c. 2, are triable either before the king's bench or commissioners. See 1 Hal. Hist. Pl. C. 283. It is also provided by the 26 of H. 8. c. 13, that the crimes made treason under that statute, or being so before, if committed *out of the realm*, shall be indictable before commissioners and tried in the king's bench; but it is doubtful whether this statute is now in force. See further as to the high constable and earl marshal, post. 106. a. and 391. b.—Note as to *escuage*, it is *expressly* taken away by the 12 Cha. 2. c. 24, and had fallen into disuse long before; for there is no instance of parliament's assessing it since the reign of Ed. 2. See ante 72. b.—[Note 37.]

---

*Appeals of murder, treason and felony, or other offences, are now abolished. 59 G. 3. c. 46.

Chap. 4. Of Knights Service. Sect. 103.

TENURE by homage fealty and escuage is to hold by knights service (per service de chivaler), *and it draweth to it ward* (gard) *mariage and reliefe. For when such tenant dyeth, and his heire male be within the age of* 21 *years, the lord shall have the land holden of him until the age of the heire of* 21 *yeares; the which is called full age, because such heire, by intendment of the law, is not able to doe such knights service before his age of* 21 *yeares. And also if such heire be not maried at the time of the death of his ancestor, then the lord shall have the wardship and mariage of him. But if such tenant dieth, his heire female being of the age of* 14 *yeares or more, then the lord shall not have the wardship of the land, nor of the bodie; because that a woman of such age may have a husband able to doe knights service. But if such heire female be within the age of* 14 *yeares, and unmaried at the time of the death of her ancestor, the lord shall have the wardship of the land holden of him until the age of such heire female of* 16 *yeares; for it is given by the statute of* W. 1. *cap.* 22, *that by the space of two years next ensuing the sayd* 14 *yeares, the lord may tender convenable mariage without disparagement to such heir female. And if the lord within the said two yeares do not tender such mariage, &c. then she at the end of the said* 2 *yeares may enter, and put out her lord. But if such heire female be married within the age* 14 *yeares in the life of her ancester, and her ancester dieth, she being within the age of* 14 *yeares, the lord shall have only the wardship of the land untill the end of the* 14 *yeares of age of such heire female, and then her husband and she may enter into the land, and oust the lord. For this is out of the case of the said statute, insomuch as the lord cannot tender mariage to her which is maried, &c. For before the said statute of* W. 1. *such issue female, which was within the age of* 14 *yeares at the time of the death of her ancestor, and after she had accomplished the age of* 14 *yeares, without any tender of mariage by the lord unto her, such heire female might have entered into the land and ousted the lord, as appeareth by the rehearsall and words of the said statute; so as the said statute was made (as it seemeth) in such case altogether for the advantage of lords. But yet this is alwayes intended by the words of the same statute, that the lord shall not have these two yeares after the* 14 *yeares, as is aforesaid, but where such heire female is within the age of* 14 *yeares, and unmarried at the time of the death of her ancestor* (1).

KNIGHTS

* *This is note* 1 *of* 75. *b. in the* 13*th and* 14*th editions.*

(1) * In L. and M. and the Pap. MS. there is the following addition: *Item, If a man holds a manor of another by knights service, and he holds another manor of another man by the same service, but holds one manor by priority, &c. and the other manor by posteriority, and has issue a daughter, and dies, and the manors descend to the daughter then being within the age of* 14 *years, and the lord of whom one of the manors is held by priority, seizes the wardship of the body of the heir and of the manor held of him, and the other lord seizes the wardship of the other manor held of him, in this case, when the daughter comes to the age of*

(6 Co. 73. b.)

"KNIGHTS *service* (service de chivaler)." *Nota*, it appeareth by [*a*] the *Register*, that it is [*b*] said *unum feodum militis*, and not *feodum unius militis*, as it was said [*c*] by some of old; and so *duo feoda militis*, &c. and sometime these fees are called *feoda militaria* [*d*]. Our author, having before treated of homage, fealty and escuage, now commeth to knight service itselfe. In *Domesday* it is thus recorded: *Episcopus Baiocensis, ille qui tenet de Modardo, reddit ei* 50 *s. et servitium unius militis.*

[*a*] Glanvil. lib. 7. cap. 10.
[*b*] Regist. 2. 30 E. 3. 24.
[*c*] Glanvil. lib. 7. cap. 14.
[*d*] Glanvil. lib. 7. cap. 9. &c. Fleta, lib. 1. cap. 8.

Bracton, lib. 2, fol. 85. Britton, fol. 162, & fol. 28, & 95. Ockam in diversis locis. Mirror, cap. 1, sect. 3. Sud. Ditton.

"*Knight* (chivaler)," *i. e. eques*, is a *Saxon* word, and by them written *cnite*. *Chivaler* taketh his name from the horse; because they alwayes served in warres on horseback. The *Latines* called them *equites*, the *Spaniards cavalleroes*, the *Frenchmen chivaliers*, the *Italians cavallieri*, and the *Germanes reiters*, all from the horse. It is necessary to be seene by what names this service of a knight is called. It is called [*e*] *Servitium forinsecum, quia pertinet ad dominum regem et non ad capitalem dominum, nisi cùm in propriâ personâ profectus fuerit in servitio, et nisi cùm pro servitio suo satisfecerit domino regi, &c. Ideo forinsecum dici potest, quia fit et capitur foris, sive extra servitium quod fit* ☞ *domino capitali.* And it is called *scutagium*, as it appeareth [*f*] by *Littleton* and many authorities before recited; sometime *droit de espée.* Also it is called [*g*] *regale servitium, quia speciuliter pertinet ad dominum regem. Ut si dicatur in cartâ, faciendo inde forinsecum servitium vel regale servitium, vel servitium domini regis, quod idem est, &c.* And another saith: *Et sunt quædam servitia forinseca, quæ dici poterunt regalia, quæ ad scutum præstantur; et inde habemus scutagium, et ratione scuti pro feodo militari reputantur, &c.* So as in respect of him that doth it, it is called *servitium militis;* but in respect of him for and to whom it is done, viz. to the king, and for the realme, it is called *servitium regale* or *servitium domini regis, &c.* [*h*] In ancient time they which held by knights service were called *militis, qui per loricas, &c. defendunt et deserviunt, &c.* and sometime this service is called *servitium hauberticum.* And in ancient time, such as held by knights service for the defence of the realme had many privileges granted to them by law; as for example, they might have a writ *de essend' quiet' de tallagio*, the effect whereof was [*i*], *Si Tho. filius Ranulphi terram suam teneat per servitium militare, sicut domino regi monstravit, tunc nullum ab eodem Tho. capient tallagium nec pro eo dando*

[*e*] Bract. lib. 2. fo. 36, 37. Britton, fol. 164, 165. Fleta, lib. 3. cap. 14. 19 E. 2. Avowry, 224. 26 Ass. 65. 31 Ass. 30. 30 E. 3. 23. 8 E. 3. 67. 7 H. 4. 19. (Ante, 68. b.)
[*f*] Bracton, ubi supra. Fleta, lib. 3. cap. 14.
[*g*] Britton, fol. 187. Bracton, ubi supra.
[*h*] Carta Hen. prim. Mat. Paris. Mirror, cap. 2. sect. 17.
[*i*] Rot. Claus. 19 H. 3. m. 22.

[75. a.]

---

of 14 *years, she shall enter on the manor held by posteriority, although she be then unmarried. For the words of the same stat. of Westm.* 1. *are in the form which followeth.—And of heirs females after they have accomplished the age of* 14 *years, and the lord (to whom the marriage belongeth) will not marry them, but for covetize of the land will keep them unmarried: it is provided that the lord shall not have nor keep by reason of marriage, the lands of such heirs females more than two years after the term of the said* 14 *years, &c. by which words it may be proved, that after the age of* 14 *years no one shall have the lands in such case, &c. except him to whom the marriage belongs, &c. such marriage does not belong to him of whom the land is held by posteriority, &c. such heir female, when she comes to the age of* 14 *years, may rightly enter on such land, which is so held by posteriority, &c.—See* 35 *H.* 6. 52.

dando ipsum distringant, vel homines suos qui per consimile servitium teneant. And this agreeth with the ancient charter of king *Henry* the first, before mentioned, which he made on the day of his coronation for the restitution of the ancient lawes. [k] *Militibus, qui per loricas terras suas defendunt et deserviunt, terras dominicarum, carucat' suarum quietas, ab omnibus gildis et omni opere, &c. concedo:* and the reason thereof is there yeelded: *Sicut tam magno gravamine allevati* ☞ *sint, ita equis et armis se bene instruant, ut apti et parati sint ad servitium meum, et defensionem regni mei.* But these priviledges and quittances are discontinued, and the charge remaineth.

[k] Carta H. 1. in Libro. Rub. fol. 41. in scaccario.

[75. b.]

It is called commonly in [l] our bookes, *servitium militare, &c.* or *servitium militis.* And this service was created and provided for the defence of the realme, to performe which service the heires are not accounted in law able till the age of one and twenty yeares. Therefore, during their minority, the lord shall have the custody of them, not for benefit onely, but that the lord might see, that they be in their young yeares taught the deeds of chivalry, and other vertuous and worthy sciences.

[l] Glanvil. lib. 7. ca. 9, 10. Fleta, lib. 1. ca. 8, & 9. & lib. 3. cap. 16, 17, &c. Bracton, lib. 2. cap. 16. Mirror, cap. 5. sect. 2. Britton, 162. (4 Inst. 192.)

[m] *Si hæreditas teneatur per servitium militare, tunc per leges infans ipse, et hæreditas ejus, &c. per dominum feodi illius custodientur, &c. Quis putas, infantem talem in artibus bellicis, quas facere ratione tenuræ suæ ipse astringitur domino feodi sui, melius instruere poterit, aut velit, quàm dominus ille, cui ab eo servitium tale debetur, et qui majoris potentiæ et honoris æstimatur, quàm sunt alii amici propinqui tenentis sui? Ipse namque ut sibi ab eodem tenente meliùs serviatur, diligentem curam adhibebit; et meliùs in hiis eum erudire expertus esse censetur quàm reliqui amici juvenis, &c. et reverâ non minimum erit regno accommodum, ut incolæ ejus in armis sint experti, nam audacter quilibet facit, quod se scire ipse non diffidit.*

[m] Fortescue, cap. 44.

[n] Amongst the laws of Saint *Edward* the Confessor, it is thus provided: *Debent enim universi liberi homines, &c. secundum feodum suum, et secundum tenementa sua arma habere, et illa semper prompta conservare ad tuitionem regni, et servitium dominorum suorum juxto præceptum domini regis explendum et peragendum.* And *William* the Conqueror confirmed that law in these words: *Statuimus et firmiter præcepimus, ut omnes comites et barones, et milites, et servientes, et universi liberi homines totius* ☞ *regni nostri prædicti habeant et teneant se semper in armis ei in equis ut decet, et oportet, et quòd sint semper prompti et parati ad servitium suum integrum nobis explendum et peragendum, cùm semper opus adfuerit, secundum quod nobis debent de feodis et tenementis suis de jure facere, &c.* Out of these two lawes the studious and learned reader will gather divers notable things. And therefore if after the lord hath the wardship of the body and the land, the lord doth release to the infant his right in the seigniorie, or the seigniorie descendeth to the infant, he shall be out of ward both for the body and the land; for he was in ward in respect he was not able to doe those services which he ought to doe to his lord, which now are extinct, and *cessante causâ cessat causatum.* And our author saith, that the tenure by knights service draweth unto it ward, marriage, &c. so as there must be a tenure continuing. As if the conusor in a statute merchant be in execution, and his land also, and the conusee release to him all debts, this shall discharge the execution; for the debt was the cause of the execution and of

[n] Lamb. fol. 135. a.

[76. a.]

See W.1. cap.48. the Second Part of the Institutes. (6 Co. 22. Post. 248.)

20 Ass. p. 7. (2 Ro. Abr. 404. Doc. Pla. 106.)

of the continuance of it till the debt be satisfied, therefore the discharge of the debt which is the cause, dischargeth the execution which is the effect.

"*And it draweth to it ward, mariage and reliefe.*" So as regularly there be sixe incidents to knights service, (viz.) two of honour and submission, as Homage and Fealtie; and foure of profit, viz. Escuage, whereof he hath treated before, Ward (*i. e.* wardship of the land), Mariage and Reliefe; of all which our author hath spoken. But there be other incidents to knights service besides these; [a] as *Aide pur faire fits chivalier, et aide pur file marier, &c.* which at the common law were uncertaine, and were called *rationabilia auxilia*, because if they were excessive and unreasonable in the judgment of the court where they were questioned, they ought not to be paide: but now as well in the king's case, as in the case of the subject, they are by acts of parliament reduced to certaintie, which are worthy your reading (1).

[a] Grand Cust. de Norm. cap. 35. Regist. orig. fo. 87. Glanvil. lib. 9. ca. 8. 35. Fleta, lib. 2. ca. 40. & lib. 3. ca. 14. Mirror, ca. 1. sect. 3. Britton, fo. 55. & 70. F. N. B. 82. B. W. 1. ca. 35. 25 E. 3. ca. 11. 11 H. 4. 34. 5 E. 3. 11. Vid. Sect. 110.

"*Ward* (or Gard)," in *Latine custodia.* And hereof the lord is called *gardian, custos*, and the *minor* is called a ward, or one in ward. [b] And albeit (as our author saith) knight service draweth with it ward, &c. yet by custome the heire of him that holdeth in socage, may be in ward.

[b] 8 H. 3. Præscript. 38. Pasch. 21 E. 1. Coram Rege, Rot. 43. Nota pro Hibernia Prior del St. Trinitie de Dublin's case.

"*Mariage,*" *Maritagium*, betokeneth, not onely the copulation of man and wife in mariage, but also (as in this place here) the interest of the gardian in bestowing of a ward in marriage, which the law gave to the lord; not for his benefit onely, but that he should match him vertuously and in a good family without disparagement, as shall be said hereafter, which is the principall foundation of his estate.

[c] Vid. Sect. 112.
[d] Bracton, lib. 2. ca. 36. fol. 84. Fleta, lib. 1. ca. 10. & lib. 3. ca. 16, 17. Britt. ca. 69, 70. Glanvil. lib. 9. ca. 4. and lib. 7. ca. 9. Ockam, de Differentiis Releviorum. (Ante 69. b. Post. 83. a.)
[*] Ockam, ubi supra. Bracton, lib. 2. fol. 85.

[c] "*Reliefe,*" *Relevium*, is derived from the *Latine* word *relevare*; for so [d] ancient authors say, and give this reason: *Quia hæreditas, quæ jacens fuit per antecessoris decessum, relevatur in manus hæredum, et propter factum relevationem faciendæ erit ab hærede quædam præstatio, quæ dicitur relevium.* And in *Domesday* it is called *relevamentum* and *relevatio.*

The reliefe of a whole knight's fee is five pound, and so according to that rate. And this reliefe was as some hold certaine by the common law; [*] but the reliefes of earles and barons were incertaine, and therefore were called *relevia rationabilia*; but the statute of *Magna Charta*, cap. 2, limits them in certaine, and mentioneth only a knight's fee. But I reade in the book of *Domesday, quòd Tainus vel miles regis dominicus moriens pro relevamento dimittebat regi omnia arma sua, et equum unum cum sellâ et alium sine sellâ; quòd si essent ei canes vel accipitres, præstabantur regi, ut si vellet acciperit.*

Since

(1) The aids *pur faire fitz chivalier et pur file marier* are *expressly* abolished by the 12 Cha. 2. c. 24.—They were incident to socage as well as knight's service. 2 Inst. 233. See further as to *aids*, Wright's Ten. 40. 145. and 2 Blackst. Comment. 63.—[Note 38.]

Since *Littleton* wrote [e] there is a good law made against fraudulent feoffments, gifts, grants, &c. contrived of fraud to hinder or defraud lords, &c. of their reliefes and heriots amongst other things, for the exposition of which statute reade the authorities quoted in the margent. And it is to be observed, that the words of the said act of 13 Eliz. are (*be it therefore declared, ordained and enacted*) and therefore like cases, and in semblable mischief shall be taken within the remedie of this act by reason of this word (*declared*), whereby it appeareth what the law was before the making of this statute (2).

[e] 13 Eliz. ca. 5. 17 E. 3. Reliefe, 3. 7 E. 3. Ib. 11. 3 Co. 80. &c. Twine's case. 5 Co. 60. Gooche's case. 6 Co. 18. Pakeman's case. 10 Co. 56 b. See also the statutes of

3 H. 7. c. 4, and 50 E. 3. ca. 6. Vide Mich. 12 & 13 Eliz. Dier, 295.

"*His heire male.*" [f] For regularly by the common law the heire shall not be in ward, unlesse he claime as heire by descent. The statute of *Merton, de iiis qui primogenitos feoffare solent*, [g] did helpe feoffments by collusion in certaine cases. And *Britton* saith that *Robert de Walrand* a sage of the law did advise the great lords of the realme to make the said statute, which when it was past, the same act tooke his first effect in the heire of *Walrand's* own heire, whereof *Britton* maketh a speciall remembrance. But now [h] by the statutes of 32 and 34 *H.* 8. of wills, he which holdeth lands by knights service may by act executed in his life time, or by his last will in writing, dispose of two parts, as by the said acts appeareth. If he dispose all by act executed, then it shall stand good against the heire,

[76. b.] ☞ so as nothing shall descend unto the heire. But in case of a devise by his last will, a third part shall descend to the heire, though all be devised away: and if the tenant leave a third part to descend, then the devise is good for the residue. [i] But these things require so many diversities grounded upon evident reasons, and are so plainly expressed in my Commentaries, as they (being very long) shall not need to be repeated here. [k] And that the tenure by knights service draweth to it ward, marriage, and reliefe, is of great antiquity, for so it was in the time of king *Alfred* (1).

[f] Brit. 168. Fleta, lib. 1. ca. 9. [g] Mert. ca. 6. (11 Rep. 23.) Bract. fo. 85. Brit. fo. 65. 9 H. 4. 6. 4 H. 7. ca. 17. 27 H. 7. 89. Partridge's case. Pl. Com. 82. [h] 32 H. 8. ca. 1. 34 H. 8. ca. 5.

(10 Co. 80.)

[i] 3 Co. 25, 26. in Butler's case. 6 Co. 75. in sir George Curzon's case. 8 Co. 163. Might's case. Eod. lib. fo. 171. in Vigil Parker's case. [k] Mir. ca. 1. sect. 3.

"*When such tenant dyeth.* Here *Littleton* speaketh not of a dying seised by the tenant, for in many cases the heire shall be in ward, albeit the tenant died not seised, &c. nor in the homage of the lord. As if the tenant maketh a feoffment in fee upon condition, and the feoffor dieth, after his death the condition is broken, the heire within age entreth for the condition broken, he shall be in ward, and yet the feoffor had no estate or right in the land at the time of his death, but onely a condition, and which was broken after his decease. [*] But because the condition restoreth the tenant to the land in nature of a descent, (for he shall be in by descent) by the same reason shall it restore the lord to the wardship, seeing now (as *Littleton* saith) the heire of

(1 Co. 99.)

[*] 39 E. 3. 36. tit. Gard. 92. 33 E. 3. Gard. 162. 11 H. 7. 12.

19 E. 3. Gard. 114. 18 Ass. 18. 40 Ass. 36. 20 El. 362. 4 H. 6. 16. b. F. N. B. 143. 6 H. 4. 4. a.

his

(2) See a note on the subject of *relief*, post. 83. a.

(1) This shows, that in lord Coke's opinion the feudal tenures were settled here before the Conquest. But as to this controverted point, see note 1 of 64. a.

his tenant is within age, and not able to doe him service, and no default in the lord to barre him of his wardship.

[l] 7 H. 4. 12. 1 H. 7. 12. 22 E. 4. 7. 6. 40 E. 3. 43. 4 M. 136. 15 E. 4. 10, 11.

[l] And so I doe take it, that if the heire within age recover in a *dum non fuit compos mentis*, or *formedon en discender*, or remainder as heire, or such like, the heire shall be in ward; for these be stronger cases than the former; for here a right doth descend to the demandant, which right being by course of law restored to the possession of the heire within age, by consequence the lord is to have the wardship of him, but in the case of the condition, no right at all descended to the heire, as hath beene said.

33 E. 3. Gard. 162. (2 Rc. Abr. 38.)

And so if tenant in tayle, the remainder in fee, maketh a feoffement in fee, and dyeth leaving the issue in taile within age, if the feoffee infeoff the issue in taile, whereby he is remitted, he shall be in ward to the lord; for as he is restored to the title of the land as heire, so is the lord restored to his title of the wardship as lord of the fee. And as to this purpose herein I take no difference betweene a right of action and a right of entry descending, when by action the right of the land is lawfully recovered by the heire within age, to his tenant: and albeit he dyed not in his homage, yet there was a right of homage, and no default or laches was in the lord, or act done by him to prejudice himselfe thereof.

11 H. 7. 12.

But if one levie a fine executorie (as *sur grant et render*) to a man and his heires, and he to whom the land is granted and rendered, before execution dieth, his heire being within age entreth, he shall not be in ward, for his ancestor was never tenant to the lord, and so there is a manifest diversitie between this and the other cases. *Et sic de cæteris.*

13 El. Dyer, 298.

But if the tenant maketh a feoffement in fee of lands holden by knights service to the use of the feoffee and his heires, untill the time that the feoffor pay to the feoffee or his heires a hundred pounds, for the which a time and place is limited; the feoffee dyeth, his heire within age, the lord shall have the wardship of the bodie of the heire, and of the lands of the feoffee conditionally, for he cannot have a more absolute interest in the wardship, than the heire hath in the tenancie: therefore if the feoffor pay the money at the day and place, and entreth into the land, in this case both the wardship of the bodie and lands is devested, because the lord had no absolute interest in either of them, but doth depend upon the performance or not performance of the condition.

(Post. 248. a.)

[*] 12 H. 4. 16. per Thirning.

[*] So if the conusor of a fine executorie of lands holden by knights service dyeth, his heire within age, the lord shall have the wardship of the bodie and land; but if the conusee entreth, the heire is disherited, and the lord hath lost the whole benefit of his wardship.

[m] 41 E. 3. 225.

If the disseisee dyeth, his heire being within age, [m] the lord shall have the wardship of the heire of the bodie of the disseisee.

[n] 15 E. 4. 11.

[n] But put the case, that in that case the disseisor dieth seised, and his heire within age, the lord may seise the wardship of his heire also, and of the land also: but the doubt is, whether the heire of the disseisee shall, after the descent to the heire of the disseisor, continue in ward, for that after the descent the heire of the disseisor is become his lawful tenant, and the heire of the disseisee is not tenant unto him untill he hath recovered the land.

If *cestui que use* before the statute of 27 H. 8. had dyed, his heire

heire within age, the lord [o] should have had the wardship of his heire; and if the feoffee had dyed, his heire within age, the lord should have had the wardship of his heire also, and so a double wardship for one and the same land, the one by the statute of 4 *H.* 7, the other by the common law.

[o] 14 H. 8. 5. 4 H. 7. cap. 17.

[p] Tenant by knights service maketh a gift in taile, the remainder in fee, tenant in taile maketh a feoffment in fee, and dyeth, his heire within age, the lord shall have the wardship of him; and if the feoffee dieth, his heire within age, the lord shall have the wardship also of his heire and of the land.

[p] 41 E. 3. 26. tit. Avowrie, 264. 20 H. 6. 9. 48 E. 3. 8. b. 10 E. 3. 26. 31 E. 3. tit. Gard. 116.

18 E. 3. 7. 14 H. 4. 38. 1 H. 5. Grant, 43. 5 E. 4. 3. 7 E. 4. 27. 15 E. 4. 13. 2 E. 2. Avow. 181.

[77. a.] ☞ If tenant by knights service maketh a gift in taile, and the donee maketh a feoffment in fee, and the donee dyeth, his heire within age, the donor shall have the wardship of him; because he is his tenant in right. [q] But if the feoffee dieth, his heire within age, the donor shall not have the wardship of his heire, but the lord paramount; because he is tenant *in fait* to him; neither shall the donor avow upon the feoffee or his heire for the services due unto him, because he must in his avowry shew the reversion in fee to be out of him by the feoffment, and consequently the services incident to the reversion are also out of him, but he shall avow upon the donee and his issues: [r] and thus are all the bookes that seeme to be at variance, either answered or reconciled.

(2 Ro. Abr. 38.)

[q] So was it holden Tr. 18 El. in Com. Banco, per Cur. which myselfe heard & noted, in sir Thomas Wyat's case.

[r] So was it resolved in sir Tho. Wyat's case, ubi supra.

[a] "*The land holden of him.*" *Littleton* here speaketh of lands holden of a subject: for if a man hold land of the king by knights service *in capite*, and other lands of other lords, and dieth, his heire within age, the king shall have the wardship of all the lands by his prerogative: and this was due to the king by the common law, the fees of certaine excepted, as in the statute of *prærogativa regis*, cap. 1, appeareth.

[a] Glanv. lib. 7. cap. 10. Bract. lib. 2. fo. 85, 86, 87. Brit. l. 3. c. 2. Fleta. l. 1. c. 10. 9 H. 3. Prerog. 25. 21 H. 3. ib. 26.

Rot. Finium. 6 Johan. Stat. Prærog. Reg. c. 1.

But if a man holdeth lands of the king by knights service, as of an honor or mannor, &c. [b] in that case the king shall onely have the lands holden of him, and not of any other. Yet by reason of tenures of the king by knights service of certaine honours, (while they were in the king's hands) the king (as some have said) had (as it were by prescription) his prerogative, viz. *Raleigh haye net bonony* and *Peverel*, and so of lands holden by knights service of the duchy of *Lancaster* in the county palatine (1).

[b] Bract. ub. supra. Mag. Carta. ca. 31. 1 E. 6. ca. 4. 5 E. 3. 5. 47 E. 3. 21. 29 H. 8. Br. tit. Livery, 58. 28 H. 8. ibid. 55. (2 Ro. Ab. 503.

When

(1) Rot. Parl. 11 H. 6. n. 57. Simile pro ducatu Cornub. Rot. Parl. 18 H. 6. n. 42. *Ryley's escheat*, m. 4 and 5 E. 1. Rot. 20. Nota, *as to the ancient honor of Peverel, the tenure of that is* in capite, *but some new additions to the honor are not so.* P. 7 Jac *Ley*, 7. *Clarke's case.* Vid. tamen P. 17 Jac. Churche's case, *Ley*, 52, *for there it was found, that tenure of the honor of Peverel is tenure* in capite, *as to the manor of Woodham Mortimer.* Hal. MSS. —By a tenure *in capite* in this note, lord Hale means a tenure of the king *ut de coronâ.* in contradistinction to a tenure of him *ut de honore.* In the time of lord Coke it was the fashion to denominate the *former* a tenure *ut de personâ regis;* and as to the *latter*, it was not allowed to be a tenure *in capite.* But Mr. Madox

[c] 8 Co. 172. Hale's case. 38 H. 8 Br. tit. Livery, 60. Vid. Sect. 154. (F. N. B. 256. B.)

[c] When an heire hath bin in ward to the king by reason of a tenure *in capite*, after his full age he must sue livery, which is halfe a yeare's profit of his lands holden. But if he be of full age at the time of the death of his ancestor, then he shall pay for lands in possession a whole yeare's profit for *primer seisin*: but if it be of a reversion expectant upon an estate for life, as tenant in dower, tenant by the curtesie, or tenant for life, then he shall pay but the moiety of one yeare's profit.

[d] 1 El Dier. 168.

[d] If the heire be in ward by reason of a tenure of an honour or mannor, (except as before) he shall not sue liverie, but an *ouster le maine cum exitibus*, albeit he never made tender.

[e] 32 H. 8. tit. Liv. Br. 62.

[e] And if he be of full age, the king shall have no *primer seisin*, but reliefe. But where the tenure is *in capite*, there the king shall have the meane profits untill the tender be made; and if the tender be made, and not duely pursued, the king shall also have all the meane profits.

[f] 38 H. 8. Liver. Br. 60. 45 E. 3. 11. 35 H. 6. 52. Staunf. 13. b.

[g] 20 El. Dy. 362. F. N. B. 259. B.

[f] He that holdeth of the king by socage in chiefe, and dieth, his heire of full age, the king shall have livery and *primer seisin* onely of the lands so holden, and not of the lands holden of others. [g] But if the heire of such a tenant in socage in chiefe be within the age of fourteen at the death of his ancestor, he shall neither sue livery, nor pay *primer seisin*, either then or any time after: and the reason thereof is, for that the custodie of his body and lands in that case belong to the *prochein amy*, as gardein in socage.

[h] F. N. B. 263. 7 E. 4. 17. Staunf. Prær. 13. Br. tit. Liv. 64.

[h] Neither shall the king have *primer seisin* of lands holden in burgage, (as some have said) for that it is no tenure *in capite*.

Note, there is a generall livery, and a speciall livery. A generall livery hath two properties.

First, it is full of charge to the heire, for he must have an office in every county where he hath land, or else he cannot sue a generall livery, and he must sue out his writ of *ætate probandâ, &c.*

[i] 46 E. 3. 33. 47 E. 3. 21. 21 H. 6. 28. b. 33 H. 6. 50. 29 Ass. 8. Pl. Com. Count. of Leicester's case, 44 E. 3. 1. & 25. 12 R. 2. Liv. 28. 2 H. 7. fol. 14.

[i] The second property is, that it is full of danger: first, it concludeth the heire for ever after to denie any tenure found in the office: secondly, if livery be not sued of all and of every parcell which the king ought to have, whether it be found in the office or not found (for a general livery could not be sued by parcels) the livery is void, and the king may resceise the lands, and be answered of the meane profits. So it is if the office be insufficient, or the processe whereof the livery was made be insufficient,

---

Mr. Madox very justly animadverts on lord Coke and his cotemporaries, as well for calling any tenure of the king a tenure *ut de personâ* by way of distinction, as for not allowing a tenure *ut de honore* to be a tenure *in capite*. He observes that *all* tenures of the king are *of his person*, and that in order to distinguish accurately between lands *originally* holden *immediately* of the king and those holden *immediately* of him in consequence of the escheat of an honor or barony, we should call the tenure of those of the *first* description a tenure *ut de coronâ*, and that of the *second* a tenure *ut de honore*. Further he insists, that tenure *in capite* of the king is holding *immediately* of him without the interposition of any *mesne* lord, and consequently that a tenure of the king *ut de honore* is equally *in capite* with a tenure *ut de coronâ*, though in other respects there certainly are very important differences between the two, such as render it highly necessary to preserve a distinction. See Mad. Baron. Aug. 163.—[Note 39.]

insufficient, or the like, the king shall reseise, as is aforesaid. [a] Therefore for the ease of the heire, and for avoyding of such danger the heire for the most part sueth out a speciall livery, which containeth a beneficial pardon, and saveth the said charges, and preventeth the said conclusion, and the other dangers; which being of grace, and not of right, as the generall liverie is, the king may well and justly take more for a speciall livery, than for a generall, for the causes aforesaid, but ever with such moderation as the heir may cheerfully goe through therewith.

[a] 1 H. 4. 6. b. 37 H. 8. Estop. Br. 1. 218. 7 E. 6. ib. 222. Scurfield's case. Tr. 8 Ja. in cur. Ward. 23 El. Dier, 377. 28 H. 8. Br. tit. Liv. 56. 41 E. 3. 5. 5 E. 6. 6. 27 Ass. 48. Pl. Com. 252. 20 El. Dyer, 360. (10 Co. 64. a.)

Note, that a livery is in nature of a restitution, which is to be taken favourably: for if livery be made of a mannor *cum pertinentiis*, the heire shall thereby have the advowson appendant. Otherwise it is grants by letters patents.

Since the time that *Littleton* wrote [c] there is a court of wards and liveries erected by authority of parliament concerning the order of the king's wards, &c. to be holden before the master of the wards and the councell of that court appointed by those acts. This hath made such a manifold alteration, as were too long here to be inserted, and doth belong to another treatise mentioned in the Epistle of the Jurisdiction of Courts, where it were necessary, that the true jurisdiction of that court should be set downe, a matter of no great difficulty, seeing it began so late by authority of parliament. And since *Littleton's* time, [d] there is a right profitable statute made concerning the finding of offices, and other things, not onely concerning the king's wards, or their rights and possessions, but some other provisions very beneficial for the subject, in all to the number of 12. [e] 1. That such persons as hold for tearme of yeares, or by copy of court roll, or have any rent common or profit *apprender* out of any lands found in any office, whereby the king is intituled to the wardship of the lands or tenements, or to the forfeiture of the lands or tenements upon attainder of treason, felony, *præmunire*, or any other offence, yet may they have, hold, enjoy, and perceive their several estates, interests, and profits, although they be not found in the office. And this being a beneficiall law, the estates of tenant by statute staple merchant and *elegit*, and executors that hold lands for payment of debts, are taken to be within the benefit of the clause: [f] and so is a doubt in 14 *El. Dier*, cleered.

[77. b.]

[c] 32 H. 8. 46. 33 H. 8. cap. 21. (4 Inst. 188.)

[d] 2 E. 6. ca. 8. (9 Co. 16.)

[e] 4 E. 4. 23. 33 H. 8. tit. Entre Congeabl. Br. 125.

[f] 14 Eliz. Dier, fo. 319.

2. Where it is found, that the heire is of fewer yeares than in truth he is, he shall not be concluded hereby, [g] but every such heire at his very full age may prosecute a writ of *ætate probandâ*, and sue his livery or *ouster le maine:* in which case he had no remedy by the common law.

[g] 5 Mar. Dier, 156.

[a] 3. Where one person or more be found heire, where another person is heire, the partie grieved had no remedy.

[a] 24 E. 3. 31. 38. 9 H. 6. 18. 12 E. 4. 16.

4. Or where one person or more be found heire in one county, and another person or persons found heire in another county, there could have beene no interpleading.

30 Ass. 28. 4 Co. 56 & 60. Sadler's case.

5. Or if any person be untruly found by office lunaticke, or ideot, or dead, the party grieved may traverse the said offices; and you may reade in *Ken's* case how the office shall be traversed upon this act.

Stanuf. Prærog. 58. b. 52. 5 E. 4. 4. 16 E. 4. 4. 1 H. 7. 14. 2 H. 7. 12. 4 H. 7. 15. 8 H. 7. 11.

[b] 6. Where it is untruly found by office, that any person attainted of treason, felony, or *præmunire*, is seised of any lands, &c.

[b] 4 E. 4. 23. 14 E. 3. cap. 14.

F. N. B. 262. 12 R. 2. Livery, 28. F. N. B. 233. 7 Co. 44, 45. Ken's case. 10 H. 6. 19. 4 Co. 56, &c. Sadler's case. 32 H. 8. Entre Cong. Br. 125.

the

the party grieved, having just title of freehold, shall have his travers or *monstrans de droit* (without being driven by this double matter of record to his petition of right as he was before this statute) which is much more speedy than the petition; for upon the petition there be foure writs of search, and every one must have 40 dayes before the serving, and now but two writs of search.

[c] Vide 6 Co. 6. Wheeler's case.

[c] 7. Where an office is found by these words or the like, *quod de quo vel de quibus tenementa prædicta tenentur, juratores præd' ignorant*, or holden of the king *per quæ servitia juratores ignorant*, it shall not be taken for any immediate tenure of the king in chiefe, but in such cases a *meliùs inquirendum* to be awarded, as hath been accustomed of old time. This branch hath been well [d] expounded; for if the first office finde a tenure of the king *per quæ servitia, &c.* yet if upon the *meliùs inquirendum* the tenure be found of a subject, the first office hath lost his force *per sensum hujus statuti*, and need not be traversed, and the *meliùs, &c.* is in nature of the *diem clausit extremum* or *mandamus, &c.* And this was but a declaration of the ancient common law, as by the words of the statute (*as hath beene accustomed of old*) it appeareth; but if upon the *meliùs* it be found againe as uncertainely as before is said, then it is in judgement of law a tenure *in capite*, and so it was before the making of this act, and so are the bookes that speake hereof to be intended; but if upon the *meliùs* a tenure be found of the king *ut de manerio per quæ servitia, &c.* it shall be taken for knight's service.

[d] 12 Eliz. Dier, fo. 292. a. 8 Co. 168. Paris Stoughter's case.

13 Eliz. Dier, 306. 4 H. 6. 13. 10 H. 4. 2. b.

8. Where it is found that lands, &c are holden of the king immediately, where in truth they are holden of a common person and not of the king immediately, and that the heire is within age, such heire within age shall have his traverse, &c. which he could not have had by the common law.

9. The meane lords of whom the lands are holden, which the king hath by his prerogrative during the minority of the heire, shall receive and take such rents as are due unto them by the hands of such of the king's officers as receive the profits of the same lands, where before that act, the lords used to spare the rents due, &c. during the king's possession, and after livery sued charged the heire with all the arrearages.

10. There is a provision for offices found before the statute or before the 20th day of *March* next after the act.

11. A speciall clause is, that a *scire fac'* shall be awarded upon every travers by force of this act, and where the party was put to his petition, there upon the travers there shall be two writs of search granted.

12. And lastly, if judgement shall be given against the king upon a travers by vertue of this act, all former rights appearing of record are saved to the king. But albeit these points are most necessary to be knowne, yet let us returne to *Littleton*.

15 E. 4. 12. 46 E. 3. 12. 21 H. 6. 11. 3 H. 7. 5.

Littleton warily and materially (treating of a common person) saith, *holden of him*, for he shall have nothing in ward but that which is holden of him. But the king by his prerogative shall not onely have such lands and [78. a.] tenements, which (as hath been said) the heire of his tenant by knight service *in capite* holdeth of others, but such inheritances also as are not holden at all of any, as rent charges, rent secke, fayres, markets, warrens, annuities, and the like; and so is the law cleerely holden at this day, as it hath beene resolved; and so experience teacheth, that the king by his

his prerogative given to him by the ancient common law shall have those inheritances not holden, and so the *quære* made by [o] *Staundford* is cleered and made without question.

[o] Staunf. Prær. fo. 8.

The law is changed since *Littleton* wrote in many cases both for the marriage of the body, and for the wardship of the lands, and a farre greater benefit given to the lords than the common law gave them, and some advantage given to the heires, which before they had not, which shall be touched briefly.

If the father had made an estate for life or a gift in taile of lands holden by knights service to his eldest sonne, or other heire apparent within age, the remainder in fee to any other, and dyed, the heire should not have beene in ward; for this was out of the statute of *Melebridge*. But at this day the heire shall be in that case in ward for his body, and a third part of his land.

Merlebridge, ca. 1. Pl. Com. 82. 27 H. 8. 10. 33 H. 6. 14.

[a] So if the father had infeoffed his eldest sonne within age and a stranger, and the heires of the sonne, and died, the sonne should have beene out of ward; but at this day he shall be in ward for his body, and for a third part of his moity. [b] So if the father had infeoffed any of his younger sonnes or others for the making of his wife a joynture, or for the advancement of his daughters, or for the payment of his debts, and after infeoffee and convey the land to his heire and dyed, his heire within age, his heire should not have beene in ward; because he was bound by the law of nature and nations to provide for them; but now in all these cases the heire shall be in ward for his body, and a third part of the land, and all this groweth by construction upon the statutes of 32 and 34 *H.* 8. [c] But if either the eldest sonne, or any of the younger sonnes purchase lands of his father, which are holden by knights service, *bonâ fide*, for the reasonable value, this is out of those statutes, and the heire shall neither be in ward, nor pay *primer seisin*.

[a] 31 E. 3. Collusion, 29. 33 H. 6. 14.

[b] 33 H. 6. 14. 27 H. 8. 7. 6 Co. 76, 77. Sir George Curson's case. 10 Eliz. 260. 3 Eliz. 193. 20 Eliz. 361. 19 Eliz. 276. 5 Mariæ, 158.

[c] 10 Co. 83. Leonard Lovey's case.

And in all the cases abovesaid, (for example) if a feoffment be made to the use of his wife for life, or to the use of any of his younger sonnes for life, or to the use of some persons for life for payment of debts, and upon all these estates a remainder is limited over, if the wife or tenant for life dye in the life of the father, [d] or if it be conveyed to the use of the wife or younger children in fee, or fee-taile, or in fee for payment of debts, and these lands are conveyed away in the life time of the father, after the decease of the father no wardship, &c. accrueth by force of any of the said statutes, for such estates must continue till the title of wardship doe grow (1).

[d] 2 Co. 91. Bingham's case, 6 Co. ubi supra, 84. 8 Co. 165. Digbye's case.

[e] If the father convey his lands holden by knights service either of the king or of any meane lord to his middle sonne in taile, the remainder to the youngest sonne in fee, and dyeth, the eldest being within age, and the king or lord seize the body and two parts of the land, if the middle brother dye without issue, the king or the lord shall not have any benefit of the statute against him in remainder; for the statute was once satisfied, and the statute extendeth not to him in remainder.

[e] 14 Eliz. Dier, 308. 3 Mariæ, Dier, 130. 2 Co. 93, 94. Bingham's case, and Northcot's case. 10 Co. 80. b. Leon. Lovey's case.

[f] If there be a grandfather, father, and divers sonnes, and the grandfather in the life of the father convey his lands holden by knights service to any of the sonnes, this is out of the statute of 32 *H.* 8. and if the grandfather die, there is neither wardship nor

[f] 6 Co. 77. Sir George Curson's case. 2 Eliz. Dier, 181. 8 Eliz. Dier, 252.

(1) Vid. Trin. 8 Jac. *Ley*, 21. *Allicock's case.* Hal. MSS.

nor *primer seisin* due; for the father hath the immediate care of his sons (2). But if the father be dead, then the care of them belongs to the grandfather, and then if the grandfather convey any of the lands to any of the sonnes, it is within the said statute: [*g*] and a conveyance to the use of any of his collaterall blood, which is not his heire apparent, is out of the said statute And so are conveyances either by father or mother to or to the use of bastard children out of the statute; for *qui ex damnato coitu nascuntur, inter liberos non computentur.* And the preamble speaketh of lawfull generations. If a man seised of lands holden in socage convey them to the use of his wife, or of his children, or payment of his debts, and after purchase lands holden by knights service *in capite*, and dieth, his heire within age, the king shall have no part of the socage land. [*h*] But if in that case he had by his will in writing devised his socage lands in fee, and after purchased lands holden *in capite*, and dieth, the king shall have so much of the socage lands as will make a full third part of all. The benefits, that grew to the subject by those acts of parliament, were, that tenants in fee simple might devise their lands by their last wills in writing in such manner and forme, as by the said acts appeareth; also that the father might infeoffe his eldest sonne or other heire lineall or collaterall of his lands holden by knights service, and two parts of the lands shall be out of ward. And in * *Might's* case you shall reade excellent matter of estates made upon collusion (3)

[g] 10 Co. 83. Leon. Lovey's case. 18 Eliz. Dier, 385.

[h] Leon. Lovey's case, ubi supra. Butler and Baker's case, 3 Co. 25, &c.

* 8 Co. 163. Might's case.

And both the statutes of 32 and 34 *H.* 8, concerning wills and wardships are many wayes prejudiciall to the heires; as, taking one example for many, if tenant by knights ☞ service make a feoffment in fee to the use of his wife and her heires, or to the use of a younger sonne and his heires, or wholly for the payment of his debts; in these cases, although nothing at all of the lands so holden descend to the heire, but he is disherited of the same, yet his body shall be in ward. But this for a little taste may suffice. More hereof you may reade in my Reports in the several cases noted in the margent.

[78. b.]

Leon. Lovey's case, ubi supra. 22 Eliz. Dier, 367.

32 E. 3. Gard. 61. 2 H. 5. 4. (6 Co. 20. Ante 73. a. Post. 314. b.) 10 H. 6. 8. 21 E. 3. 33, a. 27 H. 8. fo. 10.

"*Full age*," regularly is one and twenty yeares.

"*Intendment of the law.*" *Intendment, i. e. intellectus*, the understanding or intelligence of the law. Regularly judges ought to adjudge according to the common intendment of law. By intendment of law every parson or rector of a church is supposed

(2) *Grandfather enfeoffs the father and his son in fee, and dies. The father being of full age shall sue livery of the third part of a moiety.* Trin. 8 Jac. *Ley*, 21. *Crawley's case. But if feoffment be to daughter and her husband, they ought to sue livery of the whole, for both are* children *within the statute.* M. 9 Jac. *Ley*, 41. *Bacon's case*, et ibid. 43. *Cleer's case.* Hal. MSS.—[Note 40.]

(3) *Lands are given to husband and wife and the heires of the husband. Husband and wife join in a fine* come ceo *to the use of the husband and wife, and to the heires of the body of the husband, remainder over. The husband dies. The wife shall not sue livery, because it was originally a purchase to the husband and wife, and she had not a greater estate afterwards.* T. 15 Jac. *Ley*, 51. *Menfield's case.* Hal. MSS.—[Note 41.]

supposed to be resident on his benefice, unlesse the contrary be proved.

Of common intendment one part of a mannor shall not be of another nature than the rest.

Of common intendment a will shall not be supposed to be made by collusion. *In facto quod se habet ad bonum et malum, magis de bono, quàm de malo lex intendit. Lex intendit vicinum vicini facta scire. Nulla impossibilia aut inhonesta sunt præsumenda, vera autem et honesta, et possibilia. Lex semper intendit quod convenit rationi.* As in this case the gardian shall have the custody of the land untill the heire come to his full age of one and twenty yeares; because by intendment of law the heire is not able to doe knights service before that age, which is grounded upon apparent reason. There note, that the full age of a man or woman to alien, demise, let, contract, &c. is one and twenty yeares, the civil law five-and twenty yeares, for then the *Romanes* accounted men to have *plenam maturitatem*, and the *Lombards* at eighteene yeares.

"*If such heire be not married at the time of the death of his ancestor, &c.*" *Ancestor* is derived of the *Latine* word *antecessor*, and in law there is a difference between *antecessor* and *prædecessor*. For *antecessor* is applied to a natural person, as *I. S. et antecessores sui;* but *prædecessor* is applied to a body politique or corporate, as *Episcopus London. et prædecessores sui. Rector de D. et prædecessores sui, &c.* Vide Britton, fol. 169.

"*But if such tenant dieth, his heire female being of the age of* 14 *yeares, &c.*" And the reason, as I finde in antiquity, wherefore the law gave the marriage of the heire female if she were within the age of fourteene, and that she should not marry herselfe, was, *pur ceo que les heire females de nostre terre ne se marieront a nous enemies, et dount il nous coviendroit lour homage prendre, si eux se puissent marier a lour volunt.* This is a speciall age for an heire female to be out of ward, if she attaine unto it in the life-time of her ancestor; for at that age she may have a husband able to doe knights service. A woman hath seven ages for severall purposes appointed to her by law: as, seven yeares for the lord to have aid *pur file marier;* nine yeares to deserve dower; twelve yeares to consent to marriage; untill fourteen years to be in ward; fourteen yeares to be out of ward if she attained thereunto in the life of her ancestor; sixteene yeares for to tender her marriage if she were under the age of fourteene at the death of her ancestor; and one and twenty yeares to alienate her lands goods and chattells. Glanvil. lib. 7. cap. 1. Mirror, cap. 5. sect. 2. Britton, fol. 168. b. 39 H. 6. cap. 2. 35 H. 6. 40. Bracton, lib. 2. ap. 37. (1 Ro. Ab. 342. 6 Co. 73. b.)

A man also by the law for severall purposes hath divers ages assigned unto him, viz., twelve yeares to take the oath of allegiance in the torne or leet; fourteene yeares to consent to marriage; fourteene yeares for the heire in socage to choose his gardian, and fourteene yeares is also accounted his age of discretion; fifteene yeares for the lord to have aid *pur faire fitz chivaler;* under one and twenty to be in ward to the lord by knights service; under fourteen to be in ward to gardian in socage; fourteene to be out of ward of gardian in socage; and one and twenty to be out of ward of gardian in chivalrie, and to alien his lands, goods and chattels. 34 E. 1. Stat. 3. Glanvil. lib. 7. cap. 9. Dier, 5 Marie, 162. Bracton, lib. 2. cap. 37. F. N. B. 202. (1 Ro. Ab. 137, 138.)

"*But*

35 H. 6. 52. tit. Gard. 71. Staanford, 3. b. F. N. B. 256. 253. 35 H. 6. 40.

"But if such heire female be within the age of 14 *yeares, and unmarried, &c. the lord shall have the wardship of the land."* But put case that the lord cannot have the wardship of the land, as if the lord before the age of fourteene granteth over the wardship of the body, in this case the grantee of the body cannot enjoy the benefit of the two yeares, because he cannot hold over the land, and the lord which hath the wardship of the land, only should lose the benefit of the two yeares, because he hath the lands onely, and cannot tender any marriage; therefore in this case the heire female shall enter into her land at her age of 14 yeares. So if a tenant holdeth of one lord by priority, and of another by posteriority*, and dieth, his heir female within the age of 14 yeares, the lord by posteriority shall have the lands but untill her age of 14 yeares, because the marriage belongeth not to him. Also if the lord marrieth the heir female within the two yeares, her husband and she shall presently enter into the lands: for *cessante causâ, cessat effectus; et cessante ratione legis, cessat beneficium legis.*

Britton, fol. 169. 35 H. 6. 52.

35 H. 6. 52. 35 H. 6. tit. Gard. 71. 6 Co. 71, the lord Darcie's case.

☞ If the lord tender a covenable marriage to the heire within the two yeares, and she marry elsewhere within these two years, the lord shall not have the forfeiture of the marriage; for the statute giveth the two years onely to make a tender. [79. a.]

"And if the lord within the said two years do not tender such marriage, &c. then she at the end of the said two years may enter, and put out her lord." This is so evident, as it needeth no explication.

F. N. B. 143.

"But if such heire female be married within the age of 14 *yeares in the life of her ancestor, and her ancestor dieth, she being within the age of* 14 *yeares, the lord shall have only the wardship of the land untill the age of* 14 *years, &c."* Note, albeit the heire female be married at the age of twelve yeares in the life of her ancestor, (at which age she may consent to matrimony) to a man of full age, that is able to doe knights service, yet if the ancestor die before her age of fourteene, the gardian shall have the land untill her age of fourteene, because (as hath beene said) that is the time appointed by the common law. And so if the heire male be married in the life of the ancestor at his age of fourteene yeares, and the ancestor dieth, the lord shall have the land untill the ward commeth to the age of one and twenty.

"For this is out of the case of the said statute, insomuch as the lord cannot tender marriage to her which is married."

Natura non facit vacuum, nec lex supervacuum. The law doth never enforce a man to doe a vaine thing.

And where the said statute of *W.* 1. giveth unto the lord the said two yeares, thereby is implyed, that if he dyeth within the two yeares, his executors or administrators shall have the same. For when the statute vesteth an interest in the lord, the law giveth the same to his executors or administrators. Then put case, that a lord hath the wardship of the bodie and land of an heire female, and maketh his executor, and dyeth before her age of fourteene yeares, whether the executor shall have the two

27 H. 8. 3. 11 E. 3. Exec. 77. 4 E. 4. 55. 28 Ass. p. 7.

* *The words* priority *and* posteriority *appear to signify that the tenure of the* one *lord is of greater antiquity, or subsisted before, the tenure of the* other *lord. See ante* 22. *a.*

yeares,

yeares, because the executor is not lord. But I take it, the executor having the wardship of the body and land, shall in that case have the two yeares, for that they were vested in the lord (1).

It is further provided by the said statute, that if the lord tender a convenable marriage to the heire female within the said two yeares, and the heire female refuseth, then the lord shall hold the land until her age of one and twenty yeares, and further untill he hath levied the value of her marriage. But if the lord doth not tender a marriage within the two yeares, he shall loose the value of the marriage, and content himselfe with the two yeares value.

31 Ass. p. 26. (Cro. Jam. 151.)

6 Co. 71, Ld. Darcie's case.

"*For before the said statute, &c. as appeareth by the rehearsall and words of the said statute.*" *Nota*, the rehearsall or preamble of the statute is a good meane to find out the meaning of the statute, and as it were a key to open the understanding thereof (2). The tender of a marriage to an heire female before the age of fourteen is void, which must be understood where the lord may hold the land for the said two yeares, for then the statute appointeth the time of the tender; but where the lord cannot have the two yeares, he may tender a marriage to the heire female at any time after the age of twelve and before fourteene, for so he might have done at the common law.

35 H. 6. 52. Gard. 71.

35 H. 6. 52. Gard. 71. 6 Co. 71, lord Darcie's case. Britton, 169.

Sect. 104.

NOTE, that the full age of male and female, according to common speech, is said the age of 21 *yeares. And the age of discretion is called the age of* 14 *yeares; for at this age, the infant which is married within such age to a woman, may agree or disagree to such marriage.*

OF full age, which is the age of one and twenty, and of the age of discretion, which is the age of fourteene (3), somewhat hath beene spoken before (4). But now to the point of agreement or disagreement in this case. The time of agreement or disagreement, when they marrie *infra annos nubiles*, is for the woman at 12 or after, and for the man at fourteen or after, and there need

(Ante, 78. b.) 6 Mar. Gard. Br. Pl. ultimo. 39 E. 3. 32. 33. Prær. Reg. c. 6. Tr. 24 Eliz. Rot. 842, in Bank le Roy, Banister's case.

no

(1) See 6 Co. 74. a.

(2) Lord Coke's manner of expressing himself on the operation of the *preamble* in the construction of statutes is very observable. Instead of saying *generally*, that the preamble should control the *enacting* clauses, or of limiting precisely how far it shall have that effect, which would have been attempting to make a line where one cannot be drawn, he cautiously says, that it is a *good mean* to find out the intention. The authorities referred to in 4 New Abr. 645, will serve to explain by instances, what sort of influence the preamble ought to have in expounding statutes. See also Hatt. on Stat. 53.—[Note 42.]

(3) It seems more proper to consider *twelve* as the age of discretion for *women*; for lord Coke himself a few lines lower states *that* to be *their* time for agreeing or disagreeing to a marriage. See the note as to the age at which infants may make a will of personalty, post. 89. b.—[Fote 43.]

(4) To lord Coke's account of the several ages of a man and woman, which is given in fol. 78. b. add 1 Hal. Hist. Pl. C. 17.

no new marriage, if they so agree; but disagree they ☞ cannot before the said ages, and then they may disagree and marrie againe to others without any divorce; and if they once after give consent, they can never disagree after (1). If a man of the age of fourteen marry a woman [79. b.]

(1 Ro. Abr. 341. 3 Inst. 80.)

(1) But now the agreement after *twelve* or *fourteen* would not be binding on the infant, if the marriage was without *banns*, or by *license* and *without consent of parent or guardian*, and the infant was not a widow or widower; for the 26 Geo. 2. c. 33, makes all such marriages void. In reading this statute, it should be attended to, that the clause for annulling the marriages of infants without the consent of parents or guardians is restricted to marriages by *license;* so that the marriage of an infant without such consent may still be good, where *banns* are regularly published, unless a dissent is openly declared by the parent or guardian in the church or chapel at the time of publishing, in which latter case the statute makes the banns void. As to marriages without either *license* or *banns*, which are usually termed *clandestine*, they are *universally* annulled by the statute. Note that Scotland is excepted out of the 26 Geo. 2. c. 33. In consequence of this, so much of the act as was calculated to defeat the marriages of minors without the consent of parents or guardians, hath been frequently evaded by going into Scotland to be married there, and returning into England immediately afterwards. Indeed the validity of such marriages was once questioned; and though in *general* marriages are governed by the law of the country in which they are celebrated, yet it was doubted, whether the *lex loci* ought to be applied to a case accompanied with circumstances so strongly marking the intent to evade the law of England. See Burr. part 4, vol. 2, p. 1079. But this point seems now fully settled in favour of the Scotch marriages, by a late decision of the court of *arches*, which was afterwards confirmed in the court of *delegates*. However it may not be amiss to recollect, that there have been persons of authority who will not allow such cases of apparent evasion of the law of any country to fall within the principle of which the *lex loci* is indulged. There is a strong passage to this effect in the works of a Dutch author, whose writings on the *civil* law are much esteemed. *Ego ita existimo*, says Huber, after putting a case in which the law of one Dutch province against the marriage of minors without the consent of guardians was evaded by running away into another province having a different law, *hanc rem manifestè pertinere ad eversionem juris nostri, ac ideo non magistratus heic obligatos è jure gentium ejusmodi nuptias agnoscere et ratas habere. Multòque magis statuendum est, eos contra jus gentium facere videri, qui civibus alieni imperii suâ facilitate, jus patriis legibus contrarium, scienter volentes impertiunter.* See the digression *de conflictu legum diversarum in diversis imperiis* in Huber. Prælect. Jur. Rom. p. 538. In this digression the reader will find a very informing dissertation on the *lex loci*, and the principles by which the application of it ought to be regulated, expressed clearly, and illustrated by a variety of cases, more particularly such as relate to testaments, marriages, and contracts in general. See also the printed Arguments against Slavery in the case of Somersett the Negro, which was determined in B. R. Trin. 11 Geo. 3. p. 67 to 75. It is there attempted to prove by principles of reason as well by the authorities, that the *lex loci* is not applicable in the instance of *slavery*, and that though a negro is brought from a country in which he was *legally* a slave, yet he ceases to be so, and gains his freedom, to all intents, the moment his master carries him into one where domestic slavery is not permitted.—[Note 44.]

See further as to the *lex loci*, Prec. Cha. 205. 577. 1 P. Wms. 431. Sel. Ca. Ch. 69. Vin. tit. *Contract*, E. 22. 2 Ves. 381. 556. Mor. 2. Ayl. Pareg. Jur. Can. Fitz. 203. 4 T. Rep. 185. *Martin and Martin*, Dom. Proc. 1795. *Bruce and Bruce*, Ap. 1790. 5 Ves. 750. *Sheddon* v. *Patrick*, Feb. 1808.

a woman of the age of ten, at her age of twelve he may as well disagree as she may, though he were of the age of consent; because in contracts of matrimony, either both must be bound, or equal election of disagreement given to both; and so è *converso*, if the woman be of the age of consent, and the man under (2).

Sect. 105.

AND if the gardian in chivalrie doth once marrie the ward within his age of 14 *yeares to a woman, and if afterward at his age of* 14 *yeares he disagree to the marriage, it is said by some, that the infant is not tied by the law to be againe married by his gardian, for that the gardian had once the marriage of him, and because he was once out of his ward as to the ward of his bodie. And when he had once the marriage of him, and he was once out of his wardship, he shall no more have the marriage of him* (3).

IT is a maxime in law, *Quòd dominus non maritabit minorem in custodiâ suâ nisi semel.* And another saith, *Si semel legitimè nupt' fuer', &c. postmodum non tenebuntur sub custodiâ dominorum esse.* Albiet this marriage is *de facto*, and not *de jure*, and though the disagreement dissolveth it *ab initio*, yet the lord shall never have the marriage of him.

13 E. 1. Gard. 137. Brit. fo. 169. acc. Glanvil. lib. 7. cap. 12. 27 H. 6. Gard. 118.

And

(2) See acc. Swinb. on Spousals, 34. But though the rule, which, where one of the parties is under the age of discretion, makes the contract of marriage equally voidable by *both*, is admitted with respect to *actual* marriages, yet the civilians and canonists are not agreed that it holds as to contracts of marriage *per verba de præsenti* without solemnization. Some think that such contracts have the full effect of a contract *per verba de præsenti* on the person who is of the age of discretion, and that it is only in the power of the *younger* party to assent or dissent on attaining the age of discretion. But according to others, *both* parties are in the same situation, and as it can only have the force of a contract *per verba de futuro* as to the younger party unless it is ratified at the age of discretion, so in the meantime it shall not have a greater effect on the *elder*, and consequently unless the contract is ratified by *both* when the *younger* party attains the age of discretion, it will not avoid the subsequent marriage of *either*. Swinburne adopts this last opinion. See Swinb. on Spous. 36. But this doctrine of reciprocity where one of the parties is an infant, or under the age of discretion, however true it may be in its application to actual marriages or to contracts of marriage *per verba de præsenti*, must not be considered as extending to other contracts with an infant, not even contracts of marriage *per verba de futuro*; for in them the person of full age may, it is said, be bound at *all* events by our law, and yet as to the infant the contract may be *voidable*. Accordingly in the case of *Holt* and *Ward* the court held, that if a man of full age enters into a contract of marriage with a woman of 15 *per verba de futuro*, and afterwards marries another woman, an action on the case lies against him for breach of his promise. See 2 Stra. 850 & 937, & S. C. in Fits-Gibb. 175. 275. 1 Barnard. 208. 247. 333. 2 Barnard. 12. 173. 176. As to the effect of the 26 of G. 2. c. 33, on *precontracts* of marriage, see note 4.—[Note 45.]

(3) In L. and M. the words *quære de hoc* are added.

27 H. 6. Gard. 118.

And so if the gardian marrieth his ward to a woman, and after the marriage is dissolved by reason of a precontract(4), yet the gardian shall never have the marriage of the ward againe.

27 H. 6. Gard. 118.

But if one ravisheth a ward from the lord and marrieth him within the age of consent; in that case, if the lord taketh again his word, and he at the age of consent disagreeth to the marriage, the lord shall have the marriage of him, for he never had it before.

F. N. B. 243.

So likewise if the ancestor marrieth his heir apparent, *infra annos nubiles*, and dieth, his heire within age, the ward disagreeth, the gardian shall have the wardship of him. The same

7 H. 6. 11.

law it is in the same case, if the wife dieth before the age of consent, the lord shall have the marriage of the heire.

[a] 30 E. 1. Gard. 156. 12 E. 1. Gard. 138. 21 E. 3. 19, 20 E. 3. Gard. 41. Temps. E. 1. ibidem, 128. 35 H. 6. 45. 7 H. 6. 11. Vide Prær. Reg. cap. 6. 13 H. 3. Gard. 147. Staunf. Prær. 26, 27.

And so note a diversity when the ward is married by the ancestor or by a ravisher, and when by the gardian himselfe. [*a*] For if the ancestor marrie his heire apparent *infra annos nubiles* and dyeth, in this case if the marriage be dissolved by disagreement either of the ward or of his wife, the gardian shall have the marriage of him. [*b*] And so it is if a ravisher marry a ward *infra annos nubiles*, and the marriage is dissolved, *ut supra*, the gardein shall have the marriage. If the heire male in ward of the age of tenne yeares be married without the consent of the lord, he may tender unto the heire *infra annos nubiles* a marriage, albeit he be so married: and if he refuse, and agree to the former marriage, the lord shall have the forfeiture of his marriage, as it hath beene holden. But otherwise it is [*c*] (saith *Littleton*) where the gardian himselfe marrieth the ward, *ut supra*. And the reason of the diversitie is, because in this case the gardian had once the marriage of him, but so had not he in either of the other cases; and it is a maxim in law *quòd dominus non maritabit pupillum nisi semel.*

[b] 27 H. 6. Gard. 118. F. N. B. 143. M. 19 E. 3. Judgement, 123. 45 E. 3. 16.

[c] 47 E. 3. tit. Action sur le statute, 38. and the bookes aforesaid.

☞ It appeareth upon consideration of all the bookes aforesaid, that where the ancestor marrieth his heire apparent within the age of consent, and dyeth, the infant [80. a.] still being within the age of consent, the lord may take the infant (if he will) into his possession, in respect the infant may disagree to the marriage; and if the infant be deteyned from him, he shall recover him in a writ of ravishment of ward, and thereupon have the infant delivered to him. [*d*] But if the ancestor marrieth his heire apparant, *infra annos nubiles*, and dieth his heire being *infra annos nubiles*, and after age of consent the heire agreeth to the

[d] 7 H. 6. 11. adjudged in the booke at large.

---

(4) It seems that *precontract* is now no longer a cause for dissolving a marriage in England; for it appears *impliedly* taken away by 26 G. 2. c. 33, which enacts, that there shall be no suit in the ecclesiastical court for compelling the celebration of marriage by reason of any contract, whether *per verba de præsenti*, or *per verba de futuro*, entered into after the 25th of March 1754. It is observable that the statute mentioned contracts of marriage by *future* as well as those by *present* words; but notwithstanding this, it is far from being clear, that matrimony could ever be compelled in the ecclesiastical court on a contract of the former kind otherwise than by *admonition*, and probably it was included in the statute merely from caution. See 2 Stra. 938. —[Note 46.]

the marriage, neither the king nor the lord shall have the marriage, for now it is a marriage *ab initio*, and there need no other marriage.

Sect. 106.

IN the same manner it is, if the gardian marry him, and the wife die, the infant being within the age of 14 *yeares or* 21.

THIS *Littleton* addeth, because he spake in the case next before of a disagreement by the infant. Here he saith, that if the wife dye, the infant being within the age of consent.

Sect. 107.

AND that such an infant may disagree to such marriage, when he comes to the age of 14 *yeares, it is proved by the words of the statute of* Merton, *cap.* 6. *which saith thus:*

De dominis qui maritaverint illos quos habent in custodiâ suâ, villanis, vel aliis, sicut burgensibus, ubi disparagentur, si talis hæres fuerit infra 14 annos, et talis ætatis quòd matrimonio consentire non possit, tunc si parentes illi conquerantur, dominus amittat custodiam illam usque ad ætatem hæredis, et omne commodum quod inde receptum fuerit, convertatur ad commodum hæredis infra ætatem existentis, secundum dispositionem parentum, propter dedecus et impositum. Si autem fuerit 14 *ans et ultra*, quòd consentire possit et tali matrimonio consenserit, nulla sequatur pœna.

And so it is proved by the same statute, that there is no disparagement, but where he which is in ward is married within the age of 14 *yeares.*

"*THE statute of Merton.*" So called because the parliament was holden at *Merton*.

"*And that such infant may disagree, &c. it is proved, &c.*" Note, the time of disagreement is set downe by act of parliament, and so observed by *Littleton*, who seekes no other proofe therein than by the law of *England*. Merton, ca. 6.

"*Ubi disparagentur.*" Disparagement, *disparagatio*, commeth of the verbe *disparago*, and that of *dispar* and *ago*.

Now it is necessarie to be understood, what disparagements there be for the which the heire may refuse.

And of such disparagements there be foure kindes.

The first, *propter vitium animi*; as an ideot, *non compos mentis*, a lunatique, &c. (1).

The

(1) The 15 G. 2. c. 30, annuls the marriages of all persons, who, after being found lunatics on inquisition by commission under the great seal, or after being

Bracton, lib. 2. fol. 91. Britton, fo. 169. Fleta, lib. 1. cap. 12. Mirror, ca. 2. sect. 17. Rot. Parl. 18 E. 1. fo. 9.

The second, *propter vitium sanguinis;* as, 1. a villein: 2. *burgensis:* 3. the sonne or daughter of a person attainted of treason or felony, albeit pardoned, for the blood is corrupted: 4. a bastard: 5. an alien or the childe of an alien. *Burgensis* is a man of trade, as an haberdasher, a draper, or the like (and this agreeth with the civill law, *Patricii cum plebeiis matrimonia ne contrahant*) whereof *Glanvill* speaketh thus: *Si verò fuerit filius burgensis, ætatem habere tunc intelligitur, quando discretè sciverit denarios numerare, et pannos ulnare, et alia paterna negotia similiter exercere.* [80. b.]

The daughter of Nevil married to the sonne of Tho. of Weyland after his attainder.

The third, *propter vitium corporis;* as, first, *de membris,* having but one hand, one foot, one eye, &c.; secondly, deformitie, as to looke asquint, a creeple, halt, lame, decrepit, crooked, &c.; thirdly, privation, as blind, deafe, dumbe, &c.; fourthly, disease horrible, as leprosie, palsie, dropsie, or such like diseases; fifthly, great and continuall infirmitie, as a consumption, and such like; sixthly, impotency to have children in respect either of age past children, or so tender yeares as there is too great disparitie, or for naturall disabilitie or impediment, or such like; seventhly, defloured of her virginity.

1 E. 6. cap. 12.

The fourth kinde of disparagement was *propter jacturam privilegii, &c.* as to marry the heire to a widow, whereby he should by reason of the bigamie have lost the benefit of his cleargie, whereby he might save his life; but now the exception of bigamie in that case is ousted by the statute (1). And *Littleton* saith, [*d*] that there

[*d*] Vide Sect. 109. F. N. B. 149.

---

being committed to the care of trustees by act of parliament, shall marry without the chancellor's declaring them of sane mind. Before this act there could be no doubt as to the validity of the marriages of lunatics, where it could be clearly proved, that they were married in their lucid intervals. One should think, that there could be as little room to doubt their incapacity of contracting marriage whilst in an actual state of insanity, if our books were not remarkably silent on the subject, and it was not also said, that by our law an idiot *à nativitate,* in whom the general incapacity of making contracts appears to form as strong an objection as occurs in the case of a madman, may consent to marriage. This doctrine, as to idiots, however strange it may appear, is mentioned as a point adjudged in one case, and seems confirmed by allowing dower to the wife of an idiot, and by questioning the right of an idiot's husband to courtesy merely, where on account of an office finding the wife's idiotcy and the descent of land to her after the marriage, it is apprehended that there is a concourse of titles between the king and the husband. See 1 Ro. Abr. 357, and ante, fol. 30. b. and note 2, there. By the Roman law, persons continually mad, lunatics, except during the intervals of sanity, and idiots, were all equally incapable of marriage. See Brouwer. de Jur. Connubior, lib. 2. cap. 4.—[Note 47.]

(1) The word *bigamy* is frequently used to describe the crime of marrying a second wife during the life of the first; but the proper name for this offence in our law is *polygamy,* and with us a *bigamist* is a man who either marries a widow, or after the death of his first wife marries a second time, in consequence of which he formerly could not claim the benefit of clergy. This denial of the benefit of clergy to bigamists was in consequence of some ancient papal constitutions and canons of councils against admitting bigamists into holy orders; a prohibition, which, however speciously defended by texts of scripture, wholly originated from the injurious policy of the church of Rome in discouraging the marriages of the clergy, and led the way to the complete establishment of celibacy amongst them. See Levit. c. 21. v. 13, 14. 1 Tim. c. 3.

there be many other disparagements which are not specified in the said statute, for those two mentioned are put but for examples. In a word, it must be *competens maritagium absque disparagatione.*

"*Si talis hæres fuerit infra* 14 *annos, et talis ætatis quòd matrimonio consentire non possit, &c.*" Note, albeit the ward, where he is disparaged, may disagree at his age of fourteene yeares, yet the law doth so abhorre the odious dealing of the gardian, to whom the custody of the heire is committed, and his horrible profanation of honourable marriage, the only ligament of men's inheritance, as it inflicteth a great punishment upon the lord in this case, albeit the marriage be not perfect, but avoydable by disagreement.

"*Tunc si parentes illi conquerantur.*" *Littleton* in the next Section expoundeth these words in this manner, viz. *Si parentes conquerantur*, i. e. *si parentes inter eos lamententur, which is as much as to say, as if the cousins of such infant have cause to make lamentation or complaint for the shame done to their cousin so disparaged, which in manner is a shame to them. Parens est nomen generale ad omne genus cognationis.* See more of this in the next Section.

"*Dominus amittat custodiam illam usque ad ætatem hæredis, et omne commodum quod inde receptum fuerit convertatur ad commodum hæredis, &c.*" Here followeth the penaltie.

First, *amittat custodiam*, that is, the whole benefit of the wardship. But in this case if the gardian hath granted the wardship of the land to another *bonâ fide*, and after, the heire is disparaged, the grantee shall not forget his interest; for the statute is, *dominus amittat custodiam.*

Secondly, *et omne commodum quod inde receptum fuerit convertatur ad commodum hæredis secundum dispositionem parentum.*

These

---

c. 3. v. 12. Summa Concil. per Mirand. fol. 4. a. 119. a. 168. b. 230. b. Bingh. Antiq. Christ. Ch. b. 4. c. 5. Tayl. Elem. Civ. L. 295, and the word *Bigamus* in the index to the Corp. Jur. Canon. ed. Pithœor. However, the exclusion of bigamists from the benefit of clergy was not entirely accomplished, till the council of Lyons ended the doubts which before prevailed, by positively declaring bigamists *omni privilegio clericali nudatos.* It appears, that this constitution was immediately received in England; for the statute of 4 *E.* 1. *de bigamis* takes notice of it, and explains how it should be construed, by directing that it should be understood to comprehend bigamists *before*, as well as those who became so *after.* See 4 E. 1. c. 5. 2 Inst. 273. 2 Hal. Hist. Pl. C. 372. 2 Hawk. Pl. C. b. 2. c. 33. s. 5. and Barringt. on Ant. Stat. 2d. 73. When the benefit of clergy, by being allowed to all who could read, was extended to laymen as well as persons in orders, the reason for ousting bigamists of clergy in great measure ceased; but notwithstanding this, the exception of bigamy continued till it was taken away by the statute of Edw. 6.—The pointing out exactly the appropriated sense of the word *bigamy* in our law was the more necessary, because very sensible writers have been inattentive to it. We find a remarkable instance of this in the quarto edition of the Statutes, the editor of which, in a note on the 4 E. 1. c. 5, refers to the 1 Jam. 1. c. 11, as making *bigamy* a felony.—[Note 48.]

See further, 1 Wooddes. Lec. 425. and 1 East, P. C. 464.

These words are expounded by *Littleton*, which needeth no further explanation. Now where readers upon this statute have put a case, that if the tenant hath issue a daughter, his wife *enseint* with a sonne and dieth, the lord doth disparage the daughter before the age of twelve years, the sonne is borne, the daughter disagrees, the sonne dieth, the daughter within the age of fourteene, she shall be in ward againe: This case is not warranted by this statute, for this statute extends not to the heires female.

Vide the Second Part of the Institutes. Merton, c. 5, 6. 35 H. 6. 53. (9 Co. 127.)

If the tenant make a lease to *A.* for life, the remainder to *B.* in fee, the tenant for life surrenders upon condition, *B.* dieth, his heire within age, the lord disparages the heire, tenant for life entreth for the condition broken and dieth, the heire shall be out of ward, for that he claimeth as heire to one man. But if after the disparagement lands descend from another ancestor to the ward so disparaged, he shall be in ward for those lands.

If two joyntenants be of a ward, and the one disparageth the heire, both shall lose the wardship, for the words be *et omne commodum, &c.*

Britton, fol. 169. acc.

"*Si autem fuerit* 14 *annorum et ultra, &c. nulla sequatur pœna.*" By which it appeareth (as *Littleton* observeth), that there is no disparagement but where the ward is married within the age of fourteene.

Sect. 108.

NOTE (A) *it hath beene a question, how these words shall be understood* (Si parentes conquerantur). *And it seemeth to some, who considering the statute of* Magna Charta, *which willeth,* quòd hæredis maritentur absque disparagatione, &c. *upon which this statute of* Merton *upon this point is founded,* (1) *that no action can be brought upon this statute,* (2) *insomuch as it was never seene or heard, that any action was brought upon the statute of* Merton *for this disparagement against the gardian for the matter aforesaid* (3), *&c. and if any action might have beene brought for this matter, it shall be intended that at some time it would have beene put in ure* (il serra entendue ascun foits (4) estre mise en ure.) *And note* (5), *that these words shall be understood thus,* Si parentes (Et nota, que ceux parolx serront entendens (6), *Si parentes*) conquerantur, id est, si parentes inter eos lamententur, *which is as much as to say* (*lamententur*, que (7) est taunt a dire), *as if the cousins of such infant have cause to make lamentation or complaint amongst themselves, for the shame done to their cousin*

* *All the notes below are in* 81. *a. of the* 13*th and* 14*th editions.*

(A) See 2 Sid. 170, where the authenticity of this section is questionable.

(1) * *that no action can be brought upon this statute,* not in L. and M.

(2) * *as it seems, &c.* in L. and M.

(3) * *for the matter aforesaid,* not in L. and M.

(4) * per comen presumption devaunt ceux heurez *instead of* entendu ascun foits, *in L. and M.*

(5) * *And note* not in L. and M.

(6) * en tiel maner, *in L. and M.*

(7) * *on* instead of *que* in L. and M.

cousin so disparaged, which in manner is a shame to them, then may the next cousin, to whom the inheritance cannot descend, enter and ouste the gardein in chivalrie. And if he will not, another cousin of the infant may doe this, and take the issues and profits to the use of the infant, and of this to render an account to the infant when he comes to his full age. Or otherwise the infant within age may enter himself, and ouste the gardein, &c. Sed quære de hoc.

[81. a.] *"THE statute of Magna Charta."* Though it be in forme of a ☞ charter, yet being granted by assent and authoritie of parliament *Littleton* here saith it is a statute. 9 H. 3. (2 Inst. 1.) Vide 8 Co. the Prince's case.

This parliamentarie charter hath divers appellations in law. Here it is called *Magna Charta*, not for the length or largenesse of it, (for it is but short in respect of the charters granted of private things to private persons now a dayes being (*elephantinæ chartæ,*) but it is called the great charter in respect of the great weightinesse and weightie greatnesse of the matter contained in it in few words, being the fountaine of all the fundamentall lawes of the realme; and therefore it may truly be said of it, that it is *magnum in parvo*. It is in our bookes called *Charta Libertatem, et Communis Libertas Angliæ, or Libertates Angliæ, Charta de Libertatibus, Magna Charta, &c.* And well may the lawes of *England* be called *Libertates, quia Liberos faciunt. Magna fuit quondam Magnæ reverentia Chartæ.* Bracton, 414. and 291. Fleta, lib. 2. cap. 48. & lib. 3. cap. 3. Mirror, cap. 2. sect. 18. Brit. fol. 177. b.

This statute of *Magna Charta* is but a confirmation or restitution of the common law, as in the statute called *Confirmatio Chartarum anno* 25 *E.* 1, it appeareth by the opinion of all the justices; and in 5 *H.* 3. tit. Mord. 53, *Magna Charta* is there vouched; for there it appeareth that king *John* had granted the like charter of renovation of the ancient lawes. 25 E. 1. 5 H. 3. Mord. 53. Matth. Paris, 246. 276. 248.

This statute of *Magna Charta* hath beene confirmed above thirty times and commanded to be put in execution. By the statute of 25 *E.* 1. cap. 2, judgements given against any points of the charters of *Magna Charta*, or *Charta de Forestâ*, are adjudged void. And by the statute of 42 *E.* 3. c. 1, if any statute be made against either of these charters it shall be void. 25 E. 1. ca. 2. 42 E. 3. ca. 1.

[81. b.] *"Upon the statute of Magna Charta the statute of Merton is founded upon ☞ this point, viz. Quòd hæredes maritentur absque disparagatione* (1)."

"Founded" So as *Magna Charta* is the foundation of other acts of parliament. This act extended as well to females as to males.

"No action can be brought upon this statute, insomuch as it was never seene or heard, &c. And if any action might have beene brought for this matter, it shall be intended that at some time it would have beene put in ure."

Hereby

(1) See 9 Hen. 3. c. 6.

Vide Petitiones coram domino rege in Parliamento, fol. 3. 18 E. 1. 39 H. 6. 39. per Ashton. 6 Eliz. Dier, 229. (Ante, 11. a.) 23 Eliz. Dier. Nullum breve de errore de judicio in 5. port. quia nullum breve repetitur. In custodia parentum.

Hereby it appeareth how safe it is to be guided by judicial presidents, the rule being good, *Periculosum existimo, quod bonorum virorum non comprobatur exemplo.* And as usage is a good interpreter of lawes, so non usage where there is no example is a great intendment that the law will not beare it; for, saith *Littleton*, if any action might have beene grounded upon such matter, it shall be intended, that sometime it should have been put *in ure* (2). Not that an act of parliament by non user can be antiquated or lose his force, but that it may be expounded or declared how the act is to be understood.

3 E. 3. 50. 11 H. 4. 7. and 38. Vide le statute de Marlebridge, cap. 27. [2 Cro. Jac. 478. Str. 121. Post. 113. a. 4 Inst. 75.]

"*Si parentes conquerantur.*" Of this sufficient hath beene said before.

"*If the cousins.*" Here *Littleton* expoundeth parents to be his cousins, under which name of cousins *Littleton* includeth uncles and other cousins, who when the father is dead are *in loco parentum.*

"*Have cause to make lamentation, &c.*" Note, if they have cause to make lamentation, it sufficeth, though they never complaine.

"*For the shame done to their cousin.*" For when their cousin is disparaged in his marriage, it is not only a shame and infamie to the heire, but in him, to all his bloud and kindred.

"*Then may the next cousin, to whom the inheritance cannot descend, enter and ouste the gardein in chivalrie.*"

This is worthy the observation, for the words of the statute are generall, *secundum dispositionem parentum*, and the construction thereof shall be according to the reason of the common law; for the next cousin, to whom the inheritance cannot descend, shall enter and ouste the gardian, and shall be in place of a gardian, as it is in case of a gardian in socage.

"*And*

(2) In the famous case of Ashby and White, in which the question was, whether an action on the case would lie against a returning officer for refusing a vote at the election of a member of parliament, one objection made to the action was, that it was of the first impression: and the words of Littleton, in explaining why any action could not be maintained on the statute of Merton against a guardian for disparagement, were much relied upon by judge Powys as an authority directly in point. But lord chief justice Holt answered this objection by citing many instances of allowing new actions; and therefore in this particular judge Powell concurred with Holt, though they differed on the principal question. See 2 L. Raym. 944. 946. and 957. It might also have been observed, that Littleton is only stating the opinion of others, and that he concludes with a *quære;* and further, that in the case put by him the question was merely, whether the proper remedy was by *action* or by *entry*. However, it must be confessed, that the novelty of an action may frequently be fairly urged as a strong *presumptive* argument against its lying; more particularly, where the *right*, which is the foundation of the action, is admitted, and the *mode of relief* is the only thing controverted, as was the case in Ashby and White.—[Note 49.]

"And if he will not, another cousin of the infant may doe this." Still pursuing the reason of the common law in case of gardian in socage.

"And take the issue and profits to the use of the infant, &c." This is so evident as it needeth no explication.

"Or otherwise the infant within age may enter himself, and ouste the gardein." If none of the cousins aforesaid will enter, then the heire himself may enter; in all which the reason of the common law is pursued. But what if the heire be disparaged, and the next of kin doth enter, and when the heire commeth to 14 he agreeth to the marriage; yet shall not this give any advantage to the lord, for that he had lost the wardship before.

[82. b.]

☞ Sect. 109.

ALSO, there be many and divers other disparagements which are not specified in the same statute. As if the (Ante 80. a.) *heire which is in ward be married to one which hath but one foot, or but one hand, or which is deformed, decrepit, or having some horrible disease, or great and continuall infirmitie; and (if he be an heire male) if he be married to a woman past the age of childe-bearing. And there be other causes of disparagement; but inquire of them, for it is a good matter to understand.*

Of this sufficient hath been said before.

Sect. 110.

AND of heirs males which be within the age of 21 *yeares after the decease of their ancestor and not married, in this case the lord shall have the marriage of such heire, and he shall have time and space to tender to him covenable marriage without disparagement within the said time of* 21 *yeares. And it is to be understood, that the heire in this case may chuse whether he will be married or no; but if the lord, which is called guardian in chivalry, tenders to such heire covenable marriage within the age of* 21 *yeares without disparagement, and the heire refuseth this, and doth not marrie himselfe within the said age, then the gardein shall have the value of the marriage of such heire male. But if such heire marrieth himself within the age of* 21 *yeares against the will of the gardein in chivalrie, then the gardein shall have the double value of the marriage by force of the statute of* Merton *aforesaid, as in the same statute is more fully at large comprised.*

"TO tender to him covenable marriage, &c." But it is in the election of the lord, whether for the single value the lord will 6 Co. 70. Lo. Darcie's case. Vid. Britton. fol. 169. (5 Co. 127.)

will tender a marriage or no, for he shall have the single value without any tender (1).

Stat. de Merton, cap. 6. 18 E. 3. 18.

And of this there needeth no other explication. The value of the marriage of such an heire is according to the valuation by lawfull triall, or so much as another had before offered to give for the same without fraud and covyn.

"The heire in this case may chuse whether he will be married or no, &c." And so on the other side, though there be a tender made of covenable marriage without disparagement, yet the heire must refuse, for in everie marriage there must be a free consent. [82. b.]

"If such heire." That is, if such an heire to whom a tender hath been made by the lord, and by whom a refusall hath beene made; if such an heire afterwards marrieth another within age, he shall forfeit double the value; but if he before any tender marrieth himselfe within age, he shall pay but the single value of the marriage.

Neither the single value nor the double value shall be recovered against the heire but after his full age; but for both these the lord hath a double remedie, viz. an action, as is aforesaid; or the lord may retaine the land after full age for his satisfaction of both, with this difference, that in the case of the single value the taking of the profits shall not be accounted parcell of the value, but as a gage or pledge till the heire do satisfy him of the single value; but in case of the double value, the perception of the profits shall be taken in satisfaction of the double value; for the statute of *Merton*, which giveth the forfeiture, saith, *Dominus teneat terram, &c. per tantum tempus quòd inde percipere possit duplicem valorem maritagii:* which words (*quòd inde, &c.*) prove that the taking of the profits shall go in satisfaction: but in case of the single value, untill the heire doth satisfie the lord of the same.

Stat. de Merton, cap. 6. 2 E. 2. acc. sur l'estat. 43. 3 E. 2. ibid. 27. 16 E. 3. ibid. 14. 18 E. 3. 18. Temps E. 1. acc. sur l'estat. 43 E. 3. 21. 27 H. 8. 4.

Statute de Merton, cap. 7. 35 H. 6. tit. Gard. 71. 6 Co. 71. Lord Darcie's case.

No forfeiture of marriage is given, by the said statute of *Merton*, of an heire female, as appeareth by the said act; neither at the common law could the lord have holden the land of the heire female after fourteene yeares for the value.

Sect. 111.

ALSO, divers tenants hold of their lords by knights service, and yet they hold not by escuage, neither shall they pay escuage; as they which hold of their lords by castle-ward, that is to say, to ward a tower of the castle of their lord, or a doore or some other place of the castle, upon reasonable warning, when their lords heare that the enemies will come, or are come in England. *And in many other cases a man may hold by knight's service, and yet he holdeth not by escuage, nor shall pay escuage, as*

(1) This point, which before lord Coke's time appears to have been doubtful, was adjudged in the case of Palmer and Wilder, and and again in lord Darcie's case. See the former case in 5 Co. 126. b. and the latter in 6 Co. 70. b.

as shall be said in the tenure by grand serjeantie. But in all cases where a man holds by knight' service, this service draweth to the lord ward and marriage.

"*BY castle-ward, wardum castri, seu castel-gardum, seu castri-gardum.*" He that holdeth by castle-gard, holdeth by knight's service, but not by escuage; for escuage is due when the king maketh a voyage royall out of the realme (as hath beene said) and the tenant maketh default; but castle-gard is to be done within the realme, and without any voyage royall. 4 Co. 88. in Luttrell's case. 6 Co. 20. a. Gregorie's case. 29 R. 2. Gard. 195.

Also a certaine tearme is appointed for the service of the tenant that holdeth by escuage, but no certaine tearme by law for him that holdeth by castle-gard. *Vide* in the title of Grand Serjeantie, Sect. Hereof come ☞ *castellani*, or *constabulari castri*, for keepers or constables of a castle. [83. a.] Vide Mag. Chart. cap. 19. 20 W. 1. cap. 7. Bract. lib. 5. fol. 363. Fleta, lib. 2. cap. 43.

"*To ward a tower of the castle, &c.*" A tower, or a doome, or a bridge, or a sconce, or some other certaine part of the castle; for the tenure must be certaine. And this may be done by the tenant himselfe or his deputie. Magna Charta. cap. 20.

"*Of their lord.*" For it cannot be of a castle of another.

Lord and tenant by castle-gard, the lord granteth over his seigniory to another, [*a*] the castle-gard is gone, because the grantee hath not the castle. [*b*] For the same reason it is, that if one holdeth of me, as of my manor of *D.* by fealtie and suit of court, if I grant over the services of this tenant, the suit is gone, because the grantee hath not the manor. [*c*] But if the castle be wholly ruinated, *si castrum sit penitus dirutum*, yet the tenure remaineth by knights service, and it goeth in benefit of the tenant, as to the garding of the castle, until it be reedified. But ward and marriage belonged to the lord in the meane time. For *Littleton* in the end of this Section putteth it for a generall rule in all cases where a man holdeth by knight's service, it draweth ward and marriage. (2 Ro. Abr. 513.) [*a*] Temps E. 2. tit. Ass. 399. 31 E. 1, tit. Ass. 441. [*b*] 17 E. 3. 65. 72. 4 E. 3. 42. [*c*] 4 Co. 88. Luttrell's case. 3 H. 8. Bendloe's and Capel's case. 4 E. 3. 55.

If the tenant make default in garding of the castle, the lord may distreine for it, and recover satisfaction in dammages.

"*Upon reasonable warning.*" This warning must be given by the lord or some other for him, and the tenant need not to stirre until he have such warning.

"*Enemies.*" Which is to be understood of any manner of enemies whatsoever. And though *Littleton* speakes of enemies, yet it seemeth that to keep a castle in time of insurrection and rebellion (albeit in proprietie of speech rebels are no enemies) is a tenure by knight's service. *Vide* Hill. 8 *E.* 1. Midd. Rott. 86.

"*Will come.*" For preparation is to be made upon warning before the enemie be come indeed into *England*. This appeareth to be in time of hostilitie and warre, or for preparation therefore. But a tenure to keepe a castle in time of peace only is no knight's service.

If the tenant by castle-gard doe serve the king in his warre, he shall be discharged against the lord, according to the quantitie of the time that he was in the king's host. (2 Ro. Abr. 505.)

Fleta

Fleta, lib. 1. cap. 42.* *Fleta* speaketh of an old word called *wardite*, and (saith he) *significat quietanciam misiricordiæ, in casu quo non invenerit quis hominem ad wardam faciendam in castro.*

* *It should be* cap. 47.

Sect. 112.

AND if a tenant which holdeth of his lord by the service of a whole knight's fee dieth, his heire then being of full age, scil. *of* 21 *yeares, then the lord shall have* 100 s. *for a reliefe, and of the heire of him which holds by the moitie of a knight's fee*, 50 s. *and of him which holds by the fourth part of a knight' fee*, 25 s. *and so he which holds more, more, and which lesse, lesse.*

"*RELIEFE, relivum.*" This word is derived from the originall before (1).

Vide Sect. 103. [a] Temps E. 1. Reliefe, 13. *Nota*, Reliefe [a] is no service, but an improvement of the service, or an incident to the service (2), for which the lord may

41 E. 3. 22. 4 E. 2. Avowrie, 210. 7 H. 6. 13. 22 H. 8. Rot. 528. 34 E. 1. Avowrie, 233. (3 Co. 66. Ante 47. b.)

---

(1) See ante 76. a. Lord Coke there cites a passage from Domesday-book, in which reliefs are mentioned; and from this early use of the word, and from the terms of a law of Edward the Confessor, and of two laws of Canute, some have inferred, that reliefs were known to the Saxons. This circumstance is much relied on by those who insist that feudal tenures were established in England before the Conquest; and therefore sir Henry Spelman, who supports the contrary opinion, very full in his observation on this part of the subject. The sum of what he advances is, that Domesday-book at the utmost only proves the use of reliefs after the Conquest, which is not denied; that the supposed law of Edward the Confessor is either not genuine or belongs to William Rufus; that *heriots*, which is the word used in the original language of the laws of Canute, is improperly translated *relief;* and lastly, that however it might suit with the policy of the Normans to assimilate *reliefs* to heriots, there were the most essential differences between the two. According to sir Henry Spelman, the heriot was paid out of the *goods* of the *deceased* possessor of the land, the relief by the *heir*, out of *his own purse;* the heriots at *all* events, the relief *only* in case of taking up the lands in succession. These two of the differences taken by Spelman are particularly stated here; because they apply to heriots and reliefs as they are now distinguishable. See the Treat. on Feuds in Spelm. Posthum. 31. It is observable, that Bracton marks the distinction between reliefs and heriots very strongly, and in terms partly corresponding with the idea of Spelman; for after treating at large on reliefs, Bracton adds, *est quidem alia præstatio, quæ nominatur heriettum, et quæ nullam comparationem habeat ad relevium; scilicet, ubi tenens, liber vel servus, in morte sua dominum suum, de quo tenuerit, respici de meliori averio suo, vel de secundo meliori, secundum diversam locorum consuetudinem; quæ quidem præstatio magis fit de gratiâ quàm de jure, et quæ hæreditatem non contingit.* See Bract. lib. 2. cap. 36. fo. 86. a. See further as to heriots, post. 185. b.—[Note 50.]

[2] See acc. Ley on Wards and Liv. fol. ed. 17. W. Jo. 133. The distinction is not merely *nominal;* for lord Coke in another place assigns it as a reason, why a relief is not within the limitation of 50 years prescribed by the 32 H. 8. c. 2, in the case of avowry or conusance for *suit* or *service*. 2 Inst. 95. Note, that in the book last cited *forty* years are mentioned as the limitation in the 32 H. 8, but Mr. Ruffhead in his edition of the Statutes says, that in the *record* the time is *fifty* years.—[Note 51.]

[83. b.] ☞ but his executors or administrators may have an action of debt, and cannot distraine (1).

may distreine (3), but cannot have an action of debt (4),

And it [*b*] is to be understood, that *feodum militis*, a knight's fee, consisteth of twentie pound land (2), and he payeth for his reliefe for a whole knight's fee the fourth part of his fee, viz. five pound, and so according to the rate.

[*b*] Stat. del 1 E. 2. de militibus. Vide 9 Co. 124. Anth. Lowe's case. (2 Inst. 596. Ante 69. b.)

Baronia, a baronie, or a baron's fee, consisteth of thirteene knights fees and the third part of a knight's fee (3), which amounteth to foure hundred markes *per annum;* and the baron for an entire baronie payeth for his reliefe an hundred markes, which is the fourth part of the value of his baronie.

Comitatus, an earledome, or an earle's fee, consisteth of a baronie, and the third part * of a baronie, which includeth twenty knights fees, amounting to four hundred pound land *per annum*, and he payeth for his reliefe for an entire earldome the fourth part of his revenue, and that is a hundred pound. All which appeareth by the statute of *Magna Charta*, cap. 2, made in the 9th yeare of *Henrie* the third, at which time there was neither duke, marquesse nor viscount in *England*, as before is said. But there be precedents in the exchequer, that a dukedome consisting of two earledomes, viz. eight hundred pound land by the yeare, payeth two hundred pound, and a marquesse consisting of two baronies, viz. eight hundred markes land *per annum*, and of an earledome and a halfe, † payeth two hundred markes for his reliefe. What the viscount should pay in certaine I have not heard. Before the making of the statute of *Magna Charta* the king had *rationabile relevium* of noblemen, and it was not reduced to any certaintie (4), yet ought it to have been reasonable and not excessive.

(2 Ro. Abr. 516.)

Glanvil. lib. 9. cap. 4. 6. Bracton, lib. 2. fol. 83. Britton, fol. 178.

Ockam, 42. F. N. B. 83. 256. Fleta, lib. 3 cap. 17. Magna Charta, cap. 2.

I have seene the record of a charter made in 20 *H.* 6. to *Henrie Beauchampe* earle of *Warwicke*, whereby he was created king of the Ile of *Wight*, to him and the heires males of his bodie. His reliefe was incertaine, and not limited by the statute of *Magna Charta*.

It is to be observed, that the words of the statute of *Magna Charta* be, *hæres comitis de comitatu integro, et hæres baronis de baroniâ integrâ, &c.*" Now what an entire earldome and an entire baronie is, hath beene declared before.

Vide Bracton, fol. 84. 14 H. 4. in recordo longo. 10 H. 7. 19. 20 E. 3. Ass.

122. tit. Avowrie, 126. 18 Ass. pl. ultimo. 23 E. 3. 8.

* *The words* third part *seem to be here inserted for* half *or* moiety; *for since a barony is said to contain* 13⅓ *knights fees, it follows that an earldom, which is* 20 *knights fees (Vid. supra & ante* 69. *b.) must consist* of a barony and a half.

† *The words* a halfe *seem to be here inserted for* the third part of an earldom. *See the note supra.*

It

(3) But it is said, that if the relief is claimed, not by reason of tenure, but by *custom*, there must be a prescription for the distress to warrant it. See W. Jo. 133.—[Note 52.]

(4) Acc. ante 47. b. But there are some opinions to the contrary. See 2 Leon. 179. 2 Ro. Rep. 371.

(1) P. S. acc. ante 47. b. post. 162. b. and 1 Show. 36.

(2) See ante 69. a. and note 3, there.

(3) As to this notion of there being a certain number of knights fees in a barony and earldom, see ante 69. a. note 5.

(4) See 2 Inst. 7, 8, and Wright's Ten. 99.

It is also to be observed, that at and before the statute of *Magna Charta* all earledomes and baronies were derived from the crowne, and were holden of the king *in capite*, and the king would not suffer them to be divided, or severed. And such entire earledomes and entire baronies are within the statute, but at this day earles and barons are without such earledomes and baronies of the king's gift in chiefe. For at the creation of an earle, he hath sometimes an annuitie granted unto him (5), and sometimes nothing; so as such earles and barons so created are cleerely out of the statute of *Magna Charta*, and are to pay such reliefes as other men that hold of the king *in capite*. For as the heire of a knight shall not pay reliefe, unless he hath a knight's fee, &c. so neither the earle nor baron shall pay any reliefe by this statute, unlesse he hath an earledome, &c. or baronie, &c.

16 E. 3. Eschange, 2. 46 E. 3. Forfeiture, 18.

"*His heire of full age, scil. of* 21 *yeares.*" And yet in some case the heir shall pay reliefe when he was within age at the time of the death of his ancestor. As if a man holdeth lands of the king by knights service *in capite*, and of a common person other lands by knights service, and dieth, his heire being within age, the king hath all in ward by his prerogative untill the full age of the heire. In this case the heire shall pay reliefe to the other lord, for that the king had the wardship of bodie and lands. And the lord upon everie descent ought to have either wardship or reliefe.

24 E. 3. 24. 26 H. 8. 32 H. 8. ca. 2. in fine.

But if there be lord and tenant by knights service, and the tenant dieth, his heire being within age, the lord wayveth his wardship, as he may, and taketh himselfe to his seigniorie; in this case the lord shall not have reliefe at his full age, because he might have had the wardship of the bodie and land. Lord and tenant of two manors by divers tenures by knight's service, the tenant is disseised of the one, and the disseisor dieth seised, and the tenant dieth seised of the other, his heire within age, the lord seised the body and lands of that manor, and after the heire at his full age recovereth the other manor against the heire of the disseisor, he shall pay reliefe for that manor, and so one lord of the heire of one tenant shall have both wardship and during his minorite and reliefe at his full age.

1 E. 3. 6. Pl. Com. 229. 33 E. 3. tit. Gard. Statham.

[*k*] 3 E. 3. 13. 76. 8 R. 2. Reliefe, 14. 3 H. 4. 2. 2 H. 3. Avowrie, 124.

☞ "*His heire.*" [*k*] And yet the successor of a bishop or abbott may pay reliefe by prescription or grant.

[84. a.]

If

---

(5) This annuity is therefore called *creation-money*, and the grant of it usually expressed that it was assigned in order to enable the grantee the better to sustain his newly-acquired dignity. Mr. Madox gives us various instances of such annuities; and it appears, that they were not confined to earls; for one of the letters-patent in his book is a grant of 10*l.* a year by Hen. 6. out of the crown revenues in Cumberland to sir Thomas Percy on creating him baron of Egremont. See Mad. Baron. Anglic. 142. In Dyer, 2. a. notice is taken of an annuity of this kind, and it is there said to be so annexed to the dignity as not to be alienable. See further as to creation-money, Camd. Britann. ed. 1772, p. 125.—[Note 53.]

If the tenant infeoffeth his heire apparent by collusion, and dieth [*l*] his heire of full age, it is a question in our bookes, whether he shall have reliefe either by the common law, or by the statute of *Marlebridge*, ca. 6. But now the statute [*m*] of 13 *Eliz.* ca. 5, hath cleered that question, and that the lord shall have reliefe where the conveyance is made to any person by collusion, &c.

[*l*] 39 E. 3. tit. Reliefe. 24 E. 3. Reliefe, 11. Bracton, lib. 2. 85.
[*m*] 13 Eliz. cap. 5.

Sect. 113.

ALSO, a man may hold his land of his lord by the service of two knights fees; and then the heire, being of full age at the time of the death of his ancestor, shall pay to his lord x. *pound for reliefe* (1).

This is evident, and needeth no explanation.

Sect. 114.

NOTE, if there be grandfather father and sonne, and the mother dieth living the father of the sonne, and after the grandfather, which holds his land by knight's service, dieth seised, and his land descend to the sonne of the mother as heire to the grandfather, who is within age; in this case the lord shall have the wardship of the land, but not of the bodie of the heire, because none shall be in ward of his bodie to any lord living his father, for the father during his life shall have the marriage of his heire apparent, and not the lord (2). *Otherwise it is, where the father dieth living the mother, where the land holden in chivalrie descends to the son on the part of the father, &c.*

"*SONNE.*" Yet the father shall have the marriage of his daughter if she be his heire apparent; and *Littleton's* reason extendeth to the daughter, for that (saith he) the father shall have the wardship of his heire apparent, within which words the daughter is included, so long as she continueth heire apparent.

Fleta, lib. 1. cap. 5. 16 E. 3. Disseisin, 6. 31 E. 1. Gard. 154. 8 E. 2. Tresp. 235. F. N. B. 243. Ambrosia Gorge's case, 6 Co. 22.

"*The lord shall have the wardship of the land.*" Note, that albeit in this case the law doth give the custodie of the body to the father, and barreth the lord thereof, yet the lord shall have the wardship of the land by force of the tenure at the first creation thereof. And so it is if the father marieth his heire within

---

(1) See further as to reliefs, post. 85. a. at the end of the note there, 90. b. 91. a. and b. 92. a. 93. a. 106. a. Wright's Ten. 97, and Vin. Abr. *Tenures*, E. a. to O. a.

(2) *So in the case of the king, the father shall have the custody of the body and the marriage.* 7 Jac. Cur. Ward. *Ley, n.* 2. *Unton's case.* Hal. MSS.—See Ley, 1.—[Note 54.]

within age and dieth, yet the lord shall have the wardship of the land.

"*Living his father.* This doth not extend to any collaterall heire, but only to the sonne or daughter being heire apparent; for albeit a man shall have an action of trespasse, *quare consanguineum et hæredem cæpit*, and albeit the words be *cujus maritagium ad ipsum pertinet*, because the well bestowing of his heire apparent in marriage is a great establishment of his house, yet that is to be understood as against a wrong doer, but not against a gardian in chivalrie, and the mother shall have the writ for taking away of her sonne and heire apparent. And yet the mother shall not barre the lord by knight's service of his wardship of the bodie, as *Littleton* here saith :* *qui tamen, ex filiâ tuâ nascitur in potestate tuâ non est, sed patris ejus.* [84. b.]

9 E. 2.
18 E. 3. 25.
29 Ass. 35.
29 E. 3. 37.
31 E. 3. Bar. 237.
32 E. 3. Gard. 32.
36 E. 3. 17.
31 H. 6. 55.
12 H. 4. 16.
F. N. B. 143.
31 E. 3. Br. 357.
(2 Ro. Abr. 39.)

9 E. 4. 53. * Vide Flet. lib. 1. cap. 6. See W. 2. c. 35.

"*To any lord.*" Put the case there is lord, and *feme* tenant by knight's service of a carve of land, the *feme* maketh a feoffment in fee upon condition, and taketh the lord to husband, and hath issue a sonne, the wife dieth, the issue entreth for the condition broken, the lord entereth into the land as gardeine by knight's service, and maketh his executors, and dieth; in this case, the executors shall have the wardship of the land during the minority of the heire, but not the wardship of the body: for albeit the lord seemeth to have a double interest in the wardship of the bodie, one as lord, and another as father, yet as father, and not as lord, in judgment of law, he shall have the wardship of the bodie of his son and heire apparent, in respect of nature, which was before any wardship in respect of seigniories by knight's service began, and that wardship by reason of nature cannot be waived, and claime made in respect of the seigniorie. And the executors of the father shall not have such a wardship which the testator had as father, neither can such a wardship be forfeited by outlawrie, because it is due to the father in respect of privitie of nature.

(3 Co. 39. a. Post. 88. b.)
33 H. 6. 55.
7 Co. 13. in Calvin's case.
Vide Flet. lib. 1, c. 12. & Cum Patr. de feodo, &c.
(Ante 8. a. 2 Ro. Abr. 39.)

"*Of his heire apparent.*" And therefore if the father be attainted of felonie, &c. then cannot the sonne or daughter be an heire apparent, because the blood is corrupted betweene them, and consequently in the life of the father his sonne in that case shall be in ward.

A woman seised of lands in fee holden by knight's service taketh husband an alien, and hath issue, and the wife dieth, the issue shall be in ward, and the father shall not have the custodie of him, for that in the eye of the law he is not his heire apparent, as *Littleton* here speaketh.

Sect. 115.

NOTE, if a man be seised of land which is holden by knight's service, and maketh a feoffment in fee to his own use, and dieth seised of the use, his heire within age, and no will declared by him, the lord shall have a writ of right of the wardship of the bodie and land, as if the tenant had died seised of the demesne. And if the heire bee of full age at the time of the decease of his ancestor, in this case he shall pay reliefe, as if he had been seised of the demesne. And this is by the statute of 4 *H.* 7. *cap.* 17.

This Section is in addition to *Littleton* (1), and therefore I passe it over; and the rather, for that the said statute of 4 *H.* 7. is become of no force, for that by the statute of 27 *H.* 8. cap. 10. all uses are transferred into possession.

[85. a.]

☛ Sect. 116.

NOTE, there is gardian in right in chivalrie, and gardian in deede in chivalrie. Gardian in right in chivalrie is, where the lord by reason of his seigniory is seised of the wardshippe of the lands and of the heyre, ut suprà. *Gardian in deede in chivalrie is, where in such case the lord after his seisin grants, by deede or without deede, the wardship of the lands, or of the heire, or of both, to another, by force of which grant the grauntee is in possession. Then is the grantee called gardian* in fait, *or gardian in deed.*

HERE *Littleton* divideth gardein in chivalrie into gardian in right, and gardian *in fait.* And this is evident, and needeth no explanation.

"By deed or without deed." Here *Littleton* affirmeth, that the wardship of the body may be granted over without deed; and herein note a diversity betweene an originall chattell of a thing that properly lyeth in grant, and a chattell derived out of a freehold of any thing that lyeth in grant. As for example, if a man make a lease for years of a villeine, this cannot be done without deed, neither can the lessee assigne it over without deed, because it is derived out of a freehold that lyeth in grant. But the wardship of the body is an original chattel during the minority derived out of no freehold; and therefore as the law createth it without deed, so it may be assigned over without deed (2). (2 Ro. Abr. 62.) 12 E. 3. tit. Grant. 59. 7 E. 3. 63. 26 E. 3. 65. 28 E. 3. 96. 14 E. 3. Act. sur le stat. 17. 25 E. 3. 40. 31 E. 3. Vouch. 5. 46 E. 3. 25. 20 E. 4. 16.

12 H. 4. 19. 5 H. 7. 17. 36. 22 El. Dyer, 371. 35 H. 8. Br. tit. Grant, 85.

A corporation aggregate of many cannot make a lease for yeares without deed, in respect of the quality of the incorporation; but their lessee may assigne it over without deed. 36 H. 8. tit. Grant, B. 125. 22 H. 6. 34. 19 H. 6. 33.

If (Post. 325. b.)

---

(1) It was first introduced in Red.

(2) Lord Coke means that wardship is a thing lying in grant, and as it is an original chattel, it may be granted over or assigned without deed: an advowson lieth in grant, but it is a freehold, and a lease for years thereof is a derivative chattel: the rule is no other than this, that if the principal cannot be assigned without deed, neither can the derivative.

24 E. 3. 69, 70. 5 E. 3. 58. 43 E. 3. 15. 5 H. 7. 36. 14 H. 7. 16. 15 H. 8. 8. Bract. 366. 368. 246. 43 E. 1. 6. 5 H. 7. 37. 11 H. 6. 4. 6 H. 7. 3. 18 H. 8. 16 El. Dyer, 323.

If an advowson be holden by knight's service, and the tenant dieth, his heire being within age, the lord cannot grant the wardship of the advowson without deed; because it is derived out of an inheritance that lyeth in grant, and passeth not by livery; for *jus præsentandi est incorporale*, and so (albeit there be diversity of opinion in our bookes) is the law taken at this day (1).

☞ Chap. 5. Of Socage. Sect. 117. [58. b.]

TENURE in socage is, where the tenant holdeth of his lord the tenancie by certeine service for all manner of services, so that the service be not knights service. As where a man holdeth his land of his lord by fealty and certaine rent, for all manner of services; or else where a man holdeth his land by homage, fealty, and certaine rent, for all manner of services; or where a man holdeth his land by homage and fealty for all manner of services; for homage by itselfe maketh not knights service.

"*TENURE*

---

(1) By the 12 Cha. 2. c. 24, tenure by *knight's service*, whether of the king or of a common person, together with all its oppressive fruits and consequences, as also those of *socage in capite*, is wholly taken away; and every such tenure is converted into *free* and *common socage*. The same statute enacts, that all tenures which should afterwards be created by the king, should be in *free* and *common socage* only. Nothing can be more full in expression than this act; for besides *generally* abolishing tenure by knight's service, and the consequences peculiar to that tenure and *socage in capite*, it descends into *particulars* with a redundancy of words, which can only be accounted for by the extreme anxiety to extirpate completely the evils the legislature had under contemplation, for which purpose it might be deemed most safe to attack them in every shape. We have already observed in some former notes, that homage, escuage, and the aids *pur file marier*, and *pur faire fitz chivalier* are expressly mentioned. It remains to add, that the statute, after taking away the court of wards and liveries, enumerates wardships, liveries, primer seisins or ouster le mains, values and forfeitures of marriages, and fines, seizures, and pardons for alienation, and sweeps away the whole. But the act preserves rents certain, heriots, suits of court, and other services incident to common socage, and fealty; and also fines for alienation due by the customs of particular manors, unless such fines are for lands *in capite*. Reliefs for lands, of which the tenure is converted into common socage, are also saved in some instances; for the clause which preserves *rents certain*, provides that such relief shall be paid *in respect of such rents* as is paid on the death of a tenant in common socage. From this clause it seems, that there can be no relief out of lands which the statute changed into *socage*, unless where a quit rent is also payable; and the reason of thus expressing the act will appear by considering, that a year's rent is the relief for lands holden by common socage, and consequently is never due out of lands which are not subject to a rent, unless by special custom, or express reservation. See post. Sect. 126.—[Note 55.]

"*TENURE in socage* (1)."

Agriculture or tillage is of great account in law, as being very profitable for the common wealth, wherein the goodnesse of the habit is best knowne by the privation; for by laying of lands used in tilth to pasture, six maine inconveniences do daily encrease. First, idlenesse, which is the ground and beginning of all mischiefs. 2. Depopulation and decay of townes; for where in some townes 200 persons were occupied, and lived by their lawful labours, by converting of tillage into pasture, there have beene maintained but two or three heardsmen; and where men have beene accounted sheepe of God's pasture, now become sheep men of these pastures. 3. Husbandry, which is one of the greatest commodities of the realme, is decayed. 4. Churches are destroyed, and the service of God neglected by diminution of church livings (as by decay of tythes, &c.) 5. Injury and wrong is done to patrons and God's ministers. And 6. The defence of the land against forraine enemies is enfeebled and impaired, the bodies of husbandmen being more strong and able, and patient of cold, heat, and hunger, than of any other.

Mirror, ca. 1. s. 3. 4 H. 7. ca. 19. 4 Co. Tirringham's case, fo. 39. and 4 H. 7. ca. 12.

The two consequents that follow of these inconveniences, are, first, the displeasure of Almighty God; and secondly, the subversion of the polity and good government of the realm; and all this appeareth in our bookes. And the common law [a] giveth arable land (which anciently is called *hyde and gaine*) the preheminency and precedency before meadowes, pastures, woods, mynes, and all other grounds whatsoever; and [*] *averia carucæ*, the beasts of the plough, have in some cases more privilege than other cattell have. And amongst the *Romans* agriculture or tillage was of high estimation, insomuch as the senators themselves would put their hand to the plough; and it is said, that never prospered tillage better, than when the senators themselves plowed (such force hath the example of superiors) whereof three famous *Romanes* in their several kindes spake.

[a] 20 E. 3. Admesurement, 8. 14 Ass. 21. 24 E. 3. 25. [*] Mirror. Bracton, fo. 217. Fleta, lib. 2. ca. 41. Regist. Orig. 97. Ockam, 38, 39. 4 E. 3. 1. a. 18 E. 2. tit. Action sur le stat. 45. 29 E. 3. 16, 17.

Temps E. 1. Avoury, 230.

Omnium rerum, ex quibus aliquid exquiritur, nihil agriculturâ melius, nihil uberius, nihil dulcius, nihil libero homine dignius. Cic. lib. 1. Offic.

O fortunatus nimium, sua si bona nôrint,
Agricolas! quibus ipsa, procul discordibus armis,
Fundit humo facilem victum justissima tellus. Virgil. lib. 2. Georg.

Nullum laborem recusant manus, quæ ob aratro ad arma transferuntur, &c. fortior autem miles ex confragoso venit; sed ille unctus et nitidus in primo pulvere deficit. But now let us peruse our author's words. Seneca in Epist.

[86. a.] ☞ "*Socagium.*" *Littleton* in this Chapter, Section 119, fetched this word from the originall. *Socagium idem est quod servitium socæ, et soca est idem est quod caruca, s. a soke, or a plough* (1).

And

(1) See Wright's Ten. 142, and 2 Blackst. Comment. 5th ed. 79.

(1) Mr. Somner dis approves of this etymology, as not large enough to comprehend *all* the services of the tenure by socage, which may be, and sometimes are, totally unconnected with the plough. According to him, socage is derived from

Bracton, lib. 2. fol. 77. [b] Glanvil. lib. 7. cap. 9. & 11. & lib. 9. ca. 4. Fleta, lib. 1.ca.8. & lib. 3. ca. 14. & 16. Britton, fol. 164. [c] Domesday, Herefordsc. Vid. devant. Sect. 1. Sudru. Wendeford. Worcesterse. *Mich. 10. E. 3. Coram rege Wilts in Thes. [d] For etimologies vid. Sect. 95. 154. 164. 204. 234. 267, 268, &c. [e] Fleta, lib. 3. ca. 14. Bracton, lib. 2. cap. 16. Britton, fol. 164.

And *Bracton* agreeth herewith. *Dicitur socagium* (saith he) *à socco, et inde tenentes dicuntur socmanni,* [b] *eò quòd deputati sunt tantummodo ad culturam.* And *Benerth* signifieth the service of the plough and cart. It is to be observed, that in the book of [c] *Domesday*, land holden by knight's service was called Tainland, and land holden by socage was called Reveland; which appeareth in that it is said there, *hæc terra fuit tempore regis Edwardi Tainland, sed postea conversa est in Reveland.* (2) And in that booke they that held in socage were called by severall names, as *Sochemanni* or *Sokemanni*, which still continueth; sometimes* *Coleberti, i. e. qui tenent in liberum socagium per redditum;* and sometimes they are called *Radchenestres, i. e. liberi homines, qui tatem arabant, herciabant, falcabant, metebant, &c.* And here it appeareth how necessary it is, that words be fetched from their originals, and our author *est verus etymologus* both in this and in many other places in his [d] three bookes. And it is to be observed once for all, that the legall termination of (*agium*) in composition signifieth, service or duty; as *homagium*, the service of the man; *escuagium, servitium scuti;* [e] *socagium, servitium socæ; hidagium*, the duty to be paid for a hide or plough-land; and so of *cornagium, coragium, carnagium, cariagium, burgagium, villenagium*, and *guidagium*, (which one describeth thus) *quod datur alicui, ut tutò conducatur per loca alterius*, and the like.

[f] Mirror, ca. 2. sect. 18. Fleta, ubi supra.

"*So that the service* [f] *be not knights service.*" And in the next Section he saith, and every tenure that is not a tenure in chivalry is a tenure in socage. *Ex donationibus autem, feoda militaria, vel magnam serjeantiam non continentibus, oritur nobis quoddam nomen generale, quod est socagium.* Here *Littleton* speaketh of tenures of common persons; for grand serjeantie is not

---

from the Saxon word *soc*, which signifies *liberty* or *privilege*, and with *agium* added, to denote the *agenda* or service, imported a free or privileged tenure; and this derivation is prefered by a writer of great judgment. Somn. Gavelk. 133. and 2 Blackst. Comment. 5th ed. 8o. However, sir Martin Wright, though he confesses the ingenuity of Mr. Somner's derivation, endeavours to justify Littleton's, and thinks that the objection to it is obviated, when it is considered that in the case of socage-tenures plough-service was the most ancient and usual reservation; to which observation one may add, that the propriety of a denomination is not always the proper test of etymologies. Wright's Ten. 143. It seems indeed, that both derivations have their share of probability, which is as much as can be expected on a subject so very uncertain.—[Note 56.]

(2) This explanation of *Thane-land* and *Reve-land* is opposed by sir Henry Spelman, who investigates the subject very minutely. See Spelm. Posthum. 38, 39. In a former note we had occasion to hint at sir John Dalrymple's opinion on the same subject, and on the nature of the difference between *bock-land* and *folk-land*. See ante 6. a. note 6. Since the writing of that note, a tract, intituled *A Discourse on the Bock-land and Folk-land of the Saxons*, hath been printed, the professed object of which is to examine and confute the notions advanced by sir John Dalrymple. This tract, being at present only distributed amongst the author's friends, is difficult to be procured, and is mentioned here for the sake of such readers as may be curious to explore this dark and controverted subject. See further Fearn. Legigraphic Chart of Landed Propert. ante 6. b. 7. a. 58. a. and 2 Whitak. Hist. Manchest. 154.—[Note 57.]

not knight's service, and yet it is not a tenure in socage, as shall be said hereafter. Also here he meaneth temporall services, and not frankalmoigne, as by the examples he put is manifest, and as in his proper place shall appeare more at large. Also here *Littleton* speaketh of socage largely taken and so called *ab effectu;* that is, all tenures that have the like effects and incidents belonging to them as socage hath, are termed tenures in socage, albeit originally service of the plough was not reserved. As if originally a rose, a pair of gilt spurs, a rent, and such like are reserved, or that the tenants *in condemnatos ultrices manus mittant, ut alios suspendio, alios membrorum detruncatione, &c. puniant,* these are said to be tenures in socage *ab effectu,* for that there shall be like gardein in socage, like reliefe, and such other effects and incidents as a tenure in socage hath, and are so termed to distinguish the same from knight's service. Nay, the worst tenure that I have read of, of this kind, is to hold lands to be *ultor sceleratorum condemnatorum, ut alios suspendio, alios membrorum detruncatione, vel aliis modi juxta quintitatem perpetrati sceleris puniat,* (that is) to be a hangman or executioner. It seemeth in ancient times such officers were not voluntaries, nor for lucre to be hired, unlesse they were bound thereunto by tenure. And so note, that some tenures in socage are named *à causâ,* and some, and the greater part, *ab effectu.*

Ockam, cap. quæ per solam consuetudinem, &c.

Ockam, fo. 31. a. & b.

"*For homage by itselfe maketh not knights service.*" But it is a presumption that homage is due, that the land is holden by knights service, as hath been said.

Sect. 118.

ALSO, a man may hold of his lord by fealty only, and such tenure is tenure in socage; for every tenure which is not tenure in chivalrie, is tenure in socage. (4 Co. 8.)

Of this sufficient hath been said before.

Sect. 119.

AND it is said, that the reason, why such tenure is called and hath the name of tenure in socage, is this: because socagium idem est quod servitium socæ *and* soca idem est quod caruca, &c. i. e. *a soke or a plough. In ancient time, before the limitation of time of memory, a great part of the tenants, which held of their lords by socage, ought to come with their ploughes, every of the said tenants for certaine daies in the yeare to plough or sow the demesnes of the lord. And for that such workes were done for the livelihood and sustenance of their lord, they were quit against their lord of all manner of services, &c. And because that such services were done with their ploughs, this tenure was called tenure in socage. And afterward these services were changed into money, but by the consent of the tenants and by the desire of the lords, viz. into an annual rent, &c. But yet the name of socage remaineth, and in divers places the tenants*

tenants yet doe such services with their ploughes to their lords; so that all manner of tenures, which are not tenures or knight's service, are called tenures in socage.

"*TIME of memory.*" Time of memory* is when no man alive hath had any ☞ proofe to the contrary, nor hath any conusance to the contrary, as shall be hereafter said in his proper place. And of necessity this change hereafter spoken of, must be before time of memorie; for within time of memory, the services of the plough cannot be changed into money by consent of the tenant and the desire of the lords, *scilicet*, into an annuall rent, neither by release or confirmation or other conveyance, so long as the seigniory remaineth, as shall be said in his due place. [86. b.]

(6 Co. 59.) Cap. Burgage, Sect. 170. Mirror, cap. 2. sect. 18. Vid. 19 E. 2. Avowrie, 224. 3 E. 2. Action sur le stat. 24. 10 E. 3. 24. 20 E. 3. Avowrie 124. 39 E. 3. 17. 39 Ass. p. 3. 20 Ass. 1. Cap. Confirmation, Sect. 539.

"*Ought to come with their ploughes.*" The plough is named *propter excellentiam*; but the sicle, and the syth, for the reaping in harvest, and such like are also included. For as *carucata terræ*, a ploughland, may containe houses, milles, pasture, medow, wood, &c. as pertaining to the plough; so under the service of the plough, all services of tillage or husbandry are included.

4 E. 3. 161. 6 E. 3. 283.

"*Yet the name of socage remaineth.*" Altho' the cause whereupon the name of socage first grew be taken away, yet the name remaines the same it hath been, and is used to distinguish this tenure from a tenure by knight's service. *Nomina si nescis, perit* ☞ *cognito rerum. Et nomina si perdas, certè distinctio rerum perditur.* Therefore the names of things (as *Littleton* here teacheth) are for avoyding of confusion diligently to be observed. [87. a.]

* *It is to be observed that the words* "time of memory," *must be referred to the words in the text* "the limitation of time of memory," *and therefore, standing as they appear to do singly, must be understood as if Lord Coke had used the words* "time out of memory."

Sect. 120.

ALSO, if a man holdeth of his lord by escuage certaine, scil. *in this manner when the escuage runneth and is assessed by parliament to a greater or lesser sum, that the tenant shall pay to his lord but halfe a marke for escuage, and no more nor lesse, to how great a sum, or to how little the escuage runneth, &c. such tenure is tenure in socage, and not knight's service. But where the summe which the tenant shall pay for escuage is uncertaine* scil. *where it may be that the summe that the tenant shall pay for escuage to his lord, may be at one time more and at another time less, acccording as it is assessed, &c. such tenure is tenure by knight's service.*

(6 Co. 6. b.)

"*ESCUAGE certaine,*" is not *in rei veritate servitium scuti*, which is to be done by the body of a man, but it is *servitium crumenæ*, of money which is to be drawn out of the purse, and that is in effect a tenure in socage; wherein it is to be observed, that the service of payment of money is the more base, and lesse profitable for the commonwealth in this case; and hereof somewhat hath been said before in the Chapter of Escuage, Sect. 98, 99.

If

If a man hold by homage, fealty and escuage, scil. by an halfe penny, when escuage runs at fortie shillings, this is a tenure in socage, and no knight's service, for two causes.

15 E. 2. tit. Avowrie, 215. 31 E. 1. Ass. 441. 26 Ass. 66. 5 E. 3. 6. 5 E. 4. 128. Vid. Rot. Parl. 4 E. 3. nu. 19. Clavering's case, excellently resolved in parliament. Hill. 3 E. 2. coram Rege, Rot. 34. Agnes Frowick's case.

First, it is socage tenure, because of the certainty; for to the tenure in socage *certa servitia* doe ever belong, so as the husbandman may the rather live in quiet.

Secondly, Escuage is to be paid at every time when it is assessed; and here it is not to be paid, but when it amounteth to forty shillings.

Sect. 121.

ALSO, if a man holdeth his land to pay a certaine rent to his lord for castle-gard, this tenure is tenure in socage (1). *But where the tenant ought by himself or by another to doe castle-gard, such tenure is tenure by knights service.*

HEREIN

---

(1) According to Fitzherbert, such a tenure was *knight's service.* This he infers from the form of a writ of livery sued out by an heir on attaining his full age, where he held of the king *as of an honor* in the king's hands by the service of rendering the rent of ten shillings a year towards guarding the castle of Dover; and Fitzherbert endeavours to account for the tenure being knight's service, by suggesting, that the service might *anciently* have been guarding the castle, and that in modern times the king might take a rent in lieu of the castle-guard; which taking of a rent, says Fitzherbert, would not alter the nature of the tenure. Fitzherb. Nat. Br. 256. However, this opinion of the reverend judge is not delivered absolutely, but is accompanied with a *quære;* and indeed it seems very liable to exception. For—1. The form of the writ relied upon appears quite consistent with *socage in capite;* suing of livery by the heire at full age having been incident to that tenure as well as to *knight's service in capite,* unless the heir was under fourteen at the death of the ancestor. See ante 77. a.—2. The propriety of the writ, in the case to which it is applied, may be suspected; for suing of livery by the heir, except in some few special cases distinguished by a kind of prescription of which lord Coke speaks doubtfully, was confined to tenure *in capite,* or, to use the phrase preferred by Mr. Madox, *ut de coronâ,* whereas the writ in Fitzherbert represents the tenure to have been *ut de honore.* See ante 73. a.—3. Fitzherbert's reason for considering the tenure as knight's service seems unwarranted by the terms of the writ. He supposes the service reserved to be castle-guard, and the rent to be merely taken by the king as a commutation in money; but the writ expressly states the rent to be the service.—4. If Fitzherbert, by saying that the king took the rent for the castle-guard, means that the latter was so changed into the former, that the castle-guard could no longer be demanded, then his idea of the tenure's continuing to be castle-guard and in chivalry, is contradicted by sir William Capell's case cited in lord Coke's report of Luttrel's case; for in that the court held, that by such a perpetual change of the service the tenure was converted into socage. See 4 Co. 88. a.—5. The authority of Littleton is clearly against Fitzherbert's notion;

Vide Sect. 98, 99.

Vide 4 Co. 88. in Lutterel's case. 19 E. 2. Gard. 195. 26 Ass. 66. F. N. B. 83. 256. 6 Co. 20. Gregorie's case.

HEREIN the difference standeth thus. If a rent be paid for castle-garde, it is cleere a socage tenure, as it is ☞ agreed in *Lutterel's* case according to *Littleton's* opinion. But if a summe in grosse, or other thing, be [87. b.] voluntarily paid or given by the tenant, and voluntarily received by the lord in lieu of castle-gard, yet the tenure by knight's service remaineth. Vide Sect. 98, & 99.

Sect. 122.

ALSO, in all cases where the tenant holdeth of his lord to pay unto him any certaine rent, this rent is called rent service.

IT is called rent service, because it is accompanied with some corporal service, as fealty at the least; in respect whereof the lord may distraine for it of common right. See more of this matter in the Chapter of Rents.

Sect. 123.

ALSO, in such tenures in socage, if the tenant have issue and die, his issue being within the age of 14 *yeares, then the next friend* (le prochein amy) *of that heire* (1), *to whom the inheritance cannot descend* (a que le heritage ne poet descender), *shall have the wardship of the land and of the heire untill the age of* 14 *yeares, and such gardeine is called gardeine in socage. For if the land discend to the heire of the part of the father, then the mother, or other next cousin of the part of the mother, shall have the wardship. And if land discend to the heir of the part of the mother, then the father or next friend of the part of the father shall have the wardship of such lands or tenements. And when the heyre cometh to the age of* 14 *years complete, he may enter and oust the gardian in socage, and occupy the land himselfe, if he will. And such guardian in socage*

---

notion; and according to the opinion of the former, a case, in which the service reserved was a yearly rent in money for guard of the castle of Dover, was adjudged early in the reign of Charles the first. See Litt. Rep. 47. However it should not be concealed, that in this last case the court seemed inclined to think, that under *special* circumstances there might be a change of the castle-guard into rent by consent of the king and his tenant without altering the tenure, where evidence could be given of the manner in which the change was effected.—[Note 58.]

(1) Here the word *heir* is significant; for it seems to import, that guardianship in socage can be of *heirs* only. However, though it was always clear, that guardian in *chivalry* could only be on a *descent*, yet some have doubted whether wardship in *socage* might not be where the infant was in by *purchase*. This point was agitated so late as the 28th and 29th of Charles the second, when the court held, that guardianship in socage was equally confined to a descent with guardianship in chivalry. 2 Mod. 176. Vin. Abr. *Guardian*, I.—[Note 59.]

socage shall not take any issues or profits of such lands or tenements to his own use, but only to the use and profit of the heire; and of this he shall render an account to the heire, when it pleaseth the heire after he accomplisheth the age of 14 *yeares. But such gardian upon his account shall have allowance of all his reasonable costs and expenses in all things, &c. And if such gardian marry the heir within age of* 14 *yeares, he shall account to the heire, or his executors, of the value of the marriage, although that he tooke nothing for the value of the marriage; for it shall be accounted his own folly, that he would marry him without taking the value of the marriage, unless that he marrieth him to such a marriage, that is as much worth in value as the marriage of the heire.*

"*IN such tenures in socage.*" If a man be seised of a rent charge, rent secke, common of pasture, and such like inheritances, which do not lie in tenure, and dyeth, his heire within age of 14 yeares; in this case the heire may choose his gardein; but if he be of such tender yeares as he can make no choice, then (if the father hath made no disposition of the custody of the childe) it were most fit, that the next of kin, to whom the inheritance cannot descend, should have the custody of him (2). And whosoever taketh the rent, &c. the heire shall charge him in an account. But if he hold any land in socage, in that [88. a.] case the ☞ gardian in socage shall take into his custody as well the rent charges, &c. as the land holden in socage, because he hath the custody of the heire. (2 Ro. Abr. 40.) Vide le statute de 4 & 5 Ph. & Marie, cap. 8.

"*If the tenant have issue and die.*" The same law it is if the tenant hath no issue, but a brother or cosin within age of 14 yeares at the time of his death. [a] Also this doth extend as well to issue female, as to issue male. [a] 10 R. 2. Account, 132.

"*Within the age of* 14 *yeares.*" Of this sufficient hath been spoken in the next preceding Chapter.

"*Then the next friend* (le prochein amy) *of that heire, to whom the inheritance cannot descend.*" The next friend of the heire, &c. Here *friend* (amy) is taken for the next of blood. So the effect of it is, that the next of his blood to whom the inheritance cannot discend, whereby affinity without blood is excluded. Glanvil. lib. 7. cap. 11. Britton, 163. Fleta, lib. 1. cap. 9. Stat. de Hibernia, tit. Partition. (Plowd. 446.)

"*The next.*"

[b] If there be three brethren, and the youngest holdeth land in socage, and hath issue and dyeth, his issue within age of 14 yeares, both the uncles are in equall degree, and yet the eldest shall be gardian; because in equall degree the law preferreth him. [b] Vid. 30. Ass. 47.

[c] And yet if land holden in socage be given to a man and to the heirs of his body, and he dyeth, his heire within age, the next cosin of the part of the father, albeit he be worthier, shall not be preferred before the next cosin of the part of the mother, but such of them as first seiseth the heire shall have his custody (1). But if [c] Pl. Com. Carrel's case.

---

(2) See post. 88. b.

(1) This is according to the rule, *in æquali jure melior est conditio possidentis.* Plowd. 296, in Carrell's case. See too Hawk. Abr. of Co. Litt.

47 H. 3. Gard. 146. (2 Ro. Abr. 40. Ante 22. a.)

if lands be given in frankmarriage, and the donee have issue and dye, their issue within age of 14 yeares, the next of kin of the part of the mother shall have the custody of the body, and not the next of kin of the part of the father, albeit he first seised it, because the mother was the cause of the gift. If a man be seised of lands holden in socage of the part of his father, and of other lands holden in socage of the part of his mother, and dyeth, his issue being within the age of 14 yeares, in this case such of the next ☞ of kinne of either side, as first happeth the body of the heire shall have him (1); but the next of blood of the part of the father shall enter into the lands of the part of the mother, and the next of kinne of the part of the mother shall enter into the lands of the part of the father (2). [88. b.]

[d] F. N. B. 139. B. Regist. [e] 7 E. 3. 46. 16 E. 3. Acc. 52. 21 E. 3. 8. 31 E. 3. Enfant. 9. 17 E. 2. Account, 121. 26 E. 3. 63. 10 H. 6. 14. F. N. B. 118. [f] Bract. li. 2. fo. 88. [h] Flet. l. 1. ca. 10.

[d] If *A.* be gardian in socage of the body and lands of *B.* within the age of fourteene yeares, *A.* shall be gardein in socage *per cause de gard* (3). But an infant within age, that [e] is not in the custody of another, cannot be gardian in socage; because no writ of account lyeth against an infant. And herewith agreeth *Bract.* [f] and yieldeth this reason, *alium regere non potest, qui seipsum regere non novit.* And *Fleta* saith, [h] that *minor minorem custodire non debet; alias enim præsumitur malè regere, qui seipsum regere nescit.** And by like reason an ideot, a man *non compos mentis*, a lunaticke, a man *cæcus et mutus*, or *surdus et mutus*, or a leper removed by a writ *de leproso amovendo*, cannot be gardian in socage. But in the case of gard *per cause de gard*, there lyeth an action of account against A. in the case abovesaid.

[i] Lib. Rub. cap. 70. [k] Glanv. lib. 7. ca. 11. [l] Pl. Com. Carrel's case. (2 Ro. Abr. 40. Cro. Eliz. 825. Mo. 635.)

"*To whom the inheritance cannot descend* (a que le heritage ne poet descender)." "[i] *Nullus hæredipetæ suo propinquo vel extraneo periculosa sanè* (4) *custodia committatur.* Note [k] this word (poet) *may* or *can*. [l] And therefore this doth not onely exclude an immediate discent, but all possibility of discent. As if a man hath issue two sons by several venters, and having lands holden in socage of the nature of burgh *English* dieth the

* *The passage here cited from Fleta is in the eleventh chapter of the second edition.*

---

(1) See ante 88. a. note 1.

(2) Mr. serjeant Hawkins supposes an elder brother to purchase land, and the land to descend to his younger brother being under 14; in which case the infant's paternal and maternal relations are equally of the blood of the first purchaser, and therefore equally capable of inheriting to them: and then Mr. serjeant asks, who shall be guardian in socage? Hawk. Abr. of Co. Litt. Perhaps there may be some difficulty in solving this question. If Littleton's rule be understood *strictly*, there cannot be any guardian in socage in such a case, unless the next friend is a father or mother or other lineal ancestor, or of the half blood; for all of the other relations may by possibility succeed as immediate heirs to the son. But if the next of blood on either side may be guardian, the mother's blood must be preferred, because they are the *most remote* from the succession.—[Note 60.]

(3) Guardian *per cause de ward* is, where one infant in wardship is guardian of another infant, in which case the wardship of the first infant entitles his guardian to the wardship of the second. But it seems, that only guardian in chivalry and in socage could be guardian *per cause de ward*. See 2 Ro. Abr. 35. 40, and Vaugh. 184.—[Note 61.]

(4) *Sine* instead of *sane* seems necessary to the sense of this passage.

the younger brother within the age of 14 yeares, [m] the elder brother of the halfe blood shall not have the custody of the land (5); because by possibility the elder may inherit the land; for if the youngest dye without issue, and the land descend to an uncle, the elder brother of the halfe blood may be heire unto him: and herewith doth agree our ancient authors. [n] *Hæres sokmanni sub custodiâ capitalium dominorum non erit, sed sub custodiâ consanguineorum suorum propinquorum, hòc est, eorum qui conjuncti sunt jure sanguinis, et non jure successionis, ex parte quorum non descendit hæreditas; et regulariter verum est, quòd nunquam remanebit aliquis in custodiâ alicujus, de quo haberi possit suspicio, quòd velit jus clamare in ipsâ hæreditate, et unde si plures sint filiæ et hæredes tenere debeant in socagio, nulla debet esse in custodiâ alterius.* [o] And this is contrary to the civil law; for *leges civiles impuberum tutelas proximis de eorum sanguine committunt, sive agnati fuerint, sive cognati, unicuique, videlicet, secundùm gradum et ordinem, qui in hæreditate pupilli successurus est.* But this the law of *England* saith, *est quasi agnum lupo committere ad devorandum* (6).

[m] Lit. lib. 1. fo. 2, 3.

[n] Bract. lib. 2. fol. 87. Brit. fol. 163. b. Flet. lib. 1. c. 9. 28 E. 1. Stat. 1. Fortesc. c. 40.

[o] Fortesc. ubi supra. Statut. de Homagio capiendo, temps. E. 1.

"*Then*

(5) This point appears to have been adjudged *contra* in lord Coke's time, though it is not taken notice of by him. See Swan's case, 2 Ro. Abr. 40. Ow. 128. Mo. 635. Cro. Eliz. 825. and 2 And. 171. However, as lord Coke here decides against the half blood, the question was revived after the Restoration; but the case did not produce any opinion of the court. T. Jo. 17. The rule as expressed by lord Coke certainly excludes the half blood; because he extends it to *all* possibility of descent. But if the judgment in Swan's case was right, the rule should be confined to all possibility of *immediate* descent. —[Note 62.]

(6) Lord chancellor Macclesfield very much disapproved of the rule of our law, which gives the guardianship in socage to the next of kin to whom the land *cannot* descend. He would not allow the exclusion of the heire to the land to be founded on reason, but deemed it the offspring of barbarous times, and the effect of a cruel presumption. Therefore, when he was applied to on a like principle, for an order to remove a lunatic from the custody of Mr. justice Dormer, who was the lunatic's uncle, and next in remainder to him, but had with the consent of the *nominal* committee of the lunatic's person taken care of him for many years, and treated him with the greatest tenderness, under these circumstances his lordship refused to make such an order. 1 P. Wms. 260. See also 9 Mod. 142, and Cary's Rep. 137, 138. But notwithstanding this censure by one most deservedly of high authority, the rule of our law in respect to guardianship in socage, considered as one settling the right by *nearness of blood* without regard to *personal qualifications*, which was the point of view in which lord Coke and those he follows extolled it, is surely very defensible; for it gives the custody of the infant's person to those, who in point of *nearness of blood* have equal pretensions to the trust, without the same temptation in point of *interest* to abuse it. However, in justification of the Roman law it should be remembered, that their order of succession made it impossible to adopt a distinction like that of our law in the case of guardianship in socage; for by the Roman law, the relations both of the *father's* and *mother's* blood, being in equal degree, were equally capable of inheriting; and the emperor Justinian having wholly destroyed the distinction between the *agnati* and *cognati*, there could not be *proximity of blood* without *proximity to the succession*. Novell. 18. c. 4, 5. Such being the difference of the two laws in point of succession, it is rather unfair to make a comparison between them in point of guardianship. Besides, *nearness of blood alone* is at best a very exceptionable rule for settling the right of guardianship. It must frequently

"*Then the mother.*" Note, albeit land cannot discend to the mother from her sonne, (as hath beene said) because inheritance cannot ascend, yet here it appeareth by *Littleton*, that she is next of blood (7), for that none (as hath beene said) can be gardian in socage but the next of blood; and the like is to be said of the father, as hereafter next appeareth.

"*Then the father.*" By this it appeareth, that the father in case of a tenure in socage shall be gardian in socage, and shall not have the custody of his eldest sonne, in respect of his paternall naturall custody, (as he shall have in case of a tenure by knights service, as before appeareth) (8) but as gardian in socage. And the reason of the diversity is, for that in the case of a tenure in socage, the father must by law be accountable to the sonne both for his marriage, and also for the profits of his lands, which he should not be if he had the custody of his eldest sonne in this case as the father in respect of nature (9), and the act of law never doth any man wrong.

But no lord or other person, in respect of any tenure by knights service or otherwise, shall have the custody of any childe that is heire apparent to his father, but the father only during his life, as hath beene said before (10).

It is to be observed, that in the lawes of *England*, there are three manner of gardianships, viz. by the common law, by statute law,

---

quently give a title to those, who are in every respect the least qualified for a trust so delicate and important. Nearness of blood ought to be greatly regarded; particularly in the case of parents, whose title by nature is so strong, that to wrest from them the custody and education of their children, except when there is any gross misconduct, or the most apparent incapacity, would be very inhuman indeed. But personal qualities, situation of life, interest in the succession, and other circumstances, whether operating for or against, should also be attended to: and hence arises the necessity of *discretionary* power in the choice of guardians. On this principle, in many countries in Europe the father is now entrusted with the power of assigning guardians for his children by testament, and for want of a testamentary guardian, some great magistrate or judicial officer is authorized to nominate; and in other countries guardians are wholly dative by a magistrate. Groenweg. de Leg. Abrogat. lib. 1. tit. 15. Voet Comment ad Pandect. l. 26. 1, 2, 3. 1 Strah. Dom. 264. Stair's Inst. of Law of Scotl. 3d ed. 46. In *effect*, our law, as changed by statutes, and regulated by the modern practice of the court of chancery, conforms very much to these modes of prescribing who shall have the guardianship. But this subject will be more fully opened in the succeeding notes.—[Note 63.] *

(7) As to the construction of the *next of blood* in other cases, see ante 10. b. and note 2, there.

(8) Ante 84. b.

(9) Lord Coke should not be understood to assert that a guardian by nature is not accountable for the profits of the infant's estate; *that* being a doctrine which seems inconsistent with the nature of every other kind of guardianship except guardianship in chivalry. It is therefore presumed, that lord Coke's meaning was, that the father shall be deemed guardian in *socage;* because in that character the law makes him accountable to the son for the *value of his marriage* as well as for *the profits of his lands;* whereas in the character of gardian by *nature*, he is only accountable for the *latter*.*—[Note 64.]

(10) Ante 84. a.

* *This appears to be the note referred to by Mr. Hargrave in the concluding part of his note* 12. *to* 88. *b. where he speaks of* a preceding note, which in the last sentence is unguardedly expressed, as if receiving the profits of lands might be part of the office of guardian by nature.

law, and by custome. By the common law there are foure manner of gardians, viz. gardian in chivalry (whom *Littleton* hath described before, Sect. 103, &c.) (11) gardian by nature, as the father

(11) Ante 74. b. Though guardianship in *chivalry* is now taken away by act of parliament, it may be useful to recollect some *general* things concerning it; and for the ease of the student in that respect, the following particulars, selected principally from the Chapter of Knights Service, are brought into one point of view.—Guardianship in chivalry could only be where the estate vested in the infant by *descent*.—All *males* under 21 at the ancestor's death were liable to it; but not *females*, unless they were then under 14.—It extended, not only to the *person* of the infant, but also to all such of the infant's *lands* or *tenements* as were within the guardian's seigniory; and if the king was guardian in respect of a tenure *in capite*, then to the *whole* of the infant's estate, of whomsoever holden, whatever the tenure, and whether lying in tenure or not.—If the infant heir held lands by knights service of several lords, each lord had the wardship of the land within his seigniory; and as to the body, the wardship of it belonged to that lord of whom the tenure was most ancient, he being styled the lord by *priority*, and the others lords by *posteriority*. But this must be understood with an exception of the king; for if any lands of the infant were holden of the king by knights service *in capite*, he was entitled to the wardship both of the infant's body and all his lands held of the crown *in capite*, or of others by knights service.—It continued over males till *twenty-one*, over females till *sixteen* or *marriage*.—When it determined, if the tenure was of a *subject*, the heir might enter on the lord *immediately*; but if the king had the wardship, then the heir was not entitled to take possession of the land without suing to the crown for livery, which was a process both nice and expensive. See ante, 77. a.—It had a preference with respect to the custody of the infant's body over every other species of wardship, except only that of the *father* where the infant was his *heir apparent*; even the *mother* being excluded.—It entitled the lord to make a sale of the marriage of the infant, subject only to the restriction of not *disparaging*; and if the infant refused the marriage tendered by the lord, or married *after* such a tender and against the lord's consent; in the former case, the infant was liable to the payment of a sum equal to the value of the marriage, that is, to the profit which the lord might have made by the sale of it; in the latter case, the heir *female* paid the same sum as for a refusal, but the heir *male* was charged the *double* value, which was called a forfeiture of marriage.—The guardian in chivalry was not accountable for the profits made of the infant's land during the wardship, but received them for his own private emolument, subject only to the *bare* maintenance of the infant. At least it doth not appear in any work we have seen, what means were provided for enforcing the guardian out of the profits of the estate in wardship to support and educate the infant in a style and manner suitable to his rank and fortune.—Lastly, guardianship in chivalry, being deemed more an *interest* for the *profit* of the *guardian* than a *trust* for the *benefit* of the *ward*, was saleable and transferable, like the ordinary subjects of property, to the best bidder, and if not disposed of was transmissible to the lord's personal representatives. Thus the custody of the infant's person, as well as the care of his estate, might be devolved upon the most perfect *stranger* to the infant, one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, or any sufficient authority to restrain him from yielding to their influence. This explication of the nature of wardship in chivalry, general as it is, may well excite a strong idea of the horrid evils necessarily incident to it. On the first reflection it is natural to wonder, how it happened, that a species of guardianship so constituted

father of the eldest son, of whom *Littleton* hath spoken, Sect. 114. (12)

stituted on principles repugnant to the voice of nature, so founded in inhumanity, so retarding to the progress of science and literature amongst persons of high birth and with great hereditary estates, and so seemingly replete with mischiefs, both public and private, should, in a country distinguished for continual struggles to preserve the valuable and to annihilate the oppressive parts of its constitution, be patiently endured for several centuries after the Conquest, and even remain unreformed by any effectual checks to soften its rigour, till it was wholly taken away at the Restoration. Perhaps however on further consideration of the subject, the wonder may in some measure cease; for the facility of evading guardianship in chivalry, which could only be on a *descent*, may account both for its being so long submitted to, and for its producing consequences less extensively pernicious than seem almost necessarily incident to it. Various modes of preventing the *descent* were practised. One was enfeoffing the heir in the ancestor's life-time; and another was enfeoffing strangers on condition to pay a sum, far exceeding the value of the land, at a time so fixed as to correspond with the heir's coming of age, who might then enter for breach of the condition. See Stat. Marlebridge, 52 Hen. 3. c. 6. and 2 Inst. 109. When these modes were declared to be fraudulent, and therefore checked by the statute of Marlebridge, a third, still more fit to attain the same end, succeeded; for *uses* and *trusts* being invented, and guardianship in chivalry being only of *legal* estates, it became the fashion to make feoffments to uses, as well for preventing wardship, as for avoiding reliefs and forfeitures, and indirectly exercising the power of devising; and thus the heir taking only the use of the land on a descent instead of becoming *legal tenant*, he of course escaped being in wardship. This evasion continued in practice till 4 Hen. 7, when the legislature thought proper once more to interfere in favour of the lord, and made the heir of *cestuy que use* equally liable to wardship in chivalry with the heir of one dying seised of the *legal* estate. See 4 Hen. 7. c. 17. Ante 84. b. and 2 Inst. 110. Indeed for some time after 4 H. 7, there seem to have been no other means of preventing wardship in chivalry, than the ancestor's making a lease for life with remainder to his *heir apparent* in fee. But this protection of wardship in chivalry was soon followed by a great diminution of its profits; for, in the succeeding reign, the statute of wills gave the power of devising so as to deprive the lord of the wardship in *two-thirds* of the land holden by knights service; in which contracted state this odious species of guardianship was suffered to languish, till it was entirely abolished by the famous statute of Charles the second, together with the other oppressive appendages of military tenures. 2 Inst. 110, 111. The curious reader may see further on this subject in Smith's Commonwealth, Engl. ed. b. 3. cap. 5. Staunf. Prærog. 4 Inst. 188. Ley on Wards and Liv. et ante passim, in the Chapter of Knights Service and the books there cited, the titles *Garde* and *Guardian* in the Abridgments; Crompt. Jurisd. of Co. 112. a. to 125, and Mad. Exchéq. fol. ed. 221.—[Note 65.]

(12) Many of our books, especially some of modern date, are very indiscriminate, when they mention guardianship by *nature*. Sometimes the father is styled guardian by nature of his *heir apparent for the time* in general terms, such as at first appear to intimate, that by our law no other ancestor, except the father, not even the mother, is entitled to the gurdianship in that right; and accordingly lord chief baron Comyns makes this inference from the language of the books, though as we conceive too hastily. See Com. Dig. *Guardian*, C. 3 Co. 38. a. 6 Co. 22. b. there cited. At other times we are told, that, the father being dead, the mother may have a writ of trespass *quare consanguineum et hæredem cepit;* which imports, that she may also be guardian by nature of her heir apparent. But then the silence in one book as to other ancestors,

(12) gardian in socage, treated of by *Littleton* in this Section, and

ancestors, and the express exclusion of the grandfather in another book without the necessary explanation, tend to an opinion, that all ancestors, except the father and mother, are really excluded. Ante 84. b. 6 Co. 22. b. However in another place we find that no such opinion was intended to be conveyed; and we are informed, that the grandfather and other ancestors may be guardians by nature of their heirs apparent, as well as the father and mother; though being liable to be postponed to others, where the *father* is not, both they and the mother have a title distinguishable from *his* in point of inferiority.—8 Co. 38. a. Further, some modern books do not confine guardianship by nature to *heirs apparent*, but denominate the father and mother the natural guardians of *all* their children; and sometimes even the parents of illegitimate issue seem to have been treated as their natural guardians. 1 Ves. 158. 2 Atk. 15. 70. 9 Mod. 117. Sometimes also the guardianship of *female* children under sixteen, as given to the father and mother by the statute of Philip and Mary, is said to be *jure naturæ*. 4 & 5 Phil. and Mar. c. 8, and 8 Co. 38. b. This various and indefinite manner of expression concerning guardianship by nature must create the most distressing confusion in the minds of students; and for their benefit therefore we shall attempt to rescue the subject from a part of the obscurity in which it is involved, by offering some few distinctions calculated to reconcile the seeming contrariety of the books, so far as they are capable of being made consistent with each other. 1. It seems, that not only the father, but also the mother and every other ancestor may be guardians by nature, though with considerable differences, such as denote the superiority of the father's claim. The father hath the *first* title to guardianship by nature, the mother the second; and as to other ancestors, if the same infant happens to be heir apparent to two, as to both a paternal and a maternal grandfather, perhaps in this equality of rights priority of possession of the infant's person may decide the preference, according to the general rule *in æquali jure melior est conditio possidentis*. But this difference merely respects the order of succession to guardianship by nature. But whilst the tenure by knights service continued, there was another difference, which more strongly marked the superiority of this guardianship when claimed by the father; for he was entitled to the custody of the infant's person, even against the lord in chivalry; but the mother and other ancestors were not allowed to have the same preference. It is by this last diversity that lord Coke in another place reconciles the books, which appear to exclude the mother and all other ancestors except the father from guardianship by nature; it being observed by him, that they only apply to cases in which the right to the infant's person was in contest with the lord in chivalry. 3 Co. 38. b. Ratcliffe's case. 2. According to the *strict* language of our law, only an *heir apparent* can be the subject of guardianship by nature; which restriction is so true, that it hath even been doubted, whether such a guardianship can be of a daughter, whose heirship, though denominated *apparent*, yet, being liable to be superseded by the birth of a son, is an *effect* rather of the *presumptive* kind. 3 Co. 38. b. Ante 84. a. Therefore when *guardianship by nature* is extended to children *in general*, or to any besides such as are *heirs apparent*, it is not conformable to the legal sense of the term amongst us, but must be understood to have reference to some rule independent of the common law. Thus when in chancery the father and mother are styled the *natural* guardians of *all* their children born in marriage, or of *any* of their illegitimate issue, we should suppose those who express themselves so generally, to refer to that sort of guardianship, which the order and course of nature, so far as we are able to collect it by the light of reason, seem to point out and to mean, that it is a good rule to regulate the guardianship by, where *positive* law is silent, and it is in the discretion

[a] 8 E. 2. 43. 8 E. 4. 5. (5 Co. 37.)

and gardian *per cause de nurture;* (13) all frequent in [a] our books.

discretion of the lord chancellor to settle the guardianship. So too when lord Coke says, that the custody of a *female* child under *sixteen*, to which the father, and after his death the mother, is entitled by the provisions of the statute of the 4 and 5 Philip and Mary, is *jure naturæ*, we should understand him to mean, not that such a custody was a *guardianship by nature* recognized by our common law, but merely that it was a *statutory* guardianship adopted by the legislature in conformity to the dictates of nature, and upon principles of general reasoning. But though what our law calls guardianship by nature is thus confined to the *heir apparent*, yet we must not from thence conclude, that parents have not a right to the custody of their *other* children; for our law gives the custody of them to their parents till the age of *fourteen* by the guardianship of *nurture;* which species of guardianship, though it differs from *that* by *nature* not only in *name* but also in *duration* and some other particulars, as will appear by the next note, is founded on a like conformity to the order of nature. It being thus explained, who are entitled to the guardianship by *nature*, and what infants are its objects, we shall conclude with some few other particulars concerning it.—This guardianship continues till the infant attains the age of *twenty-one*.—The books inform us, that it extends no farther than the custody of the infant's *person;* a peculiarity we did not sufficiently advert to, when we were writing a preceding note, which in the last sentence is unguardedly expressed, as if receiving the profits of lands might be part of the office of guardian by nature. See ante note 8.* of 88. b. Carth. 386. Ante 84.—It yields as to the custody of the person to guardianship in socage, where the title to both guardianships concur in the same individuals, as they *necessarily* do in the case of father or mother, if lands held by a socage tenure descend on the heir apparent being an infant, and *may* in the case of other ancestors; the reason of which is explained elsewhere. See fol. 88. b. note 8.† But guardianship in socage ending at *fourteen*, we presume, that after that age the father, or other ancestor, having a like title to both guardianships, becomes guardian by nature till the infant's age of *twenty-one*. See Carth. 384.—Lastly, the father may disappoint the mother and other ancestors of the guardianship by nature, by appointing a testamentary guardian under the statutes of Philip and Mary and of Charles the second, which will be the subject of a subsequent note. See infra, note 14.—[Note 66.]

(13) Here we shall bring into one point of view some few *general* things relative both to guardianship by *socage* and *that* by *nurture*.

Guardianship by *socage*, like the one in *chivalry*, springs wholly out of *tenure*. Therefore the title to it cannot arise, unless the infant is seised of lands, or other hereditaments *lying* in tenure, holden by socage. Ante fol. 87. b.—Like guardianship in *chivalry*, it is deemed to take place on a *descent* only; though some have argued to the contrary. Ante note 1. fol. 87. b.—The title to this guardianship is in such of the infant's next of blood, as cannot have by descent the socage estate, in respect of which the guardianship arises, by descent, without any distinction between the *whole* and *half* blood. If there are two or more in equal degree, he who first gains possession of the heir, shall have the custody of him; except where they happen to be brothers or sisters, or to be the infant's lineal ancestors, the law preferring the *eldest* in the former case, and the father or other *male* ancestor in the latter. But if the infant derives lands by descent both *ex parte paternâ*, and *ex parte maternâ*, in which case it may be possible not to find any next of kin incapable of inheriting to the infant, the next of kin on either side, first seizing the infant, is entitled to the custody of his person, and the custody of the lands coming

ex

* *Note* 9. *of* 88. b. *is probably the note intended to be here referred to.*
† *Note* 6. *of* 88. b. *was probably meant.*

books. By statute, viz. the statute in 4 and 5 *Ph. & Mar.* of women children, and that is in two manners, either of the father or

ex parte paternâ goes to the maternal heir, and so *vice versâ*, as to the lands coming *ex parte maternâ*. Should, however, the infant derive lands by descent in such a way as lets in both the paternal and maternal blood successively to the inheritance, but with a preference of the former; as where the infant derives lands by descent from a brother who was the first purchaser, and there is no next of kin but such as may inherit from the infant, it seems unsettled who should have the guardianship.—If the person entitled to be guardian in socage is himself under custody of a guardian, the latter is entitled to the custody of *both;* to the *former* in his own right, and to the *latter pur cause de ward*, that is, in right of his wardship of the *former*.—Being wholly for the infant's benefit, and not in any respect for the guardian's profit, it is not a subject either of alienation, forfeiture or succession, as wardship in chivalry was; and consequently if the guardian in socage becomes incapable or dies, the wardship devolves upon the person next in degree of kindred to the infant, not being inheritable to him. Fitzherbert indeed in his *Natura Brevium* cites two cases of Edward the third, in which guardian in socage granted the wardship to a stranger, and the grant was awarded good. F. N. B. 143. P. The same author too in his Abridgment gives another case of the same reign, according to which a lease of guardianship in socage was pleaded. Fitzh. Abr. *Garde*, 161. But possibly these cases import, only that a guardian in socage may place the body of the infant under the custody of another, and that such placing will be a good answer to an action for ravishment of the ward; not that the guardianship itself may be transferred by bargain or sale. However, should these ancient authorities not bear the former construction, they seem sufficiently answered by the *doctrine* and *practice* of later times; for in them, the acknowledged qualities of guardianship in socage being, that it is a *personal* trust wholly for the infant's benefit, and neither transmissible by succession nor devisable, are not consistent with its being assignable; and we have lord chief justice Vaughan's authority for saying, that even in his time *common experience* proved the contrary. See Plowd. 293. Vaugh. 181. See too post. 90. b. note 1.—It extends not only to the *person* and *socage* estates of the infant, but also to his hereditaments *not lying in tenure;* and even to his copyhold estates, unless there is a special custom for the lord's appointing a guardian of them. Ante 87. b. and Egleton's case, 1 Ro. Abr. 40. See also Hutt. 17, and 2 Lutw. 1181. But whether the guardian in socage is entitled to take into his custody the infant's *personal* estate, we have not yet been able to ascertain by any express authority. However, we are inclined to think, that *personalty* is included, except where by the custom of a particular place it happens to be liable to a different custody; our idea being, that the custody of the infant's person draws after it the custody of every species of property, for which the law hath not otherwise provided. This idea receives some countenance from the instances of *copyholds*, and of *hereditaments not lying in tenure;* for including which, it will be difficult to account by any other reason than the one we give for including *personalty*. It is also strongly confirmed by the manner in which the 12 of Cha. 2. c. 24. regulates the powers of the guardian which it enables a father to appoint. After authorizing such guardian to take the custody of the infant's *personal estate*, as well as of his *lands, tenements* and *hereditaments*, it provides that he may bring *such action or actions in relation thereunto, as by law a guardian in common socage might do:* words almost necessarily importing, that the *personal* estate is equally an object of the custody of guardian in socage with the infant's real property. Yet we must apprise the reader, that there is an expression of lord chief justice Vaughan in his Reports, which conveys or seems to convey a different opinion; for speaking of the guardian under the statute

or mother (14) without assignation, or of any other to whom the father shall appoint the custody, either by his last will, or by any act in his life-time, whereof you shall reade at large [b] in *Ratcliffe's* case in my Reports (15). [c] Lastly, by custome, as of orphans

[b] 3 Co. 57. Ratcliffe's case.
[c] 32 E. 3. Gard. 31. 8 R. 2. Gard. 166. (Cro. Jam. 99.)

---

statute of Charles the second, he says, *this new guardian hath the custody, not only of the lands descended or left by the father, but of lands and goods any way acquired or purchased by the infant, which the guardian in socage had not.* Vaugh. 186.—It is superseded both as to the body and lands, if the father exercises his power of appointing a testamentary or other guardian according to the statute of the 12 Cha. 2. See chap. 24.—Regularly it ends, when the infant, whether male or female, attains fourteen; though some say, that this must be understood only where another guardian, either by election of the infant or otherwise, is ready to succeed, and that the guardianship in socage continues in the mean time. Andr. 313.

As to guardianship by *nurture*, it only occurs where the infant is without any other guardian; and none can have it, except the father or mother. 8 E. 4. 7. b. Br. *Guard.* 70. 3 Co. 38.—It extends no farther than the custody and government of the infant's person, and determines at fourteen in the case both of males and females. Ibid.—Lord chief baron Comyns refers to *Fleta*, as if according to that ancient book *grandfathers* and *great grandfathers* might be guardians by *nurture*. Com. Dig. v. 3. p. 421. But the passage cited doth not point at this *species* of guardian, it describing the *patria potestas* in *general*, and being apparently borrowed from the text of the Roman law; nor will it bear the least application to guardianships, as our own law regulates it.—[Note 67.]

(14) The direct object of the 4 & 5 Ph. and M. was to prevent the taking away or marrying maidens under sixteen against the consent of their parents. But the statute prohibited it in terms which implied, that the custody and education of such females should belong to the father and *mother*, or the person appointed by the former. It is observable on this statute, that though the title is confined to maidens being *inheritors*, and the preamble speaks only of such as be heirs apparent, or have real or personal estate, yet the enacting part mentions maidens under sixteen *generally*. For other cases on this statute besides Ratcliffe's, see Poph. 204. Cro. Cha. 465. 1 Sid. 362. 2 Mod. 128. 3 Mod. 84. 168.—[Note 68.]

(15) There is now another statute in respect to the appointment of guardians: for the 12 Cha. 2. c. 24, after taking away guardianship in chivalry, enables the father by deed or will, attested by two witnesses, to appoint who shall be guardians of his children after his decease. The substance of this parliamentary regulation is, 1. That the father shall have the power, though under *twenty-one*. 2. That he shall have it as to *all* his children under twenty-one and unmarried at his decease, or born after. 3. That he may appoint any persons, except popish recusants. 4. That the appointment may be either in possession or remainder. 5. That he may appoint the guardianship to last till twenty-one, or for any less time. 6. That the appointment shall be effectual against all claiming as guardians in socage or otherwise. 7. That the guardian so appointed shall have ravishment of ward on trespass, and recover damages for the ward's benefit. 8. That such guardian shall have the custody of the infant's estate both real and personal, and have the same actions in relation to them as a guardian in socage. 9. That the statute shall not prejudice the custom of London or any other city or corporate town.—For cases on the construction of this statute, see tit. *Guardian* in Vin. Abr. and Com. Dig. and the continuation of the latter book. The nature of this new kind of guardianship, which the statute professedly models after that in socage, except as to duration,

orphans by the custome of the city of *London*, and of other cities and boroughes (16).

" *Only*

duration, is particulary discussed in Bedell and Constable, Vaugh. 177, and in Lord Shaftesbury's case, 2 P. Wms. 102. Gilb. 172.—[Note 69.]

(16) Another species of customary guardianship is, where by the special custom of a manor the lord names, or is himself, the guardian of an infant copyholder. See 2 Com. Dig. 399. The nature of this guardianship depends wholly on the custom of the particular manor; and though it is not expressly saved by the 12 Cha. 2, yet it has been held, that the father's appointment of the custody of his child under that statute will not extend to copyhold estates. Church and Cudmore, 2 Lutw. 1181. 3 Lev. 395, and Comberb. 253. —But besides the several kinds of guardians enumerated by Lord Coke, and those we have already mentioned in addition, there are *four* others which still remain to be noticed.

The *first* of these is guardian by election of the infant himself. But the right of making such an election only arises, when, from a defect of the law, the infant finds himself wholly unprovided with a guardian. This may happen to be the case, either *before* fourteen, when the infant has no property such as attracts a guardianship by tenure, and the father is dead without having executed his power of appointing a guardian for his child, and there is no mother; or *after* fourteen, when the custody of the guardian by socage terminates, and from the want of the father's appointment there is no other ready to succeed to the trust, and to take care of the infant or his property. Lord Coke only takes notice of such an election where the infant is *under fourteen*, and as to this omits to state how and before whom it should be made, nor have we yet met with any prior or contemporary writer who supplies the defect. Ante 87. b. As to a guardian after *fourteen*, it appears from the ending of guardianship in socage at that age, as if the common law deemed a guardian *afterwards* unnecessary. However, since the 12 of Cha. 2, enabling the father to appoint a guardian to his children till twenty-one, it has been usual for want of such a guardian to allow the infant to elect one for himself; and according to one book, this practice seems to have prevailed in some degree before the Restoration. Phil. Tenend. non Tollend. 159. Such election is said to be frequently made before a judge on the circuit. 2 Ves. 375. 3 Brown C. C. 500. But we do not conceive this form to be essential. The last lord Baltimore, when he was turned of *eighteen*, having no testamentary guardian, and being under the necessity of having one for some special purposes relative to his proprietory government of Maryland, named a guardian by deed. This mode was adopted by the advice of two eminent barristers; for though one of them at first doubted, whether the administration of the government of the province was not devolved upon the crown during the infancy, yet he afterwards retracted this idea, and concurred in thinking that the guardian named by the infant might act as lord proprietor. Indeed it seems as if there was no prescribed form of an infant's electing a guardian *after* fourteen, any more than there is before; and therefore election by *parol* might perhaps be sufficient, though it would be wrong to trust to a mode so unsolemn. But we do not wonder at the deficiency; because guardianship by election of the infant is of very late origin, it being, we believe, not only unnoticed by any writer before lord Coke, except Swinburne, but there still being no cases in print to explain the powers incident to it, or whether the infant may change a guardian so constituted by himself. Swin. Testam. ed. 1590, fol. 97. b. Even Lord Coke, we see, though professing to enumerate the different sorts of guardianship, and though he had before mentioned this latter one, omits it here; whence it may be probably conjectured, that, in his time, it was in strictness scarcely

recognized

"*Only to the use and profit of the heire.*" And therefore gardian in socage shall not forfeit his interest by outlawrie or attainder

recognised as legal. See de Curatoribus Minorum amongst the Romans in 1 Hein. Syntag. lib. 1. tit. 23.

The *second* is guardian by appointment of the lord chancellor. How this jurisdiction was acquired by him is not easy to state. The usual manner of accounting for it appears to us quite unsatisfactory. See Gilb. Eq. Rep. 172. 10 Ves. 59. Saying that his jurisdiction over idiots and lunatics is undoubted, furnishes an argument against his having any over infants; for he derives the former from a *separate commission* under the sign manual, but there is not any such to warrant the latter. The writs of *ravishment of ward* and *de recto de custodiâ* prove as little: for were not these returnable in the courts of common law; or, though they had not been so, how doth a jurisdiction to decide between contending competitors for the right of guardianship prove a power of appointing a guardian, where it happens that one is wanting? The writs *de custodiâ admittendo*, in the Register, only relate to guardians *ad litem*. Reg. Br. Orig. 198 a. The assertion, that the appointment of guardians belonged to the chancellor before the erection of the court of wards, remains to be proved; or at least we, after a diligent search, do not find any authority in print. The passage referred to in *Fleta*, and the doctrine in Beverely's case 4 Co. by no means warrant the use made of them; for in neither is any notice taken of *infants*. Though the case of infants, as well as of idiots and lunatics, should be admitted to belong to the crown, yet something further is necessary to prove that the chancellor is the person constitutionally delegated to act for the king. It is no wonder, therefore, that lord Chancellor Hardwicke took occasion to disapprove of comparing the court's jurisdiction over infants with that over idiots and lunatics. 2 Atk. 315. As to the writs relative to the appointment and removal of guardians in the Register, they merely relate to *suits:* which is of very different consideration from *general* guardians. See Index to Reg. Brev. Orig. tit. *Custodes*. Nor will it answer the purpose, to attempt including guardianship in the idea of *trusts*, which are the peculiar objects of equitable jurisdiction, as it must be seen that this is an overstrained refinement; for though guardianship, in the *common* acceptation of the word *trust*, may be properly so denominated, yet it as surely is not so in the *technical* sense in which our lawyers use the word, and Chancery exercises a jurisdiction over trusts; for, in this latter, trusts are invariably applied to *property*, especially *real estates*, and not to the *person*.—However, we must not be understood by these remarks to controvert the *present* legality of the jurisdiction thus exercised in Chancery over infants; our intent being simply to show that such jurisdiction is not, *as far as yet appears*, of *ancient date;* and that, though it is now unquestionable, yet at first it seems to have been an usurpation, for which the best excuse was, that the case was not otherwise sufficiently provided for. Our conjecture, as to the late commencement of this branch of jurisdiction in Chancery, is strengthened by some precedents, which have been obligingly communicated to us by a respectable gentleman in the Register's office. According to these, the first instance to be found of a guardian appointed by the chancellor, *on petition without bill*, was in 1696, in the case of Hampden. But since that time, the Court of Chancery hath exercised the power of appointing guardians, without its being once called into question. Therefore in the case of Lady Teynham against Mr. Lennard, which was heard on an appeal to the lords in 1724, the counsel for the respondent very properly stated it as a thing fixed, that the lord chancellor was intrusted with that part of the crown's prerogative which concerned the guardianship of infants. 1 Brown Cas. in Parl. 544. 1 Brown Ch. Ca. 500. Under the same idea too, the last marriage act refers to the chancellor for the appointment of a guardian

attainder of felony or treason; because he hath nothing to his owne use, but to the use of the heire.

Also

guardian to consent to marriage, where the infant is without a guardian, and the mother is not living. 26 G. 2. c. 33. s. 11. See a case of importance on this subject, where the child is illegitimate, Horne v. Lydiard, published by Dr. Croke.——In the MSS. notes of sir Eardely Wilmot there is the following case:—*Ex parte* Lord Abergavenny. Lord A. being above the age of fourteen, and his father having died intestate without appointing him a guardian, petitioned to have Mr. Pelham appointed his guardian, and to have a maintenance allowed him, and that a receiver might be appointed.—Lord Chancellor. This court has never appointed a receiver without a bill depending, and sir Jos. Jekyll was the first who ever appointed a guardian in this summary way without a bill. Lord A. being in court, nominated Mr. Pelham, and it was referred to the master to fix the maintenance."

The *third* kind of guardian, not hitherto mentioned, is guardian by *appointment of the ecclesiastical court.* The right of appointing guardians for the personal estate, and, if there is no other guardian by tenure or otherwise, for the person also, is, we understand, claimed by the ecclesiastical court. Swinburne takes notice of such a guardian; but confines his observations on the appointment and his extent of power, to the custom within the province of York. Swinburne on Testam. 1st ed. 99. b. In a case, first before the king's bench in lord Hale's time, he admitted the right of the ecclesiastical court to appoint a curator of the personal estate; and after his death the court inclined to the same opinion. 2 Lev. 162. T. Jo. 90. In another case soon after, the court of king's bench allowed the right as to the infant's *portion*, but denied it over the *person*. 3 Keb. 384. In the next case on the subject, the question as to the right was largely debated on a plea in prohibition. This alleged that by the common law used and approved in England, if any person by his will devises any goods to his children, the ordinary before whom the will is proved, hath used to commit the custody of the sons and their portions till fourteen, and of the daughters and their portions till twelve, except where they are in the custody of any other by reason of any tenure, or by the father's appointment; and if any person detained such infants and their portions, the ordinary hath also used to compel the delivery of them by ecclesiastical censures. 2 Lev. 217. But on a demurrer this plea was overruled, and the prohibition ordered to stand; the latter being founded on the libel in the suit in the ecclesiastical court, which had stated the right in a more *extensive* way; for the libel was, that by the ecclesiastical law, every person having the tuition of any infant under age, by the will of the father, or *per judicem competentem*, ought to have the custody of the infant and suit in the ecclesiastical court for the detainer. After this case we find nothing on the subject for a long time. But in a case of temp. Geo. 2. Lee, justice, casually takes notice of the ecclesiastical court's appointment without objection, saying, that the course of the spiritual court is, that if the infant is under seven years, they choose a curator, but if he is seven he chooses. Fitzgib. 164. However, in a loose note of a still later case, lord chancellor Hardwicke is made to say, that only guardians *ad litem* can be appointed by the ecclesiastical court. 14 Vin. Abr. 176. pl. 7, in a note. In another case, the report of which is more to be relied upon, the same respectable judge reprobated it as a presumption in the ecclesiastical court to appoint a guardian of the *person* and *estate*, and declared their appointment of any, except when a suit was depending, to be an interference with his power as chancellor; and so displeased was he in the instance before him, as to conclude with recommending to the attorney general, to consider, whether a *quo warranto* would not lie against the ecclesiastical court. 3 Atk. 631. Under a like apprehension of the subject, the late chief justice of the king's bench, in Miss Catley's case, spoke of the appointment by the ecclesiastical courts as confined to guardians

Pl. Com. (3 Co. 39.)

☞ Also if the mother be gardian in socage, and taketh husband, and dyeth, the husband shall not have this custody by survivour; because the wife had it *en auter droit*, in the right of the heire. [89. b.]

[d] 8 E. 2. Presentm. 10. 7 E. 3. 39. 27 E. 3. 89. 29 E. 3. 5. F. N. B. 33. 31 E. 3. Estoppel, 240. Britton, 163, 164. Fleta, lib. 1. cap. 10.

A gardian in socage shall not [d] present to a benefice in the right of the heire; because he cannot be accomptable therefore, for that he can make no benefit thereof, for the law doth abhorre simony, or any corrupt contract for benefices; and therefore in that case the heire shall present himselfe (1). And *Britton* speaking of these gardians said well, *les queux gardeins sont pluis servants que gardeins* (that is) which gardiens are rather servants than gardians.

(2 Ro. Abr. 41. Cro. Jam. 99. 3 Inst. 156. Post. 120. a.)

"*He shall render an account, &c. after the heire accomplisheth the age of* 14 *yeares.*" This point hath been much controverted in our bookes, and the causes of the doubts have beene, 1. Upon the

---

in litem, and therefore as perfectly insignificant. Burr. v. 3. p. 1436. These authorities being brought before the reader, we shall leave him to his own judgment, with this further information only, that in the warm debates in parliament about the late marriage act, this species of guardianship is said to have been incidentally discussed.

The *fourth* kind of guardian, not yet enumerated, is the guardian *ad litem*. But of this *special* guardian it may suffice for the present purpose to observe, that the power of appointing such is incident to all courts; and that the king *may*, as it is said, by letters patent appoint a guardian to prosecute or defend for an infant in suits generally, though such appointments have been long out of use. F. N. B. 27. L. So further as to guardian *ad litem*, post. 135 b.

In the preceding notes about guardianship we have purposely confined ourselves to the subject exclusive of the *royal family*. Their case is too delicate to warrant our touching on the subject without better materials than we are at present possessed of. Therefore we can only refer to the arguments in the case on the king's right in respect to the education and marriage of his grand-children, which was referred to the judges in the reign of George the first. See Fortesc. Rep. 401. & post. 133. b. note 1.—[Note 70.]

(1) S. P. acc. ante 17. b. post. 120. a. S. P. acc. as to guardian by nurture. Cro. Jam. 99. In another work lord Coke extends the doctrine so far, as to say that the infant shall present, *whatsoever his age* may be. 3 Inst. 156. But some suppose the guardian to have the right of presenting in the name of the infant. Others again admit the right of the infant *in general*, but add, that if the infant be of such tender years as not to have any discretion, then the guardian should present for him. See Vin. Abr. *Guardian*, Q. pl. 2. But the law seems now settled in the full extent of lord Coke's opinion by a determination of lord chancellor King. In a cause before him in advowson had been conveyed to trustees on trust to present such person as the grantor, his heires or assigns, should by deed appoint; and on the principle that an infant of *any* age may present, his lordship confirmed an appointment by an infant heir, though it appeared that the child was not a year old, and that the guardian guided the child's pen in making his mark, and putting his seal. 2 Eq. Cas. Abr. *Infant*, B. pl. 3. Vin. Abr. *Collation*, A. pl. 10. Wats. Clergym. L. ed. 1747, p. 140. See also, 3 Atk. 710.—However, though this decision may remove all doubts about the *legal* right of an infant of the most tender age to present, still it remains to be seen, whether the want of discretion would induce a court of equity to control the exercise, where a presentation is obtained from an infant without the concurrence of the guardian.—[Note 71.]

the words of the statute of [e] *Merlebridge*, ca. 17. 2. Upon the originall writ of account against the gardian in socage. The words of the statute be, *cùm ad legitimam ætatem pervenerit sibi respondeat, &c.* and *legitima ætas* [f] lawfull age is xxi. yeares. Also the writ of accompt reciteth the said statute, *quare cùm de communi consilio regni nostri provisum sit quòd custodes terrarum & tenementorum, quæ tenentur in socagio, hæredibus terrarum & tenementorum illorum, cùm ad plenam ætatem pervenerint, reddant rationabilem compotum.* [g] Whereupon it is gathered that no action of account did lye against the gardian in socage at the common law, untill the heire be of his lawfull age of 21 yeares. But as to the first (*legitima ætas*) as the statute [h] speaketh, or *plena ætas* (as the writ doth render it) are to be understood *secundùm subjectam materiam*, that is of the heire of socage land, whose lawfull and full age as to the custody of guardianship is 14. And as to the recitall of the statute, [i] it is evident that an action of account did lye against gardian in socage at the common law; and that the statute was made in affirmance or declaration of the common law; for the statute speaketh onely *de custodiâ parentûm*, that is of a gardian in right; but yet an action of account lyeth against him that occupieth the land as gardian, albeit he be not of the blood (as hereafter shall be said). And upon consideration had of the said statute and of all the bookes, it was adjudged in the court of common pleas, *Pasch.* 16 *Eliz.* Rot. 436, according to the opinion of *Littleton*, that the heire after the age of 14 yeares shall have an action of account against the gardian in socage, when he will at his pleasure; and so is an ancient question well resolved (2).

Britton was of opinion, that the statute of *Merlebridge*, which gave the *capias* in account, extended to gardian in socage, for he wrote before the statute of *W.* 2. c. 11. But later bookes have over-ruled this point, that no *capias* lyeth against gardian in socage, for the statute extendeth to bailifes only. Neither doth the statute of *W.* 2. extend to gardian in socage, for that speaketh only *de servientibus, ballivis, camerariis, & receptoribus.*

[e] It is called the Statute of Merlebridge, because the parliament in 52 H. 3. was holden there.
[f] 16 E. 3. Wast. 100. 18 E. 3. 55. 77. 29 E. 3. 5. Vide 32 E. 3. Gard. 31. F. N. B. 118. 6 E. 3. 38.
[g] 16 E. 2. Account, 120. 17 E. 2. ibid. 121.
[h] 2 E. 2. Account. 14 E. 3. ib. 3 Mar. Dy. 137. Keylwey, 131.
[i] 18 E. 2. Avowry, 220. (2 Inst. 380. Cro. Cha. 229.) Pasch. 16 Eliz. Rot. 436. in communi banco. Mirror, ca. 2. sect. 17. Britton, fol. 163. b. Fleta, lib. 2. cap. 64. 18 E. 2. Avowry, 220. 17 E. 3. 59. Merlbr. ca. 29. W. 2. ca. 11.

"But such gardian upon his account shall have allowance of all his reasonable costs and expenses in all things." (3) And this is due to all accountants by the common law (4); and so it is declared

The statute of Merlb. intended by Litt. is ca. 17.

---

(2) But against a testamentary or other guardian, whose authority doth not determine till the infant is twenty-one, or *being a female* attains that age or *marries*, the infant cannot have action of account before; for the rule of the *common law* is, that account shall not lie whilst the guardianship continues. However, in *equity* the infant may by *prochein amy* sue his guardian for an account during the minority. 2 Vern. 342. 2 P. Wms. 119. 1 Ves. 91. 3 Atk. 625. 2 Ves. 484. Mitf. pl. 25.—[Note 72.]

(3) Therefore a guardian cannot be charged in account as a *receiver;* because then he would lose his costs and expenses; these it is said being in *general* allowed only to *guardians* and *bailiffs*, and not to *receivers*. Post. 172. a. —[Note 73.]

(4) The rule seems expressed too *generally;* lord Coke elsewhere telling us, that a receiver, who is one of the *three* denominations of accountants known to our law, cannot charge for costs and expenses, except in some special cases in favour of trade and merchandise. Post. 172. 1 Freem. 378. —[Note 74.]

declared by the said statute of *Merlebridge, salvis ipsis custodibus rationalibus missis suis.*

41 E. 3. 3. 22 Ass. 41, 22 E. 3. Account, 111. 29 Ass. 28. 3 H. 7. 4. b. 6 H. 7. 12. 10 H. 7. 25. 10 H. 6. 21. 2 E. 4. 15. Doct. & Stud. c. 38. fo. 130. (Cro. Eliz. 219. 1 Ro. Ab. 2, 3. 124.)

"*Allowance.*" What other allowances shall the gardian have? If the gardian receive the rents and profits of the lands, and be robbed of the same, whether shall he be discharged thereof upon his account? And it seemeth, that if he be robbed without his default or negligence he shall be discharged thereof (5). As if a bailife of a manor, or a receiver, or a factor of a merchant, or the like accountant, be robbed, he shall be discharged upon his account. And seeing the gardian shall be charged as bailife after the heire's age of 14, and be discharged after his account if he be robbed, *pari ratione* if he be robbed before the age of 14. But otherwise it is of a carier, for he hath his hire (6), and thereby implicitely undertaketh the safe delivery of the goods delivered to him, and therefore he shall answer the value of them if he be robbed of them (7). Note the diversity, and so it was resolved * in the king's bench.

* Hil. 48 Eliz. inter Woodliefe and Curties. (8) p. 28. (Cro. Jam. 188, 189.)

(4 Co. 83 b. Cro. Eliz. 815. Cro. Jam. 188. Noy. 126.) 29 Ass.

So it is if goods be delivered to a man to be safely kept, and after those goods are stollen from him, this shall not excuse him; because by the acceptance he undertook to keepe them safely, and therefore he must keepe them at his perill.

So it is if goods be delivered to one to be kept, for to be kept and to be safely kept is all one in law (9). But if the goods be delivered to him to be kept as he would keepe his owne, there if they be stollen from him without his default or negligence, he shall

(5) The rule is the same as to trustees, though for their greater security it is usual to insert *special* provisions in the instrument creating the trust. 2 Cha. Cas. 2.—[Note 75.]

(6) But the *hire* is not the *only* or *principal* ground, on which the carrier is liable; for factors, though they also receive a reward, are not so, except for *negligence* or by reason of a *special* undertaking. The great cause of the laws charging the carrier is the *public employment* he exercises. 1 Ld. Raym. 917. 1 Salk. 143. 12 Mod. 487.—[Note 76.]

(7) This is by the *common law* or *general* custom of the realm; and to recite it in the declaration, as is sometimes the practice both with respect to innkeepers and carriers, seems not only unnecessary but even rather improper; because it tends to confound the distinction between *special* customs, which ought to be pleaded, and the *general* custom of the realm, of which the courts are bound to take notice without pleading. Accordingly it seems admitted in several books, that describing the defendant to be a *common carrier*, without any thing more, is sufficient. Hob. 18. 1 Sid. 245. Hard. 485. 3 Mod. 227. Wils. v. part 1. page 281.—[Note 77.]

(8) S. C. Mo. 462. Ow. 57. 1 Ro. Abr. 2.

(9) This doctrine was denied by the court in the great case of Coggs and Barnard; and it is now understood, that acceptance of goods to be kept *generally* is merely an undertaking to keep them as the party receiving keeps his own. 2 L. Raym. 911.—In Coggs and Barnard the action was for so negligently carrying some hogsheads of brandy that one of them was staved; and on motion in arrest of judgment, the court held that a *sufficient consideration* appeared in the declaration, though it was wholly grounded on a *special undertaking* to carry safely, without stating, either that the defendant was to have *hire*, or that he was a *common carrier*.—[Note 78.]

shall be discharged. So if goods be delivered to one as a gage or pledge, and they be stollen, he shall be discharged; because he hath a property in them (10), and therefore he ought to keepe them no otherwise than his owne; but if he that gaged them, tendred the money before the stealing, and the other refused to deliver them, then for this default in him he shall be charged.

[89. b.] If *A.* leave a chest locked with *B.* to be kept, and taketh away the key with him, and ☞ acquainteth not *B.* what is in the chest, and the chest together with the goods of *B.* are stolen away; *B.* shall not be charged therewith, because *A.* did not trust *B.* with them, as this case is (1). And that which hath beene said before of stealing, is to be understood also of other like accidents, as shipwrecke by sea, fire by lightning, and other like inevitable accidents (2). And all these cases were resolved and adjudged in the king's bench*. And by these diversities are all the bookes concerning this point reconciled (3).

8 E. 2. tit. Detinue, 59. (8 Co. 32. 5 Co. 13. b.) (Doct. & Stud. 129. b.)

* Pasch. 43 Eliz. inter Southcote & Bennet, in Detinue. (4 Co. 83. b.)

Note, reader, it is necessary for any that receiveth goods to be kept, to receive them in this speciall manner, viz. to be kept as his owne, or to keep them at the perill of the owner (4). But now is *Littleton* to be further heard.

"*And*

(10) Lord ch. j. Holt thought this reason insufficient, and justly as it seems. Other bailees have a property, that is, a *special* and *limited* one; and what hath the pawnee more? The only difference is in the *degree;* the pawnee's property, though not *absolute,* being rather more *enlarged,* and for some purposes a *beneficial* one. 2 L. Raym. 916. Com. Dig. tit. *Mortgage,* and Vin. Abr. tit. *Pawn.* But whatever the difference may be in point of property, it is become immaterial so far as regards the use made of it by lord Coke; because now *general* bailees of goods are not deemed any further chargeable for the loss of them than pawnees. 1 Roll. 338. Salk. 522. 3 Burr. 1593.—[Note 79.]

(1) In the case here stated, the not informing *B.* what was in the chest is relied on as the material circumstance; but the modern doctrine would make it unnecessary to resort for aid from it, as according to that *B.* would not be chargeable, though he had known the contents of the chest. However, there are cases which turn upon the giving of such information. All. 93. 1 Ventr. 258. Carth. 486. 1 Stra. 145. Law of Nisi Prius, ed. 1775, p. 71.—[Note 80.]

(2) Here lord Coke joins losses by shipwreck and lightning, and other like inevitable accidents, with those by stealing; but other authorities make a distinction, and according to them, neither carriers nor masters of ships are responsible for losses by *acts of God* or of the *king's enemies.* 2 Bulst. 280. 2 L. Raym. 918. Vin. Abr. tit. *Master of a Ship,* B. pl. 12.—[Note 81.]

(3) The *old* doctrine about bailments will be found at large in Southcote's case, which is cited by lord Coke in the margin. For the *modern* doctrine, the student should consult the famous case of Coggs and Barnard already cited. Lord chief justice Holt's argument in that case, as reported by lord Raymond, particularly merits attention; it being a most masterly view of the whole subject of bailment. Another important case connected with the same subject is that of Lane and Cotton, in which three judges against Holt held, that action on the case will not lie against the Master of the General Post-Office for the loss of a letter with exchequer bills in it. 12 Mod. 472. See further the following books, which are citations from a note by the editor of the 11th edition. —21 E. 4. 55. 4 E. 3. 6. 2 H. 7. 11. Palm. 548. W. Jo. 179. Grot. de Jur. Bell. l. 2. c. 12. s. 13. Puffend. de Jur. Nat. l. 5. c. 4. s. 6, 7; and Dom. Loix Civ. l. 1. t. 5. s. 2. t. 6. s. 3. t. 7. s. 3.—3 Atk. 47.—[Note 82.]

(4) We have already observed, that *in general* this distinction is now exploded.

"*And if such gardian marry the heire within age of* 14 *yeares, &c.*" For if he marry the heire after 14, he is out of his custody, and no account shall be made therefore.

"*He shall account to the heire.*" He shall account for the marriage of the heire, viz. for so much as any man *bonâ fide* had offered for the marriage, or would give in marriage unto him.

1 Ro. Abr. 908. 910. Cro. Cha. 79.)

"*Or to his executors.*" Not(5) that an infant of the age of 14 may make his will (as some hereupon have collected); but the meaning of *Littleton* is, that if after his marriage he accomplish his age of 18 yeares, at what time he may make his testament(6), and

---

exploded. Ante 89. a. note 9. See further tit. *Bailment* and *Carrier*, in New Abr. tit. *Bailment* and *Action for Negligence*, in Vin. tit. *Action on the case for misfeasance*, in Com. Dig. Law of Nisi Prius, ed. 1775, p. 69.

(5) It is *note* in *all* the former editions, but *not* is apparently *the true* reading.

(6) There is a great abundance of irreconcilable opinions in our books about the earliest age at which a will may be made of *personal* estate. Here lord Coke states 18 to be the age; though the reasons and authorities in favour of that time do not appear.—Others mention 17, that being the age at which an administration during the minority of an executor determines. 1 Vern. 255. 2 Vern. 558. But this opinion was probably founded on an idea, that our spiritual courts make no difference between the time for acting as an executor and the time for making a will, which is clearly a mistaken notion. However, it receives some countenance from the decisive manner in which a late chancellor of the first authority mentions 17, and the ambiguous terms in which he speaks of an earlier age. 1 Ves. 303. 3 Atk. 709.—According to others 15 is the age for *males*, if the party can be proved of sufficient discretion; but we are not informed why, and therefore little respect is due to this opinion, if *that* can be deemed one, which in fact was nothing more than a loose *dictum*. 2 Vern. 469.—Others doubt, whether any time before 21 is not too early; because none can be administrators till they have attained that age. 1 Vern. 326. The reasons usually assigned for not granting administration to any person under 21 are, that an administrator being created by statute his age should be according to the common law, and that the statute of distribution requires the security of a bond from an administrator, which an infant cannot give. See the books cited in Vin. Abr. *Executors*, L. 3. pl. 6. The latter reason against an infant's being administrator is the most forcible; but both seem equally inapplicable to the other point; the power of making a will of personal estate not being derived from or regulated by any statute, and the giving of a bond being foreign to the case of a testator.—In Perkins *four* is said to be the age for making a will of personalty; but though this is the time mentioned in the old as well as the new editions of this book, yet, as Swinburne well observes, it appears to be an error of the press by omission of the figure x, and most probably xiiii. was the age intended. Perk. sect. 503. Swinb. Testam. part 2. sect. 2. Off. of Ex. cap. 18.—The last opinion on the subject, and that most to be relied upon, distinguishes between *males* and *females*, making the *testamentary* power to commence in the former at 14, and in the latter at 12. At these ages the Roman law allowed of testaments, and the civilians agree that our ecclesiastical courts follow the same rule; and to them we ought principally to resort for information on testamentary subjects; because these being so peculiarly of spiritual conusance, they speak more *ex tripode juridico*, to use the phrase of a great author, than our common lawyers. Swinb. on Testam. part. 2. sect. 2. Godolph. Orph. Leg. 276. 2 Strab. Dom. 11. Har. Justin. Instit. l. 2. t. 12. s. 1. But the doctrine is not sustained by the authority of civilians only. Some respectable

and constitute executors for his goods and chattells, and the words are so to be understood, as may stand with law and reason. Note, executors could not have an action of account at the common law, in respect of the privity of the account; but the statute of W. 2. ca. 23, hath given the action of account to executors, the statute of 25 *E.* 3. ca. 5, to executors of executors, and the statute of 31 *E.* 3. c. 11, to administrators.

7 E. 3. 62. 19 E. 3. Account, 56. 38 E. 3. 7. 31 E. 3. tit. Account, 57.

"*That he would marry him without taking the value.*" So as the gardian shall not account only for that which he shall receive in this case, but for that also which he might receive.

3 E. 3. 10. 46 E. 3. Account, 40. 2 R. 2. ibid. 45. 6 R. 2. Account, 47.

"*Unless that he marrieth him to such a marriage, that is as much worth, &c.*" This needeth no explanation.

If the heire in socage be ravished out of the custody of the gardian, and the ravisher marrieth the heire, the gardian shall have a writ of ravishment of ward, and recover the value of the marriage, &c. and shall account to the heire for the same.

Hill. 3 E. 2. coram Rege, Rot. 34. Agnes Frowick's case, F. N. B. 139. I. & 140. 26 E. 3. 65. 1 E. 3. 19, 20.

And the guardian in socage is bounden by law, that the heire be well brought up, and that his evidences be safely kept.

The grandmother of the sonne and heire of *John Bernevill*, who held the manor of *Totington* in the county of *Midd.* in socage, recovered the heire in a ravishment of ward against *Simon Chevin*, which had married the step-mother of the heire; and by the rule of the courte, the plaintife *pro nutriturâ hæredis et pro custodiâ evidentiarum invenit plegios*

Trin. 1 H. 5. coram Rege, Rot. 1 Midd.

Sect. 124.

AND if any other man, who is not the next friend, occupies the lands or tenements of the heire as gardian in socage, he shall be compelled to yielde an account to the heire, as well as if he had beene next friend; for it is no plea for him in the writ of account to say, that he is not the next friend, &c. but he shall answer whether he hath occupied the lands or tenements

---

respectable books, written by common lawyers, mention 12 and 14 for the same purpose; prohibitions have been refused by the king's beneh, when applied for to restrain the ecclesiastical courts from allowing wills made at such early ages; and there are instances, in which the doctrine hath been recognized and adopted by the court of chancery. Off. of Ex. cap. 18. Shep. Touchst. 403. T. Jo. 210. 2 Show. 204. Comb. 50. Prec. in Cha. 316. Gilb. Eq. Rep. 74. Mos. 5. To conclude this point, it may be added, that as on the one hand the rule of the ecclesiastical courts, in holding 12 and 14 to be ages at which males and females, according to the difference of sex, first have the power of making wills of personalty, seems now well established; so on the other hand it is in some degree consonant to the doctrine of our common law; for though *that* is silent as to the age for wills of personalty, these being the subjects of a different law, yet it adopts the same standard of 12 and 14 for other purposes, and so far deems them the ages of discretion, as to give infants of those ages the power of choosing guardians, and to presume that they are *doli capaces* in respect to crimes. 1 Hal. H. P. C. 22.—[Note 83.]

tenements as gardian in socage or no. But quære, *if after the heire hath accomplished the age of* 14 *yeares, and the gardian in socage continually occupieth the land until the heire comes to full age,* scil. *of* 21 *yeares, if the heire at his full age shall have an action of account against the gardian, from the time that he occupied after the said* 14 *yeares, as gardian in socage, or against him as his bailife.*

19 E. 2. Avowry, 221. 39 E. 3. 16. 41 E. 3. Account, 35. 49 E. 3. 19. 18 E. 3. 77. 28 Ass. p. 11. Pl. Com. 542. 6 E. 3. 38. F. N. B. 118.

"*AND if any other man, who is not the next friend, &c.*" If a stranger entreth into the lands of the infant within age of 14, and taketh the profits of the same, the infant may charge him as gardian in socage. And this doth well agree with the writ of account against a gardian in socage: for the words be, *Idem* B. *præfato* A. *rationabilem compotum suum de exitibus & provenientibus de terris et tenementis suis in* N. *quæ tenentur in socagio et quorum custodiam idem* B. *habuit dum præd.* A. *infra ætatem fuit ut dicitur.* And true it is, that in judgement of law he had the custody of the lands: and he is called *tutor alienus*, and the right gardian in socage *tutor proprius;* and it is no plea for him to denie that he is *prochein amy*, but he must answer to the taking of the profits (1), as *Littleton* here saith. [90. a.]

13 H. 3. Account, 77. 22 E. 3. 11. 41 E. 3. Account, 35. 10 H. 7. 7. 4 H. 7. 6. b. 7 H. 7. 9. a.

6 E. 3. 38. 32 E. 3. Account, 60. 7 E. 4. F. N. B. 118.

"*But quære, &c.*" This *quære* came not out of *Littleton's* quiver; for it is evident, that after the age of 14 yeares he shall be charged as bailife, at any time when the heire will, either before his age of 21 yeares, or after (2).

Sect. 125.

ALSO, if gardian in chivalrie makes his executors and die, the heire being within age, &c. the executors shall have the wardship during the nonage, &c. But if the gardian in socage make his executors and die, the heire being within the age of 14 *yeares, his executors shall not have the wardship; but another next friend, to whom the inheritance cannot descend, shall have the wardship, &c. And the reason of this diversitie is, because the guardian in chivalrie hath the wardship to his owne use, and the gardian in socage hath not the wardship to his owne use, but to the use of the heire* (1)†. *And in this case where the gardian in socage dyeth before any account*

† *This note is in* 90. *b. of the* 13*th and* 14*th editions.*

(1) That is, whether he took the profits as guardian; for if he assumed to take them in that character, he shall answer for them accordingly, though he was not guardian *de jure.*—[Note 84.]

(2) Notwithstanding Lord Coke's observation on the *quære*, it is in L. and M.; Roh.; P. and both of the MSS.

(1) † Fitzherbert cites two authorities which make guardianship in socage grantable. F. N. B. 143. P. But Littleton's opinion militates strongly to the contrary; for if such a trust is so *personal* as not to be transmissible to executors, why should it be so to grantees? Accordingly in the arguing of a modern case it seems to have been taken for granted, that guardianship in socage cannot be assigned. Gilb. Eq. Rep. 177.—[Note 86.]

account made by him to the heire, of this the heire is without remedy, for that no writ of account lieth against the executors (2) ‡, *but for the king onely.*

"*To his owne use.*" A tenant holdeth land of a bishop by knights service, which seigniorie the bishop hath in the right of his bishoprick, the tenant dieth, his heire within age, the bishop either before or after seisure dyeth; neither the king, nor the successor of the bishop, shall have the wardship, but his executors. For albeit the bishop hath the seigniorie *en auter droit*, yet the wardship being but a chattell, he hath in his owne right, and a chattell cannot goe in the succession of a sole corporation, unless it be in the case of the king (3). 7 R. 2. Br. 634. 40 E. 3. 14. 2 H. 4. 19. 10 Eliz. Dier. 277. (Post. 117. 4 Co. 64. b.) 7 H. 4. 41. 44 E. 3. 42.

And yet if a bishop have an advowson, and the church become void, and the bishop die, neither the successor nor the executors shall present, but the king: because it is but a *chose in action* (4). 24 E. 3. 26. 44 E. 3. F. N. B. 33.

[90. b.] And so it is in the case where the king hath wardship, but ☞ that is a prerogative that belongeth to the king to provide for the church being void; for where the tenure by knight's service is of a common person, the executors of the tenant shall present where the avoidance fell in the life of the tenant. See more of this in the Chapter of Warranty, Sect. 740. (Cro. Jam. 248.)

"*The*

‡ *This note is in* 90. *b. of the* 13*th and* 14*th editions.*

(2) ‡ Littleton must be understood to mean, that at *common law* account did not lie against executors; for in his time it did lie under several statutes against an executor *in general*, though they were deemed not to extend to the executor of guardian in socage. See post. note 3 to 90 b.—[Note 87.]

(3) Acc. ante 9. a. 46. b. post. 388. a.

(4) This reason requires some explanation. It is not that *choses in action* are in their nature incapable of transmission to executors; for the contrary is known to be law, and some instances of it are here given; but it is because in the case of a *chose in action*, so peculiar as a right of presentation, the law favours the king more than the bishop's executors, and therefore gives the king, as having in his custody the temporalties of the vacant bishopric, that presentation, which executors in general are entitled to when they are opposed to an heir. See post. 388. Bro. Abr. *Presentation*, 34. Wats. Clergym. L. ed. 1747, p. 72. But then it may be asked, why the king should not have a like preference, in the case of the bishop's being entitled to a wardship by knight's service in right of his fee, and dying *before* reducing it into possession by seizure. The answer may be, that the law distinguishes between an *interest both of profit and trust*, as wardship by knight's service is, and one *merely of trust*, such as a presentation. The law gives the former to the bishop's executors, for the benefit of his personal estate. It gives the latter to the king; because the presentation to a vacant church cannot lawfully be sold; and as the bishop's personal estate cannot derive any *profit* from the presentation, the law deems it more proper to follow the temporalties of the see to which the advowson belongs. In a subsequent part of the Commentary, where it is said, that the bishop's executors shall not present, because nothing can be taken for a presentation, lord Coke seems to hint at something of this kind. Post. 388. a. However, as a like reason might be urged against executors in favour of an heir, it is most safe to rely on the right of the king as settled by *authorities* and *long practice*.—This preference of the king's title by prerogative is carried so far, that even *presentation* and *institution* in the lifetime of the bishop will not prevail, unless there hath been also an *induction*. Vin. Abr. *Presentation*, C. a. E. a. Wats. Clergym. L. ed. 1747, p. 73.—[Note 85.]

31 E. 3. Account, 57. 19 E. 3. ibid. 156. 48 E. 3. 2. 2 H. 4. 13. F. N. B. 117. 19 H. 6. 5. 4 E. 4. 25. 43 E. 3. 21. 11 Co. 89. (2 Inst. 404.) [*] Rot. Parl. 50 E. 2. nu. 123.

"The heire is without remedy, &c." For albeit in an action of account against a gardian in socage, &c. the defendant cannot wage his law, yet in respect of the privity of the matters of account, and the discharge resting in the knowledge of the parties thereunto, an action of account neither lyeth against the executors of the accountant, nor at the common law for the executors of him to whom the account is to be made, as is aforesaid (3); but that is holpen by statute (4). [*] It hath beene attempted in parliament to give an action of account against the executors of a gardian in socage, but never could be effected (5).

[a] Pl. Com. 321. Keyleway, 131. 11 Co. 89.

"But for the king onely." [a] The reason of this is, because the king's treasure is the sinewes of warre, and the honour and safety of the king in time of peace, *firmamentum belli, et ornamentum pacis;* and therefore the death of the party shall not barre the king of his treasure due unto him upon the account, because it is intended, that the king was busied about the publicke for the good of the common-wealth, and had not leisure to call his accountant to make his account, *et nullum tempus occurrit regi* (6). *Littleton* speaketh of the king's prerogative but twice in all his bookes, viz. here, and Sect. 178, and in both places, as part of the lawes of *England*. *Prærogitiva* [b] is derived of *præ.* i. e. *ante*, and *rogare*, that is, to aske or demand beforehand, whereof commeth *prærogitiva*, and is denominated of the most excellent part; because though an act hath passed both the houses of the lords and commons in parliament, yet before it be a law, the royall assent must be asked or demanded and obtained, and this is the proper sense of the word. But legally [*] it extends to all powers, preheminences, and priviledges, which the law giveth to the crowne, whereof *Littleton* here speaketh of one. *Bract.* lib. 1, in one place calleth it *libertatem*, in another *privilegium regis;* [c] *Britton* [d] (following *W.* 1.) *droit le roy;* [e] *registr. jus regium*, and *jus regium coronæ, &c.*

Vid. Sect. 178. Staunf. Prær. 32.

[b] Fortescue, fo. 45. Rot. Parl. 1 H. 4 nu. 188. Pl. Com. 236. Staunf. Pl. Cor. 162. b. Staunf. Prær. 1. a. & 10 b.

[*] Staunf. Prær. 5. 10.

[c] Westm. 1. cap. 50.

[d] Britton, fol. 27. [e] Regist. fol. 61, &c.

Sect.

---

(3) This rule of the common law, which did not allow of actions of account *against* or *for* executors, had some exceptions. The *latter* part of the rule did not extend to the executors of *merchants;* and the king was not within *either* part. F. N. B. 117. 11 Co. 90. a. It should also be remarked, that though at the common law executors in general were not compellable to account, yet if they consented to settle an account, they were liable to an action of *debt* for the balance. F. N. B. page 267 of 4to ed. in lord Hale's notes.—[Note 88.]

(4) The 13 E. 1. c. 23, gave an account to executors; but this being construed to describe *immediate* executors only, other statutes were made to extend the remedy to the executors of executors and to administrators. 25 E. 3. st. 5. c. 5. 31 E. 3. c. 11. 2 Inst. 404. Ante 98. b.—[Note 89.]

(5) Acc. Cott. Abr. Rec. 131. But now by 4 Ann. c. 16. s. 27, actions of account lie against the executors and administrators of every *guardian*, bailiff and receiver.—[Note 90].===According to lord Nottingham, MSS. Prologom. bills in equity did lie against executors in such cases.

(6) See post. 119. a. and the note there.

Sect. 126.

ALSO, the lord, of whom the land is holden in socage, after the decease of his tenant shall have reliefe in this manner. If the tenant holdeth by fealty and certaine rent to pay yeerely, &c. if the tearmes of payment be to pay at two termes of the yeare, or at 4 termes in the yeare, the lord shal have of the heire his tenant as much, as the rent amounts unto, which he payeth yearly. As if the tenant holds of his lord by fealty, and tenne shillings rent payable at certaine terms of the yeare, then the heire shall pay to the lord ten shillings for relief, beside the tenne shillings which he payeth for the rent.

"*CERTAINE rent.*" A tenant holdeth of his lord certaine lands in socage, to pay yearely a paire of gilt spurs or five shillings in money at the feast of *Easter*. In this case the rent is uncertaine, and the tenant may pay which of them he will at the said feast, and likewise the tenant may pay which of them he will for reliefe; but if he pay it not when he ought, then may the lord distraine for which of them he will. But if the tenure be to attend on his lord at the feast of *Christmasse*, or to pay ten shillings, there the reliefe must be ten shillings, because the other cannot be doubled. *Et sic de similibus.* [91. a.]

43. E. 3. Barre, 294. 9 E. 4. 36. Bract. lib. 2. fol. 35. Glanvil. lib. 9. cap. 4. (2 Ro. Abr. 519. Post. 145. a.) (2 Co. 37. 2 Ro. Abr. 519.)

"*To pay yeerely.*" If the tenant holdeth of his lord by fealty, and to pay every two or three year ten shillings, albeit this be no annual rent, yet shall he pay ten shillings for reliefe. *Et sic de similibus.*

But it is to be noted, that beside reliefe, whereof *Littleton* here speaketh, there belongeth to a tenure in socage of common right aid for the making of his eldest son a knight at the age of fifteene years, and to marry his daughter at the age of 7 years (1).

Vid. Sect. 103. F. N. B. 82. West. 1. cap. 35. 25 E. 3. stat. 5. cap. 11.

In the same manner it is, if a man be seised of certaine land which is holden in socage, and maketh a feoffment in fee to his own use, and dieth seised of the use, (his heire of the age of 14 yeares or more, and no will by him declared) the lord shall have reliefe of the heire, as afore is said. And this by the statute of 19 H. 7. cap. 15 (2).

There is an addition to *Littleton*, wherefore I omit it the rather, for that the statute of 19 *H.* 7. is for the cause above mentioned become of none effect.

Sect.

---

(1) We have already had occasion to observe, that these aids are taken away by the 12 Cha. 2. c. 24. Ant. 76. a note 1.

(2) This part about relief from the heir of *cestui que use*, as lord Coke truly observes, is an addition to *Littleton:* and it first appears in *Redman*. See post. 117. a.

Sect. 127.

AND in this case, after the death of the tenant, such reliefe is due to the lord presently, of what age soever the heire be; because such lord cannot have the wardship of the body, nor of the land of the heire. And the lord in such case ought not to attend for the payment of his reliefe, according to the terms and dayes of payment of the rent; but he is to have his reliefe presently, and therefore he may forthwith (1) *distreine after the death of his tenant for reliefe.*

16 H. 7. 4. 18 E. 3. 26. p. 18. Bracton, lib. 2. fol. 85. dabit hæres una vice redditum suum unius anni

"*PRESENTLY;*" and as *Littleton* saith, he ought not to attend the payment of his reliefe according to the daies of paiment of his rent, but he ought to have his reliefe presently, and for the same he may incontinently distraine after the death of the tenant.

duplicatum. Britton, fol. 178. occ. Fleta. lib. 1. cap. 8. (2 Ro. Abr. 519.)

(Ant. 47. b. 2 Ro. Abr. 519.)

And therefore in the case aforesaid, where the tenant holdeth by the rent of five shillings, or a paire of gilt ☞ spurres, if the heire be not presently (that is, as presently and as conveniently as he may, all due cir- [91. b.] cumstances considered) after the death of his ancestor ready upon the land to pay reliefe, the lord may distrain for which of them he will; and if the tenant tendered either of them according to the law, and none for the lord was ready there to receive it, yet the lord may distraine for that which was tendered, at his pleasure (2).

45 E. 3. 19. 35 H. 6. 52. 20 Eliz. Dier. 361. Staunf. Prær. 13. b. F. N. B. 256. 259.

"*Of what age soever the heire be.*" And yet it appeareth in our bookes, that in this case the king in case of a tenure in socage in chiefe shall not have *primer seisin*, unless the heire of the age of 14 yeares at the death of his ancestor; for if he be under that age, he is in the gard and custody of his *prochein amy*.

But otherwise it is in case of a common person, as here it appeareth. And where in some impressions these words be added (*so that he be past the age of* 14 *yeares*), those words so added are against the law, and no part of *Littleton's* works (3).

* *This note is in* 91. *b. in the* 13*th and* 14*th editions.*
† *The word* in *seems to be inserted for* or.

Sect.

---

(1) *But here we must understand Littleton to be speaking of a reliefe due on the descent of a fee simple in † fee taile *in possession*; for if only a *remainder* or *reversion* expectant on an estate for life descends on the heir, the relief is not leviable till the death of the tenant for life. Keilw. 83. b. Kitch. ed. 1592. fo. 146. b. As to the descent of a remainder or reversion expectant on an estate tail, it seems doubtful whether a relief is payable at *any* time in respect of such a descent. Keilw. 84. a. Watk. on Desc. 513. 3d. ed.—[Note 91.]

(2) See ant. 83. b. note 4.

(3) Accordingly the words objected to by lord Coke are neither in L. and M nor Roh.—They were first inserted in P.

Sect. 128.

IN the same manner it is, where the tenant holdeth of his lord by fealtie and a pound of pepper or cummin, and the tenant dyeth, the lord shall have for reliefe a pound of cummin, or a pound of pepper, besides the common rent. In the same manner it is, where the tenant holdeth to pay yearely a number of capons or hennes, or a pair of gloves, or certaine bushels of corne, or such like.

"A *POUND of pepper or cummin.*" Here it is to be observed, that the lord may reserve pepper, or any other things that be *exotica*, foreign, of the growth of outlandish countreyes or beyond sea, as well as of the growth of *England*, whereby navigation (the life of every island) is employed. And where *Littleton*, here putteth his case in the disjunctive, if the tenant doth hold by fealty and one pound of pepper or a pound of cummin, he shall pay for reliefe a pound of pepper or a pound of cummin, over and besides the rent. But if the tenant holdeth of his lord by doing of certaine worke dayes in harvest, or to attend at *Christmasse*, or such like, he shall not double the same: for of corporall service, or labour or worke of the tenant, no reliefe is due, but where the tenant holdeth by such yearly rents or profits, which may be paid or delivered, whereof *Littleton* hath put his examples; and by them is manifestly proved, that corporall service, worke, or labour, shall not be doubled in this case (4). (Post. 142. a.) (2 Ro. Abr. 515.)

"*Or certaine bushels of corne.*" Here it appeareth, that the reliefe of bushels of corne is to be paid presently, though the tenant die in winter before corne be ripe.

[92. a.] ☞ Note, here are examples put of five natures. 1. *Aromatorum exoticorum*, of spices or drugs, of outlandish growth. 2. *Granorum*, of corne of *English* growth. 3. *Avium villaticarum*, of powltry; as capons, hens, &c. 4. *Artificiorum*, of handicrafts; as a paire of gloves generally either of outlandish or *English*. 5. *Aut similium*, or such like, (that is) of like outlandish growth, or of *English* growth, or of powltry, or of artifices outlandish or *English*, and like herein also, that they may be paid or delivered to the lord every year, or every second or third year, &c.

Sect. 129.

BUT in some case the lord ought to stay to distreine for his reliefe untill a certaine time. As if the tenant holds of his lord by a rose, or by a bushel of roses, to pay at the feast of St. John *the* Baptist, *if such tenant dieth in winter, then the lord cannot distreine for his reliefe, untill the time that roses by the course of the yeare may have their growth, &c. And so of the like.*

"BY

(4) But Rolle tells us, that Master Herbert of the Inner Temple in his autumn reading, 11 Cha. 1, held the contrary. 2 Ro. Abr. 515.

(Post. 197. b.)

"*BY the course of the yeare.*" *Lex spectat naturæ ordinem,* The law respecteth the order and course of nature. *Lex non cogit ad impossibilia,* The law compells no man to impossible things. The argument *ab impossibili* is forcible in law. *Impossibile est quod naturæ rei repugnat.* And here it is to be observed, that *Littleton* puts a diversity betweene corne and roses; for corne will last. And therefore the tenant must deliver the corne presently before the time of growth (as before is said); and so of saffron and the like. But roses, or other flowers, that are *fructus fugaces,* cannot be kept, and therefore are not to be delivered till the time of growing. Neither is the tenant driven by law artificially to preserve roses; for the law in these cases respecteth nature, and the course of the yeare, as *Littleton* here saith, *Et ars naturam imitatur. Et sic de similibus.*

Sect. 130.

ALSO, if any will aske, why a man may hold of his lord by fealty only for all manner of services, insomuch as when the tenant shall doe his fealty, he shall sweare to his lord that he will doe to his lord all manner of services due, and when he hath done fealty, in this case no other service is due: to this it may be said, that where a tenant holds his land of his lord, it behooveth that he ought to do some service to his lord. For if the tenant nor his heires ought to do no manner of service to his lord nor his heires, then by long continuance of time it would grow out of memorie, whether the land were holden of the lord, or of his heires, or not, and then will men more often and more readily say, that the land is not holden of the lord, nor of his heires, than otherwise; and hereupon the lord shall lose his escheat of the land, or perchance some other forfeiture or profit which he might have of the land. So it is reason, that the lord and his heires have some service done unto them, to proove and testifie, that the land is holden of them.

"*WHEN the tenant shall doe his fealty, he shall sweare to his lord, &c.*" Here it appeareth, that the doing of the fealty is both a performance of his service, and of his oath also when it is done, for that no other service is due; and that one oath of fealty is taken of all that hold, and is not to be changed for any noveltie or nicety of invention; for judges anciently and continually have suppressed innovations, and would in no case change the ancient common law.

31 E. 3. tit. Gager deliverance, 5. 38 E. 3. 1. 42 Ass. p. 12. 4 E. 3. ca. 5. 18 E. 3. ca. 4. & 6. 4 H. 4. ca. 2. 2 H. 4. fo. 18.

☞ "*It behooveth that he ought to do some service to his lord.*" For there can be no tenure without some service; because the service maketh the tenure. [92. b.]

See of this in the Chapter of Fee Simple, Sect. 4. (1 Ro. Abr. 816. F. N. B. 144. Ante 13. a.)

"*His escheat of the land.*" *Eschaeta* is derived of this word *eschier, quod est accidere;* for an escheat is a casuall profit, *quod accidit domino ex eventu et ex insperato,* which happeneth to the lord by chance and unlooked for. And of this word *eschaeta* commeth *eschaetor,* an eschaetor, so called, because his office is to enquire

enquire of all casuall profits, and them to seise into the king's hands, that the same may be answered to the king (1).

Lands may escheat to the lord two manner of wayes; one by attainder, the other without attainder. By attainder in three sorts. First, *Quia suspensus est per collum.* Secondly, *Quia abjuravit regnum* (2). Thirdly, *Quia utlegatus est.* Without attainder; as if the tenant dies without heire.

See more of this in the Chapter of Warrantie, Sect.*

"Or perchance some other forfeiture." As if the land be aliened in mortmaine; or when *Littleton* wrote, if the tenants had erected crosses upon their houses or tenements in prejudice of the lords, that the tenants might claim the privilege of the *Hospitalers* to defend themselves against their lords, they had forfeited their tenancies. But since *Littleton* wrote, the *Hospitalers* are dissolved, and consequently that forfeiture is gone.

W. 2. ca. 33. Flet. li. 2. ca. 43. & li. 5. ca. 34. 32 H. 8. ca. 24. (F. N. B. 144.)

"Or profit." As *reliefe, aid pur file marier, aid pur faire fitz chivaler,* and the like.

* *Probably sect.* 745, 746, & 747.

[93. a.] ☞ Sect. 131.

AND for that fealtie is incident to all manner of tenures, but to the tenure in frankalmoigne (1), (*as shall be said in the tenure of frankalmoigne*), *and for that the lord would not at the beginning of the tenure have any other service but fealty, it is reason, that a man may hold of his lord by fealty onely; and when he hath done his fealty, he hath done all his services.*

"FEALTIE

---

(1) See further as to *escheat* and *escheator,* ante 13. b. and 18. b. and note 2. there. 4 Inst. 225. Mad. Excheq. chap. 10. s. 2.

(2) Abjuration, according to the *ancient* use of the word, had the effect of an attainder; because it was necessarily accompanied with the confession of a felony. But this kind of abjuration is not now in force; the privilege of sanctuary, of which it was consequential, having been taken away by a statute of James the first. See 1 Jam. c. 25. s. 34. 2 Inst. 629. and 2 Hawk. Pl. C. b. 2. c. 32. However, the word *abjuration* is still in use in our law for *some* purposes. For—1. Some statutes, in order to secure the *established religion,* require persons convicted of certain kinds of *recusancy* to abjure the *realm,* on pain of being adjudged guilty of a *capital* felony; and the word in this sense is similar to the ancient abjuration, and is attended with a like effect. 35 Eliz. c. 1, and 2. 13.—2. In order to secure the *succession of the crown* as settled at and since the Revolution, other statutes make all persons who refuse to take the oath prescribed for abjuring the *Pretender* and his descendants, liable to various penalties and forfeitures; but this kind of abjuration differs both in *object* and *effect* from the ancient one. 13 W. 3. c. 6. 1 An. st. 1. c. 22. 1 G. 1. st. 2. c. 13. 6 G. 3. c. 53.—[Note 92.]

(1) Tenure *at will* should be also excepted. See the next Section, and ante 67. b. note 2. 68. b. n. 5. However, even to tenure *at will* fealty may be incident by the custom of a manor; and so generally, if not universally, it is to *copyhold* tenures. 10 H. 6. 13. 20 H. 6. 3. Kitch. on Co. ed. 1592, fol. 132.—[Note 93.]

(4 Co. 8. Post. 143. a.)

"*FEALTIE is incident.*"

Of incidents there be two sorts, viz. separable and inseparable.

Separable, as rents incident to reversions, &c. which may be severed: inseparable, as fealty to a reversion or tenure, which cannot be severed: for as all lands and tenements within *England* are holden of some lord or other, and either mediately or immediately of the king; so to every tenure at the least fealty is an inseparable incident, so long as the tenure remains; and all other services, except fealty, are severable. But where the tenure is by fealty only, there is no reliefe due for the cause abovesaid (2).

Sect.

---

(2) The reason is plain. Socage relief, being a year's rent, cannot be calculated, if an annual rent is not payable. See ante 85. a. note 1. But as by *custom*, or by *express reservation* on creating the tenure, a payment wholly different from and unconnected with the yearly rent may be due for relief; so it may be presumed, that by the same means a relief may be payable, where there is no yearly rent; because the relief is ascertained, without reference to a yearly rent, in both cases equally. See Kitch. on Co. ed. 1592, fo. 103. Here it may not be amiss to advert to some other differences between the several kinds of relief payable by socage-tenants. 1. The *proper* socage-relief, that is, the relief incident to the tenure by socage by the *general* custom of the realm, is a year's rent, and consequently can never be payable, except where there is an annual rent; but the *improper* socage-relief, that is, the relief due either by *special* custom or by *express* reservation, may be *more* or *less* than the annual rent, or may be payable, where there is no annual rent. 2. The socage-relief by *common law* is only payable on a *descent* and by a *natural* person; but the two other reliefs *may* be due where the tenant comes in by *purchase*, or where he takes as a *sole corporation* by *succession*. Ante 84. a. 2 Ro. Abr. 517, 518. 3. If the relief claimed is one at *common law*, it is presumed to be due, till the contrary appears; that is, unless it can be proved that the relief hath been released, or that the tenure was reserved with an *express exemption* from relief. 3 Lev. 145. Vin. Abr. *Evidence*, A. b. 28. pl. 5. But if the relief be claimed by *special custom* or *special reservation*, the *onus probandi* must necessarily fall upon the lord. 4. If the relief is by the *common law*, it is merely a fruit *incident to the service;* but if the relief is by *express reservation*, it is a *part of the service*. This distinction, however nice it may appear, may be deemed an *essential* one. Relief, when only an *incident to the service*, is not within the limitation of 50 years prescribed for seisin of it by the 32 H. 8. c. 2, as hath been observed in a former note; nor will acceptance of rent estop the lord afterwards from claiming such a relief. Ante 83. a. note 2. Cro. Eliz. 885. But the law seems to be to the contrary in both these particulars, where the relief is *part of the service*. 5. If the relief is by the *common law*, or by *special reservation*, the remedy by distress follows of course; but it is said, that for relief by *special custom*, distress is not warranted without a prescription. W. Jo. 133.—These differences between the *three* kinds of socage-reliefs lie scattered in the books; and thus bringing them into one point of view may be useful. The learned reader will judge of their propriety. The diligent student may add to their number. See further Co. Copyhold, chap. 2. Survey. Dial. 4th edit. 95, and the case of Huggerford and Havyland in W. Jo. 132. 2 Bulst. 323. Latch. 87. 94. 129. 2 Re. Rep. 370. O. Bendl. 180.—[Note 94.]

Sect. 132.

ALSO, if a man letteth to another lands or tenements for terme of life, without naming any rent to be reserved to the lessor, yet he shall do fealty to the lessor, because he holdeth of him. Also if a lease be made to a man for terme of yeares, it is said, that the lessee shall do fealty to the lessor, because he holdeth of him. And this is well proved by the words of the writ of wast, when the lessor hath cause to bring a writ of wast against him; which writ shall say, that the lessee holds his tenements of the lessour for terme of yeares. So the writ proves a tenure betweene them. But he, which is tenant at will according to the course of the common law, shall not do fealty; because he hath not any sure estate. But otherwise it is of tenant at will according to the custom of the manor; for that he is bound to do fealty to his lord for two causes. The one is by reason of the custome; and the other is, for that he taketh his estate in such form to do his lord fealty.

"*IF a man letteth for terme of life, without naming any rent, &c. he shall do fealty, &c.*" And the reason is; because there is a tenure, and fealtie (as hath beene said) is incident to all manner of tenures; and it is to be noted, that the law, for the suretie ☞ of the lord, that his tenant shall be faithfull and loyall to him, doth create such a service as the tenant shall be bound thereunto by oath. V. Sect. 214. (Ante 67. a. 68. a.) [93. b.]

"*Also if a lease be made for yeares, &c. the lessee shall do fealty.*" For there also is a tenure between them. And *Littleton's* opinion in this case is holden for good law at this day (1). 40 E. 3. 34. 9 H. 6. 41. 10 H. 6. 13. 9 E. 4. 1. 21 E. 4. 29. 5 H. 5. 12. 5 H. 7. 11.

"*And this is well proved by the words of the writ, &c.*" *Nota*, the original writs are (as it were) the foundations and grounds of the law, and, as it appeares here by *Littleton*, are of great authority for the proofe of the law in particular cases (2). Vid. Sect. 84.

"*Because he hath not any sure estate.*" Therefore tenant at will shall not do fealty (as hath been said before); because the matter of an oath must be certaine. The rest of this Section needs no explication (3). (Ante 68. a. 5 Co. 10.)

CHAP.

---

(1) See ante 67. b. note 2.

(2) See ante 73. b.

(3) It may be proper to conclude this Chapter of Socage, by pointing out the several changes made in the tenure of socage by the statute of the 12 Cha. 2. c. 24, so often mentioned. 1. It takes away the aids *pur file marier* and *pur faire fitz chivalier*, which were incident to *all* socage-tenures. 2. It relieves socage *in capite* from the burden of the king's *primer seisin* and of *fines of alienation to the king*; to both of which *socage in capite* was equally liable with tenure by *knight's service in capite*, though not so to *wardship*. 3. It extends the father's power of appointing guardians by deed or will, which by the 4 and 5 Phil. and Mar.

Chap. 6. *Frankalmoigne.* Sect. 133.

***TENANT** in frankalmoigne is, where an abbot, or prior, or another man of religion, or of holy church holdeth of his lord in frankalmoigne; that is to say in Latine,* in liberam eleemosinam, *that is, in free almes. And such tenure beganne first in old time. When a man in old time was seised of certain lands or tenements in his demesne as of fee, and of the same land infeoffed an abbot and his covent, or prior and his covent, to have and to hold to them and their successours in pure and perpetuall almes, or in frankalmoigne; [or by such words to hold of the grantor, or of the lessor*, and his heires in free almes:](1) in such case the tenements were holden in frankalmoigne.*

Bract. lib. 2. cap. 5. and lib. 4. ca. 2. Britton, fo. 164, 165. Mirror, ca. 2. sect. 18. Glanvil. lib. 7. ca. 1. & lib. 12. ca. 3. & 25. Fleta, lib. 3. ca. 5. 21 H. 7. 39. 29 E. 3. 14. 8 H. 6. 23. 12 H. 8. 8. (4 Co. 104.) 2 Inst. 121.

"*AN abbot, prior, or another man of religion, or of holy church.*" It is to be observed, that of ecclesiastical persons some be regular, and some be secular. They be called regular, because they live under certaine rules, and have vowed three things; true obedience, perpetuall chastity, and wilfull poverty. And when a man is professed in any of the orders of religion, he is said to be *a man of religion* or religious. Of this sort be all abbots, priors, and others of any of the said orders regular. Secular are persons ecclesiasticall; but because they live not under certain rules of some of the said orders, nor are votaries, ☞ they are for distinction sake, called secular, as bishops, deanes, and chapters, archdeacons, prebends, parsons, vicars, and such like. All which *Littleton* here includeth under these general words, *of holy church;* and none of these are in law said to be *men of religion*, or religious. [94. a.]

Where *Littleton* saith (*infeoffed an abbot and his covent*) his meaning is, that the abbot only is infeoffed: for he is only a person capable, and the covent are dead persons in law, and have power of assent only, and that they thereunto assent. But since *Littleton* wrote, all abbeys, priories, monasteries, and other

See the Statutes of 27 H. 8, not printed, but in the abridgment.

31 H. 8. cap. 13. and 32 H. 8. ca. 24, &c. Vide Sect. 530.

religious

* *The word which lord Coke translates "Lessor," is in the original "Feoffor," but, as he evidently refers to a lease for lives, for which, before the statute of uses, Livery of Seisin was necessary, such a lease was a feoffment; so that the difference is immaterial.*

Mar. (the first statute conferring such a power) was restricted to *female* children, to children of *both* sexes, and thus supplied the means of still further preventing guardianship in socage.—In all other respects the tenure in socage seems to be under the same circumstances, and attended with the same consequences, as it was before the Restoration. But the statute of Charles the second goes farther than the mere alteration of socage; and having thus reformed and improved this favourite tenure, in the next place provides for the extension of it throughout the kingdom. This the statute effectually secures, by converting into socage all tenures by knight's service, and by taking from the crown the power of creating any other tenure than socage in future.—[Note 95.]

(1) The words between brackets are in L. and M. but not in Roh.

religious houses of monkes, canons, friers and nuns, &c. have been dissolved, and their possessions given to the crowne (2).

The ecclesiasticall state of *England*, as it standeth at this day, (4 Inst. 321.) (which is necessary for our student to know) is divided into two provinces, or archbishopricks, (viz.) of *Canterbury* and of *Yorke*. The archbishop of *Canterbury* is styled *Metropolitanus et Primas totius Angliæ*, and the archbishop of *Yorke Primas Angliæ*. Each archbishop hath within his province suffragan bishops of several dioceses (3). The archbishop of *Canterbury* hath under him within his province, of ancient foundations, viz. *Rochester* his principall chaplaine, *London* his deane, *Winchester* his chancellor, *Norwich*, *Lincolne*, *Ely*, *Chichester*, *Salisbury*, *Exeter*, *Bathe* and *Wells*, *Worcester*, *Coventry* and *Litchfield*, *Hereford*, *Landaffe*, *St. David*, *Bangor*, and *St. Assaphe*, and four founded by king *Henry* 8, erected out of the ruins of dissolved monasteries (that is to say) *Gloucester*, *Bristow*, *Peterborow*, and *Oxford*. The archbishop of *Yorke* hath under him four, (viz.) the bishop of the county palatine of *Chester*, newly erected by king *Henry* 8, and annexed by him to the archbishopricke of *Yorke*, of the county palatine of *Durham*, *Carlile*, and the isle of *Man*, annexed to the province of *Yorke* by *H.* 8, but a greater number this archbishop anciently had, which time hath taken from him. The extent of every diocesse you may elsewhere read, the which for brevity I here omit. All the said archbishoprickes and bishoprickes of *England* were founded by the kings of *England*, to hold by barony, as hereafter shall be said (4). * And every archbishop and bishop hath his deane and chapter, whereof more shall be said hereafter. The archbishop of *Canterbury* hath the precedencie, next to him the archbishop of *Yorke*, next to him the bishop of *London*, and next to him the bishop of *Winchester* (5), and then all other bishops of both provinces after their ancientnesse.

Matth. Parker, de vitis archiepiscoporum. Lindwood. Camden Britannia. Vid. Rot. Parliam. anno. 36 H. 8. 1 E. 6. 5 E. 6. &c. Westminster also was newly erected a bishopricke by H. 8. but by queene Mary it was restored to be an abbey, and by queene Eliz. created a deanry collegiate. Chester had been anciently a bishop's see, and long since translated to Coventry. 33 H. 8. ca. 31. Camden, ubi supra. 26 H. 8. first fruits and tenths. Vid. Sect. 137. * 3 Co. 73. deane and chap. of Norwich case. Vide Sect. 134. 201. 31 H. 8. cap. 10.

Every diocesse is divided into archdeaconries, whereof there be 60; and the archdeacon is called *oculus episcopi;* and every archdeaconry

---

(2) The student will find a good history of the dissolution of monasteries in England in the excellent preface to that most valuable work the *Notitia Monastica*, by bishop Tanner.

(3) Here bishops are styled suffragans in respect of their relation to the archbishop of their *province;* but formerly each archbishop and bishop had also his suffragan, to assist him in conferring orders, and in other *spiritual* parts of his office within his *diocese*. These in our ecclesiastical law are called suffragan bishops, and resemble the *chorepiscopi* or *bishops of the country* in the early times of the christian church. How this *inferior* order of bishops *may* be elected and consecrated is regulated by the 26 H. 8. c. 14; but notwithstanding this statute, it is not usual to appoint them.—They should not be confounded with the *coadjutors* of a bishop; the *latter* being appointed in case of the bishop's infirmity to superintend his *jurisdiction* and *temporalities;* neither of which was within the interference of the former. See fully on this subject in Gibs. Cod. 1st ed. v. 1. 155.—[Note 96.]

(4) See ante 70. b. note 2. post. 164. a.

(5) This is a mistake; for the statute, by which precedency is principally regulated, gives the bishop of Durham place between the bishop of London and the bishop of Winchester. See 31 H. 8. c. 10. s. 8.—[Note 97.]

archdeaconry is parted into deanries; and deanries again into parishes, townes and hamlets. And thus much, for the better understanding of our author, and how the state ecclesiasticall standeth at this day, shall suffice.

Vide more hereof, Sect. 180. 528. 648, &c.

"*Frankalmoigne, that is to say in Latine, in liberam eleemosinam,*" in *English*, in free almes. There is an officer in the king's house called *eleemosinarius*, vulgarly called the king's almner (whose office and duty is excellently described in ancient authors,) viz. *fragmenta diligenter colligere, et diligenter distribuere singulis diebus egenis; ægrotos et leprosos, incarceratos, pauperesque viduas, et alios egenos vagosque in patriâ commorantes charitativè visitare: item equos relictos, robas, pecuniam, et alia ad eleemosinam largita recipere, et fideliter distribuere. Debet etiam regem super eleemosinæ largitione, crebris summonitionibus stimulare, præcipuè diebus sanctorum, et rogare ne robas suas quæ magni sunt pretii, histrionibus, blanditoribus, accusatoribus, seu menistrallis, sed ad eleemosinæ suæ incrementum, jubeat largiri* (6).

Fleta, lib. 2. cap. 23.

All ecclesiasticall persons may hold in frankalmoign, be they secular or regular; and no lay person can hold in frankalmoign. This adjective (*liber*) doth distinguish many things in law from others; as here, *libera eleemosina* are words appropriated to this case, and do distinguish it from a tenure by divine service; *liberum tenementum*, from a tenure in villenage, by copyhold or base tenure; *liberum feodum*, franke fee, from a tenure in ancient demeane; ☞ *liberum maritagium*, from other estates taile; *libera firma*, frank ferme, when an estate is changed from knights service to socage; *liberum socagium*, from a tenure by service in chivalrie; *francus bancus*, to distinguish it from other dowers, for that it cometh freely without any act of the husband's or assignement of the heire; *libera lex*, to distinguish men who enjoy it, and whose best and freest birthright it is, from them that by their offences have lost it, as men attainted in an attaint, in a conspiracie upon an indictment, or in a *præmunire*, &c. and so of *libera capella*, *francus plegius* frank-pledge, *libera chasea* free chase, *liber burgus*, *liber aper*, *liber taurus*, and the like. But in a matter (some will say) of curiosity, this shall suffice; and yet seeing it tends to the better understanding (others say) it is tolerable.

Vide Sect. 1. Bract. l. 4. c. 37, 38. Britton, cap. 32. Britton, cap. 66. Bract. lib. 4. F. N. B. 150. Bract. lib. 4. fo. 288. 247. 292. Brit. fol. 245, Fleta, lib. 5. cap. 11. Fortescue, c. 26. 24 E. 3. 34. 43 E. 3. Conspir. 11. 27 Ass. 59. Staunf. 175. Vide Sect. 199. Fleta, lib. 1. cap. 47.

[94. b.]

By the ancient common law of *England*, a man could not alien such lands as he had by descent, without the consent of his heire; (1) yet he might give a part to God in free almoigne, or with his daughter in free marriage, or to his servant *remuneratione servitii*. Our old bookes described frankalmoign thus; when lands or tenements were bestowed upon God, (that is) given to such people as are consecrated to the service of God. In our ancient bookes these gifts of devotion were called Churchesset, or Churchseed, *quasi semen ecclesiæ;* but in a more particular sense it is described thus: *certam mensuram bladi tritici significat, quam quilibet olim sanctæ ecclesiæ die sancti Martini, tempore tam Britonum quàm Anglorum, contribuerunt. Plures tamen magnates, post Romanorum adventum, illam contributionem secundùm veterem legem Moisis nomine primitiarum dabant, prout in brevi regis*

Glanvil. lib. 7. ca. 1. fo. 44, 45. acc.

Britton, ca. 66. fol. 164. Bract. lib. 2. ca. 5 & 10. F. N. B. 211.

Fleta, lib. 1. cap. 42*.

* *The passage in Latin cited by lord Coke is in cap. 47, of the second edition of Fleta.*

(6) The office of king's almoner is usually given to the archbishop of York, with the title of lord high almoner.—[Note 98.]

(1) See Wright's Ten. 167.

regis Knuti ad summum pontificem transmisso continetur, in quo illam contributionem Churchsed appellant, quasi semen ecclesiæ.

"*And such tenure.*" For albeit neither fealty, nor any other temporall service is due, yet it is a tenure.

"*In old time.*" [a] That is to say, before the statutes of mortmaine, viz. *Magna Charta*, cap. 36, and 7 *E.* 1, *de religiosis*, &c. and before the statute of *quia emptores terrarum*, as shall be hereafter in his proper place said in this chapter (2). 7 E. 4. 12. 33 H. 6. 6. 7. 39 H. 6. 29. [a] Mortmaine. Britton, fol. 32. & 90. Bracton, lib. 2. cap. 5. Fleta, lib. 3. cap. 5. 11 H. 7. 12.

"*Infeoffed an abbot and his covent, &c.*" Albeit the covent be dead persons in law, and the abbot only capable (as before is said), yet if the feoffment be made to an abbot and covent, the feoffment is good, and the state vesteth only in the abbot. And note a man may infeoffe an abbot, a bishop, a parson, &c. or any other sole body politique, by deed or without deed, in free almes; and so may a gift in frankmariage be made without deed also; but if lands be given to deane and chapter, or any other corporation aggregate of many, there the gift must be by deed (3). (2 Ro. Abr. 61.) 39 H. 6. 30. b.

"*To have and to hold to them and their successours.*" For in case of an abbot or prior and covent regularly a fee simple doth not passe without this word (successors); (4) for the diversity standeth thus betweene a corporation aggregate of many capable persons, and a sole corporation. As if lands be given to a deane and chapter, they have a fee simple without this word (successors), for that the body never dies; but if lands be given to a bishop, parson, or any other sole corporation, who after their deceases have a succession, there without this word (successors) nothing passeth unto them but for life (5). But of corporations aggregate of many, there is a diversity when the head and body both are capable, as in the case of deane and chapter, and when one (as hath been said) is onely capable, as in case of abbot or prior and covent; but yet out of the generall rules, the case of frankalmoign is (1 Ro. Abr. 832.) Vid. Litt. in the Chapter of Fee simple, Sect. 1, 2.

---

(2) See post. Sect. 140,

(3) In *general* a corporation aggregate cannot take or pass away an interest in land, or even do any acts of importance, without deed; but there are several exceptions to the rule. See ante 66. b. Vin. Abr. *Grants*, D. a. *Corporation*, K. Com. Dig. *Franchises*, F. 12, 13, 14. New Abr. *Corporation*, E. 3.—[Note 99.]

(4) Contra 1 Ro. Abr. 832. Also in the following annotation by lord Hale, which he gives at the bottom of fol. 8. b. several authorities are cited to the contrary. Vid. 7 E. 3. 41. 11 H. 4. 84. *Gift to abbot and monks passeth fee simple. If an abbot makes lease* reddendo *rent* nobis, *it enures to the successor.* 20 *H.* 6. 8. *Land granted to the abbot of S. and his heirs is only for life.* 9 H. 5. 9. Hal. MSS.—See further the authorities cited in Vin. Abr. *Estate*, L. pl. 1.—[Note 100.]

(5) Acc. ante 8. b. But some take a distinction between describing a sole corporation both by his *natural* and *politic* name, and describing him by his *politic* name only; and it has been resolved, that a visitatorial power, granted to the bishop of Ely over Trinity College, Cambridge, in the *latter* way, ought to be construed as a grant to the bishop of Ely for *the time being*, and therefore extended to *successors*. This point was adjudged in Dr. Bentley's case. See 2 Stra. 913. Fitz-Gibb. 308. 312. 1 Barnard. 453.—[Note 101.]

39 H. 6. 30.

is excepted, as hereafter shall be said. Also lands must be given to a corporation aggregate of many by deed; but to a sole corporation it may be granted without deed.

Bracton, lib. 2. cap. 10. *Potest donatio fieri in liberam eleemosinam ecclesiis cathedralibus, conventualibus, parochialibus, et viris religiosis.*

35 H. 6. 56.
7 E. 4. 11.
Vid. Bract. lib. 2. ca. 10.

"*In pure and perpetuall almes.*" Here it appeareth, that a tenure in frankalmoigne may be created without this word (*libera*), for *pura* implyeth as much.

35 H. 6. 56.
7 E. 4. 11.
Bract. ubi supra.
44 E. 3. 24.

"*Or in frankalmoigne.*" But one of these words, either *pura* or *libera*, must be used, or else it is no tenure in frankalmoigne.

20 H. 6. fol. 36.

38 E. 3. 4. a.
14 H. 6. 12.
10 H. 7. 13.
16 H. 7. 9.
18 E. 3. Connsans, 39.
33 H. 6. 22.
17 E. 3. 51.
6 E. 3. 54. &c.
Tr. 5. H. 3. Rot. 4. in Scaccario.
The prior of Dunstable's case.

"*Or by such words, to hold of the grantor, or of the lessor, and his heires in free almes.*" Here it appeareth, that by these words a fee simple passeth without this word (successors), albeit it be in case of a sole corporation. For as in case of a gift in frankmariage, an estate taile passeth to the donees without the words (of the heires of their two bodies) as hath beene said in the Chapter of Fee taile; so in case of a gift in frankalmoigne (which may be resembled to a divine mariage), a fee simple passeth, as hath bin said, though it be in case of a sole corporation, without this word (successors). And besides, grants in frankalmoigne are ancient grants, as hath beene said, and therefore shall be allowed, as the law was taken, when such grants were made.

☞ Sect. 134. [95. a.]

IN the same manner it is, where lands or tenements were granted in ancient time to a deane and chapter and to their successors, or to a person of a church and his successors, or to any other man of holy church and to his successours, in frankalmoigne, if he had capacitie to take such grants or feoffments, &c.

"*IN the same manner, &c.*" Here *Littleton*, having put an example of bodies incorporate aggregate of many, whereof the head is only capable, now putteth examples both of bodies incorporate aggregate of many (all being capable) and of sole corporations of secular persons.

"*Deane,*" *Decanus*, is derived of the *Greek* word δεκα, that signifieth Ten, for that he is an ecclesiasticall secular governour, and was anciently over ten prebends, or canons at the least, in a cathedral church, and is head of his chapter (1).

"*Chapter,*"

---

(1) Various kinds of deans, besides deans of chapters, are known to our law: and it requires more divisions than one to distinguish them properly. Considered in respect of the *difference of office*, deans are of *six* kinds. 1. Deans of *chapters*, who are either of cathedral or collegiate churches; though the members of churches of the latter sort may more properly be denominated *colleges* than *chapters*. 2. Deans of *peculiars*, who have sometimes both jurisdiction and

cure

"*Chapter*," *Capitulum est clericorum congregatio sub uno decano in ecclesiâ cathredali* (2). And chapters be twofold, viz. the ancient and the later. And the later to be also of two sorts. First, (3 Co. 73.)

---

cure of souls, as the dean of Battel in Sussex; and sometimes jurisdiction only, as the dean of the Arches in London, and the deans of Bocking in Essex and of Croydon in Surrey. 3. *Rural* deans. 4. Deans *in the colleges* of our universities, who are officers appointed to superintend the behaviour of the members and to enforce discipline. 5. *Honorary* deans, as the dean of the Chapel Royal at St. James, who is so styled on account of the dignity of the person over whose chapel he presides. As to the Chapel of St. George, Windsor, there being canons as well as a dean, it is something more than a mere chapel, and, except in name, resembles a collegiate church. 6. Deans of *provinces*, or, as they are sometimes called, deans of bishops. Thus the bishop of London is dean of the province of Canterbury, and to him as such the archbishop sends his mandate for summoning the bishops of his province, when a convocation is to be assembled; which perhaps may account for calling the dean of the province dean of the bishops. What the other parts of his office are, the books we have been able to consult do not explain: nor do they mention whether there is a dean for the province of York. See Lyndw. Oxf. ed. 317. Gibs. Synod. Anglican. 17. Ante 94. a.—Another division of deans, arising from the nature of the office, is into deans of *spiritual* promotions and deans of *lay* promotions. Of the former kind are deans of peculiars with cure of souls, deans of the royal chapels, and deans of chapters: though as to these last a contrary opinion formerly prevailed. Perhaps too rural deans may be added to the number. Of the latter kind are deans of peculiars without cure of souls, who therefore may be and frequently are persons not in holy orders. In respect of the manner of appointment, deans are, 1. *Elective*, as deans of chapters of the *old* foundation; though they are so only nominally and in form, the king being the real patron, which will appear from the next note but one. 2. *Donative*, as those deans of chapters of the *new* foundation, who are appointed by the king's letters patent, and are installed under his command to the chapter, without resorting to the bishop either for admission or for a mandate of instalment; if that mode of promoting *still* prevails in respect to any of the new deaneries. See the next note but one. Deans of the royal chapels are also *donative*, the king appointing them in the same way. So too may deans of peculiars without cure of souls be called; as the dean of the *Arches*, who is appointed by commission from the archbishop of Canterbury; but this must be understood in a large sense of the word *donative*, it being most usually restrained to *spiritual* promotions. 3. *Presentative*, as some deans of peculiars with cure of souls, and the deans of *some* chapters of the *new* foundation, if not of *all*. Thus the dean of Battel is presented by the patron to the bishop of Chichester, and from him receives institution. Thus too the dean of Gloucester is presented by the king to the bishop with a mandate to admit him and to give orders for his instalment. See the next note but one. 4. *By virtue of another office*, as the bishop of London is dean of the province of Canterbury, and the bishop of St. David is dean of his own chapter.—Again in respect of the manner of holding, deans are so *absolutely* or *in commendam*. But this division applies only to *spiritual* deaneries.—In thus pointing out the several denominations of deans we have attempted a more comprehensive as well as a nicer *general* discrimination and arrangement, than the books usually resorted to furnish; though to them we are indebted for most of the materials, and to them we refer the student for a competent idea of the nature of each kind of deanery. See *Decanus* and *Deanery* in Spelm. Gloss. Cow. Dict. Ayl. Parerg. Nels. Rights of the Clerg. Burn. Eccles. L. and the Index to Gibs. Cod.—[Note 102.]

(2) But the name of chapter is not confined to *cathedrals*, the prebendaries and

First, those which were translated or founded by king *Henry* the eighth, in place of abbots and covents, or priors and covents which were chapters whiles they stood; and these are new chapters to old bishoprickes. Secondly, where the bishopricke was newly founded by *Henry* the eighth (as *Chester, Bristow*, &c.) there the chapters are also new (3). There is a great diversitie betweene the commings in of the ancient deanes and of the new. For the ancient come in, in much like sort as bishops doe; for they are chosen by the chapter, by a *conge de eslier*, as bishops be, and the king giving his royall assent they are confirmed by the bishop. But they which are either newly translated or founded, are donative, and by the king's letters patents are installed, which are matters necessarie to be knowne (4).

"*If*

---

and canons of *collegiate* churches being also styled chapters; though rather improperly, as we have before hinted.—[Note 103.]

(3) The *new* deaneries and chapters to *old* bishoprics are *eight;* namely, Canterbury, Norwich, Winchester, Durham, Ely, Rochester, Worcester, and Carlisle. The new deaneries and chapters to *new* bishoprics are five; namely, Peterborough, Chester, Gloucester, Bristol, and Oxford. See Will. Cathedr.—[Note 104.]

(4) In this account of the *old* and *new* deaneries, many particulars, relative to the manner of coming to the possession of them, are omitted; and therefore we shall add some *general* things historically in respect to both. As to the old deaneries, it will be very difficult to trace the subject, with any tolerable degree of precision, higher than the reign of king John, or to ascertain what was the *legal* mode of constituting deans of chapters before. If our ancient chronicles are to be depended upon, nothing could be more variable than the practice for several reigns after the Conquest. Thus in the church of York, we find sometimes the archbishop collating to the deanery, and sometimes the king conferring, and sometimes the chapter electing; and it is probable that a like uncertainty prevailed in other cathedrals. See Drake's Antiq. York, 557 to 565. 1 Will. Surv. Cathedr. 64. At length however, after many struggles, the *elective* mode of constituting deans, as well as bishops, abbots, and priors, was established throughout the kingdom; for king John by a charter of the 16th of his reign grants, *ut de cætero, in universis et singulis ecclesiis et monasteriis cathedralibus et conventualibus totius regni nostri Angliæ, libere sint in perpetuum electiones quorumcunque prælatorum majorum et minorum;* and *deans* of chapters clearly fall within the description of *minor prelates*. See king John's charter in 1 Coll. Eccles. Hist. Append. No. 33, and as to the word *prælatas*, consult Lyndw. Ox. ed. 41, and 217. But notwithstanding the strong terms in which the freedom of canonical election is provided for by this charter, and the repeated confirmation of it by various statutes, the election of a dean by the chapter is by long practice converted into a mere form, and the king is in reality as much the patron of the *old*, as he is both in name and substance of the *new* deaneries. For two centuries past at least, the king's *conge d'élire*, which by the charter of John must precede every election of a prelate, and was in use long before, hath been invariably accompanied with the king's *letter missive*, as it is styled, recommending a particular person, whom the chapter of course elect their dean. In the case of the *old bishoprics*, which are filled in the same form, the election of the person named by the crown is secured by a statute of the 25th of Henry the eighth, which compels the chapter to yield to the recommendation by the pains of *præmunire* and if they refuse authorizes the king to appoint a bishop by letters patent. See post. 134. a. But no such statute hath been yet made in respect to the *old* deaneries; and therefore the right of the crown over them rests wholly on the charter of king John and the subsequent practice. Here then

"*If he had capacitie to take.*" For ecclesiasticall persons have not capacitie to take in succession, unless they be bodies politique;

then it may be asked, how the crown, without the aid of a statute can enforce its claim of patronage; and what are the means, by which the nomination would be made effectual if the chapter should disregard the royal recommendation, and persevere in a *free* exercise of the right of electing? This question may be resolved, by considering, that even the charter of king John requires the king's confirmation of the choice made by the chapter; and therefore by refusing to confirm he may always prevent the effect of their election. Nay it hath been said, that the election is so wholly a ceremony as not even to be essential, and that even before any act of parliament to dispense with it the king might nominate to the *old* bishoprics by letters patent, without resorting to the chapter for the form of their concurrence; and the *old* deaneries are within the same reason. See Revan O'Brian v. Knivan, in Cro. Jam. 552. Palm. 22, and 2 Ro. Rep. 101. 130, and S. C. cited in F. N. B. 4to ed. 396, note (a.). This doctrine, it must be owned, notwithstanding the positive terms in which it was asserted, and the reverence due to the judges by whom it was recognized, seems as repugnant to the *letter* of king John's charter, as the mode of electing in conformity to the *letter missive* certainly is to the genuine *spirit* and intention. But the latter having the sanction of a practice too ancient to be now drawn into question, it can be of little use to deny the former; and accordingly in the reign of Charles the first we find some instances, in which the king actually appointed to some of the old deaneries by letters patent without the least appearance of opposition on the part of the chapter. See Rymer Fœd. vol. 8, part 3, page 166, vol. 9, part 1, p. 82. To fix the time when the *letter missive*, in respect either to the old deaneries or the old bishoprics, first came into use; to explain how from a mere recommendation, it grew into a royal mandate; and more particularly to determine, whether it operated as such before the Reformation, or whether *that*, in consequence of the assertion of the king's supremacy, was the æra of implicit obedience to it, might be both curious and useful. Probably the *letter missive* was not *generally* used to control the freedom of election till after the time of Edward the first. At least Mr. Prynne, hostile as he was to canonical election, he deeming it an usurpation to the prejudice of the royal prerogative, gives us a *conge d'élire* of Edward the first for the election of a bishop, which concludes with a recommendation to the chapter in *general* terms to choose a person duly qualified; but he takes no notice of its being accompanied with a *letter missive;* a circumstance which, had it occurred, would scarcely have escaped his observation See 3 Prynn. Rec. 1255. The earliest precedent of such a letter we have hitherto met with since the charter of king John, is of the year 1347, when Philip de Weston is said to have been elected to the deanery of York on exhibiting a letter from Edward the third. Drak. Antiq. York, 563. Another instance of a *letter missive* relative to the same deanery occurs in 1544; Henry the eighth signifying it to be his pleasure that Dr. Wooton should be elected, and the chapter electing him accordingly. Drak. Antiq. York, 565, and append. 81. These few facts may give *some* idea of the gradation, by which the crown hath possessed itself of the complete patronage of the old deaneries. We are not prepared for a more ample discussion: and if we were, this would not be the proper place for a subject so extensive.—As to the deans of the *new* foundation, though the king nominates by letters patent, yet *some*, if not *all*, of the *new* deans of *cathedral* churches are *now* deemed *presentative* and not *donative*, the practice being to present the letters patent to the bishop for institution and a mandate of instalment. It hath indeed been a question, whether they are *donative* or *presentative;* for the understanding of which we shall shortly state the principal facts on which the case, so far as relates to the *deanery* of Gloucester, depends

The

politique; as bishops, archdeacons, deanes, parsons, vicars, &c. or lawfully incorporate by the king's letters patents, or prescription; as

---

The new deaneries were erected by Henry the eighth under powers given by act of parliament, which also authorized him to make statutes for their regulation by *letters patent or writing under the great seal.* In the charter for founding the deanery of Gloucester, being one of the *new* foundation, the king reserved the nomination of the deans to himself, and directed, that the deans and chapters should be governed according to such rules and statutes as the king should appoint by *indenture.* The king afterwards by commissioners named for the purpose formed a body of statutes, amongst which one required that the king should upon every vacancy nominate a dean by letters patent, and that he should be presented to the bishop, and being instituted by him should be admitted by the chapter. The commissioners signed these statutes; but they were neither under the *great seal* nor *indented;* and on account of this deviation both from the act of parliament and the commission, they were considered as invalid, and powers were given by other acts to Mary and Elizabeth successively to form other statutes. However, nothing final being done under these powers, *some* of the statutes framed by Henry the eighth's commissioners, for want of others more regularly made, were adopted, but the particular statute which made the deanery *presentative,* was never practiced *after* the Restoration; and only in one instance *before,* the deans being constituted by mere grants from the crown. In this state of things came the 6 Ann. c. 21, which established *such* of the statutes of the cathedral and collegiate churches founded by Henry the eighth, *as had been usually received and practiced in the government of the same respectively since the Restoration,* and were not inconsistent with the constitution of the church of England or the laws of the land. But this act, made to remove doubts, created a very important one; which was, whether the act confirmed the *whole* body of the statutes where *any* of them had been practised since the Restoration, or only such statutes or parts of statutes as had been *individually* received. Amongst other cases which depended on the solution of this doubt, one was the mode of constituting the dean of Gloucester: for if receiving a part of Henry the eighth's statutes necessarily was followed with a confirmation of the whole, then the cathedral church of Gloucester being under this predicament, it was become essential to conform to the particular statute, which required a presentation of the dean to the bishop, though that form had hitherto been disregarded. It being of importance to have this point settled, the crown in 1720 referred it to sir Philip Yorke and sir Robert Raymond, the then attorney and solicitor general, who were of opinion, that it was intended by the act of queen Anne to confirm the whole body of statutes where any part had been received, and therefore that in the case of the particular deanery of Gloucester a presentation was become necessary; though they allowed the question to be one of *great doubt* and difficulty. See Burn. Eccl. L. tit. *Deans* and *Chapters.* To this opinion was added the form of a presentation; and it is presumed that the deanery of Gloucester hath ever since been treated by the crown as *presentative.* Probably too under the same sanction the example may have been followed in respect of such other of the *new* deaneries as at the time of the act of queen Anne were in the same circumstances; that is, had statutes of doubtful authority from Henry the eighth or any of his successors, some of which between the Restoration and the act of Anne had been usually practiced, though not the particular one directing a presentation of their deans. But whether this construction of the act of Anne hath ever been judicially recognized, we cannot inform the reader. As to those *new* deaneries, which had statutes requiring a presentation, and usually complied with *after* the Restoration, there cannot be the least doubt of their being legally *presentative.* But if there are any of the *new* deaneries, the rules and statutes

as deanes and chapters, colledges, &c. But a colledge of religious persons, chauntry priests, and such like, that are not lawfully incorporated,

statutes of whose churches are wholly silent as to presentation, it is most likely that they always have been donative, and still continue so; and we guess, that the church of Westminster may fall under this description, it being *collegiate*, and not for any other purpose subject to the jurisdiction of any bishop.—From this detail about appointing to deaneries of the new foundation, it seems that lord Coke was fully justified in styling *all* of them *donative;* for it is said, that none of the charters for founding the *new* deaneries mention presentation, and that the subsequent statutes prescribing it were equally liable to the objection of *informality* as those of the church of Gloucester, and there was no act for establishing them in lord Coke's time. On the other hand, bishop Gibson *might* be equally warranted in calling *all* the *new* deaneries *presentative*, if we except the collegiate church of Westminster; because in 1713, when the *first* edition of his book on Ecclesiastical Law was published, they were become so by the operation of the act of queene Anne. This distinction of *time* did not strike the bishop, though a writer in general well informed and much to be relied on, when he animadverted on those, who like lord Coke denominated the *new* deaneries *donative*. 1 Gibs. Cod. 197.

What we have hitherto observed, as to the manner of constituting the *old* and *new* deans, must be confined to *England;* those of *Wales* and *Ireland* being under different circumstances, and therefore reserved for a separate consideration. Of the *four* Welsh cathedrals, *two* are without deans; or rather the dignities of bishop and dean unite in the same person, the bishop being deemed *quasi decanus*, and having, it is said, both an episcopal throne and a decanal stall allotted to him in the choir. The cathedral churches of St. David's and Llandaff are of this kind. St. Asaph and Bangor, the other two Welsh cathedrals, have the dignity of dean distinct from that of bishop; but the patronage of both deaneries is in the respective *bishops*, they being neither elective by the *chapter*, nor donative by the *crown*. See Ect. Thesaur. ed. of 1742, and Will. Parochial. Anglic. In respect to *Ireland*, as we are informed, before the Reformation the deaneries of the cathedral churches there were elective by the respective chapters, under a *conge d'élire* from the crown, in much the same manner as the *old English* deaneries. But since the Irish act of the 2d of Elizabeth, c. 4. s. 1, which takes away the election of bishops in Ireland, and declares them wholly donative by the king, and hath never been repealed as the English statute of Edward the sixth to the same effect was, the form of electing to the *old* deaneries hath been also discontinued, and the king appoints to them by letters patent as to bishoprics. This change, so far as regards the Irish old deaneries, not having yet had a parliamentary sanction, its legality depends on a notion that the patronage of deaneries as well as of bishoprics was an ancient right of the crown, that the election by the chapter was a mere ceremony, and that the statute for putting an end to it in the case of the bishoprics was a provision of caution and not one of necessity; and this notion, little consonant as it may appear to some of the facts we have stated in our historical account of the *old* English deaneries, is not only supported by practice since the reign of Elizabeth, but seems to have been *judicially* recognized and acted upon in the case of the Irish bishopric already cited from Croke James and other books. See ante 96. b. in the notes. Such, we are told, is the state of the patronage of the Irish *old* deaneries *in general;* but it must be added, that the right of the crown over *one* or *two* of them, which either are or are supposed to be under peculiar circumstances, is denied by the chapters. Suits on this subject have been depending between the crown and the chapter of *St. Patrick*, one of the two cathedrals of the archbishopric of Dublin; the crown claiming the deanery as a royal *donative*, and the chapter insisting

Chap. 6. *Frankalmoigne.* Sect. 133.

TENANT in frankalmoigne is, where an abbot, or prior, or another man of religion, or of holy church holdeth of his lord in frankalmoigne; that is to say in Latine, in liberam eleemosinam, *that is, in free almes. And such tenure beganne first in old time. When a man in old time was seised of certain lands or tenements in his demesne as of fee, and of the same land infeoffed an abbot and his covent, or prior and his covent, to have and to hold to them and their successours in pure and perpetuall almes, or in frankalmoigne; [or by such words to hold of the grantor, or of the lessor*, and his heires in free almes:](1) in such case the tenements were holden in frankalmoigne.*

Bract. lib. 2. cap. 5. and lib. 4. ca. 2. Britton, fo. 164, 165. Mirror, ca. 2. sect. 18. Glanvil. lib. 7. ca. 1. & lib. 12. ca. 3. & 25. Fleta, lib. 3. ca. 5. 21 H. 7. 39. 29 E. 3. 14. 8 H. 6. 23. 12 H. 8. 8. (4 Co. 104.) 2 Inst. 121.

"*AN abbot, prior, or another man of religion, or of holy church.*" It is to be observed, that of ecclesiastical persons some be regular, and some be secular. They be called regular, because they live under certaine rules, and have vowed three things; true obedience, perpetuall chastity, and wilfull poverty. And when a man is professed in any of the orders of religion, he is said to be *a man of religion* or religious. Of this sort be all abbots, priors, and others of any of the said orders regular. Secular are persons ecclesiasticall; but because they live not under certain rules of some of the said orders, nor are votaries, ☞ they are for distinction sake, called secular, as bishops, deanes, and chapters, archdeacons, prebends, parsons, vicars, and such like. All which *Littleton* here includeth under these general words, *of holy church;* and none of these are in law said to be *men of religion*, or religious. [94. a.]

Where *Littleton* saith (*infeoffed an abbot and his covent*) his meaning is, that the abbot only is infeoffed: for he is only a person capable, and the covent are dead persons in law, and have power of assent only, and that they thereunto assent. But since *Littleton* wrote, all abbeys, priories, monasteries, and other religious

See the Statutes of 27 H. 8, not printed, but in the abridgment.

31 H. 8. cap. 13. and 32 H. 8. ca. 24, &c. Vide Sect. 530.

* *The word which lord Coke translates "Lessor," is in the original "Feoffor," but, as he evidently refers to a lease for lives, for which, before the statute of uses, Livery of Seisin was necessary, such a lease was a feoffment; so that the difference is immaterial.*

Mar. (the first statute conferring such a power) was restricted to *female* children, to children of *both* sexes, and thus supplied the means of still further preventing guardianship in socage.—In all other respects the tenure in socage seems to be under the same circumstances, and attended with the same consequences, as it was before the Restoration. But the statute of Charles the second goes farther than the mere alteration of socage; and having thus reformed and improved this favourite tenure, in the next place provides for the extension of it throughout the kingdom. This the statute effectually secures, by converting into socage all tenures by knight's service, and by taking from the crown the power of creating any other tenure than socage in future.—[Note 95.]

(1) The words between brackets are in L. and M. but not in Roh.

religious houses of monkes, canons, friers and nuns, &c. have been dissolved, and their possessions given to the crowne (2).

The ecclesiasticall state of *England*, as it standeth at this day, (which is necessary for our student to know) is divided into two provinces, or archbishopricks, (viz.) of *Canterbury* and of *Yorke*. The archbishop of *Canterbury* is styled *Metropolitanus et Primas totius Anglicæ*, and the archbishop of *Yorke Primas Angliæ*. Each archbishop hath within his province suffragan bishops of several dioceses (3). The archbishop of *Canterbury* hath under him within his province, of ancient foundations, viz. *Rochester* his principall chaplaine, *London* his deane, *Winchester* his chancellor, *Norwich*, *Lincolne*, *Ely*, *Chichester*, *Salisbury*, *Exeter*, *Bathe* and *Wells*, *Worcester*, *Coventry* and *Litchfield*, *Hereford*, *Landaffe*, *St. David*, *Bangor*, and *St. Asaphe*, and four founded by king *Henry* 8, erected out of the ruins of dissolved monasteries (that is to say) *Gloucester*, *Bristow*, *Peterborow*, and *Oxford*. The archbishop of *Yorke* hath under him four, (viz.) the bishop of the county palatine of *Chester*, newly erected by king *Henry* 8, and annexed by him to the archbishopricke of *Yorke*, of the county palatine of *Durham*, *Carlile*, and the isle of *Man*, annexed to the province of *Yorke* by *H.* 8, but a greater number this archbishop anciently had, which time hath taken from him. The extent of every diocesse you may elsewhere read, the which for brevity I here omit. All the said archbishoprickes and bishoprickes of *England* were founded by the kings of *England*, to hold by barony, as hereafter shall be said (4). * And every archbishop and bishop hath his deane and chapter, whereof more shall be said hereafter. The archbishop of *Canterbury* hath the precedencie, next to him the archbishop of *Yorke*, next to him the bishop of *London*, and next to him the bishop of *Winchester* (5), and then all other bishops of both provinces after their ancientnesse.

(4 Inst. 321.)

Matth. Parker, de vitis archiepiscoporum. Lindwood. Camden Britannia. Vid. Rot. Parliam. anno. 36 H. 8. 1 E. 6. 5 E. 6. &c. Westminster also was newly erected a bishopricke by H. 8. but by queene Mary it was restored to be an abbey, and by queene Eliz. created a deanry collegiate. Chester had been anciently a bishop's see, and long since translated to Coventry. 33 H. 8. ca. 31. Camden, ubi supra. 26 H. 8. first fruits and tenths. Vid. Sect. 137. * 3 Co. 73. deane and chap. of Norwich case. Vide Sect. 134. 201. 31 H. 8. cap. 10.

Every diocesse is divided into archdeaconries, whereof there be 60; and the archdeacon is called *oculus episcopi;* and every archdeaconry

---

(2) The student will find a good history of the dissolution of monasteries in England in the excellent preface to that most valuable work the *Notitia Monastica*, by bishop Tanner.

(3) Here bishops are styled suffragans in respect of their relation to the archbishop of their *province;* but formerly each archbishop and bishop had also his suffragan, to assist him in conferring orders, and in other *spiritual* parts of his office within his *diocese*. These in our ecclesiastical law are called suffragan bishops, and resemble the *chorepiscopi* or *bishops of the country* in the early times of the christian church. How this *inferior* order of bishops *may* be elected and consecrated is regulated by the 26 H. 8. c. 14; but notwithstanding this statute, it is not usual to appoint them.—They should not be confounded with the *coadjutors* of a bishop; the *latter* being appointed in case of the bishop's infirmity to superintend his *jurisdiction* and *temporalities;* neither of which was within the interference of the former. See fully on this subject in Gibs. Cod. 1st ed. v. 1. 155.—[Note 96.]

(4) See ante 70. b. note 2. post. 164. a.

(5) This is a mistake; for the statute, by which precedency is principally regulated, gives the bishop of Durham place between the bishop of London and the bishop of Winchester. See 31 H. 8. c. 10. s. 3.—[Note 97.]

Chap. 6. *Frankalmoigne.* Sect. 133.

TENANT in frankalmoigne is, where an abbot, or prior, or another man of religion, or of holy church holdeth of his lord in frankalmoigne; that is to say in Latine, in liberam eleemosinam, *that is, in free almes. And such tenure beganne first in old time. When a man in old time was seised of certain lands or tenements in his demesne as of fee, and of the same land infeoffed an abbot and his covent, or prior and his covent, to have and to hold to them and their successours in pure and perpetuall almes, or in frankalmoigne; [or by such words to hold of the grantor, or of the lessor*, and his heires in free almes:](1) in such case the tenements were holden in frankalmoigne.*

Bract. lib. 2. cap. 5. and lib. 4. ca. 2. Britton, fo. 164, 165. Mirror, ca. 2. sect. 18. Glanvil. lib. 7. ca. 1. & lib. 12. ca. 3. & 25. Fleta, lib. 3. ca. 5. 21 H. 7. 39. 29 E. 3. 14. 8 H. 6. 23. 12 H. 8. 8. (4 Co. 104.) 2 Inst. 121.

"*AN abbot, prior, or another man of religion, or of holy church.*" It is to be observed, that of ecclesiastical persons some be regular, and some be secular. They be called regular, because they live under certaine rules, and have vowed three things; true obedience, perpetuall chastity, and wilfull poverty. And when a man is professed in any of the orders of religion, he is said to be *a man of religion* or religious. Of this sort be all abbots, priors, and others of any of the said orders regular. Secular are persons ecclesiasticall; but because they live not under certain rules of some of the said orders, nor are votaries, ☞ they are for distinction sake, called secular, as bishops, deanes, and chapters, archdeacons, prebends, parsons, vicars, and such like. All which *Littleton* here includeth under these general words, *of holy church;* and none of these are in law said to be *men of religion*, or religious. [94. a.]

Where *Littleton* saith (*infeoffed an abbot and his covent*) his meaning is, that the abbot only is infeoffed: for he is only a person capable, and the covent are dead persons in law, and have power of assent only, and that they thereunto assent. But since *Littleton* wrote, all abbeys, priories, monasteries, and other

See the Statutes of 27 H. 8, not printed, but in the abridgment.

31 H. 8. cap. 13. and 32 H. 8. ca. 24, &c. Vide Sect. 530.

religious

* *The word which lord Coke translates "Lessor," is in the original "Feoffor," but, as he evidently refers to a lease for lives, for which, before the statute of uses, Livery of Seisin was necessary, such a lease was a feoffment; so that the difference is immaterial.*

Mar. (the first statute conferring such a power) was restricted to *female* children, to children of *both* sexes, and thus supplied the means of still further preventing guardianship in socage.—In all other respects the tenure in socage seems to be under the same circumstances, and attended with the same consequences, as it was before the Restoration. But the statute of Charles the second goes farther than the mere alteration of socage; and having thus reformed and improved this favourite tenure, in the next place provides for the extension of it throughout the kingdom. This the statute effectually secures, by converting into socage all tenures by knight's service, and by taking from the crown the power of creating any other tenure than socage in future.—[Note 95.]

(1) The words between brackets are in L. and M. but not in Roh.

religious houses of monkes, canons, friers and nuns, &c. have been dissolved, and their possessions given to the crowne (2).

The ecclesiasticall state of *England*, as it standeth at this day, (which is necessary for our student to know) is divided into two provinces, or archbishopricks, (viz.) of *Canterbury* and of *Yorke*. The archbishop of *Canterbury* is styled *Metropolitanus et Primas totius Angliæ*, and the archbishop of *Yorke Primas Angliæ*. Each archbishop hath within his province suffragan bishops of several dioceses (3). The archbishop of *Canterbury* hath under him within his province, of ancient foundations, viz. *Rochester* his principall chaplaine, *London* his deane, *Winchester* his chancellor, *Norwich*, *Lincolne*, *Ely*, *Chichester*, *Salisbury*, *Exeter*, *Bathe* and *Wells*, *Worcester*, *Coventry* and *Litchfield*, *Hereford*, *Landaffe*, *St. David*, *Bangor*, and *St. Assaphe*, and four founded by king *Henry* 8, erected out of the ruins of dissolved monasteries (that is to say) *Gloucester*, *Bristow*, *Peterborow*, and *Oxford*. The archbishop of *Yorke* hath under him four, (viz.) the bishop of the county palatine of *Chester*, newly erected by king *Henry* 8, and annexed by him to the archbishopricke of *Yorke*, of the county palatine of *Durham*, *Carlile*, and the isle of *Man*, annexed to the province of *Yorke* by *H.* 8, but a greater number this archbishop anciently had, which time hath taken from him. The extent of every diocesse you may elsewhere read, the which for brevity I here omit. All the said archbishoprickes and bishoprickes of *England* were founded by the kings of *England*, to hold by barony, as hereafter shall be said (4). * And every archbishop and bishop hath his deane and chapter, whereof more shall be said hereafter. The archbishop of *Canterbury* hath the precedencie, next to him the archbishop of *Yorke*, next to him the bishop of *London*, and next to him the bishop of *Winchester* (5), and then all other bishops of both provinces after their ancientnesse.

(4 Inst. 321.)

Matth. Parker, de vitis archiepiscoporum. Lindwood. Camden Britannia. Vid. Rot. Parliam. anno. 36 H. 8. 1 E. 6. 5 E. 6. &c. Westminster also was newly erected a bishopricke by H. 8. but by queene Mary it was restored to be an abbey, and by queene Eliz. created a deanry collegiate. Chester had been anciently a bishop's see, and long since translated to Coventry. 33 H. 8. ca. 31. Camden, ubi supra. 26 H. 8. first fruits and tenths. Vid. Sect. 137. * 3 Co. 73. deane and chap. of Norwich case. Vide Sect. 134. 201. 31 H. 8. cap. 10.

Every diocesse is divided into archdeaconries, whereof there be 60; and the archdeacon is called *oculus episcopi;* and every archdeaconry

---

(2) The student will find a good history of the dissolution of monasteries in England in the excellent preface to that most valuable work the *Notitia Monastica*, by bishop Tanner.

(3) Here bishops are styled suffragans in respect of their relation to the archbishop of their *province;* but formerly each archbishop and bishop had also his suffragan, to assist him in conferring orders, and in other *spiritual* parts of his office within his *diocese*. These in our ecclesiastical law are called suffragan bishops, and resemble the *chorepiscopi* or *bishops of the country* in the early times of the christian church. How this *inferior* order of bishops *may* be elected and consecrated is regulated by the 26 H. 8. c. 14; but notwithstanding this statute, it is not usual to appoint them.—They should not be confounded with the *coadjutors* of a bishop; the *latter* being appointed in case of the bishop's infirmity to superintend his *jurisdiction* and *temporalities;* neither of which was within the interference of the former. See fully on this subject in Gibs. Cod. 1st ed. v. 1. 155.—[Note 96.]

(4) See ante 70. b. note 2. post. 164. a.

(5) This is a mistake; for the statute, by which precedency is principally regulated, gives the bishop of Durham place between the bishop of London and the bishop of Winchester. See 31 H. 8. c. 10. s. 3.—[Note 97.]

Chap. 6. *Frankalmoigne.* Sect. 133.

TENANT in frankalmoigne is, where an abbot, or prior, or another man of religion, or of holy church holdeth of his lord in frankalmoigne; that is to say in Latine, in liberam eleemosinam, *that is, in free almes. And such tenure beganne first in old time. When a man in old time was seised of certain lands or tenements in his demesne as of fee, and of the same land infeoffed an abbot and his covent, or prior and his covent, to have and to hold to them and their successours in pure and perpetuall almes, or in frankalmoigne; [or by such words to hold of the grantor, or of the lessor*, and his heires in free almes:](1) in such case the tenements were holden in frankalmoigne.*

Bract. lib. 2. cap. 5. and lib. 4. ca. 2. Britton, fo. 164, 165. Mirror, ca. 2. sect. 18. Glanvil. lib. 7. ca. 1. & lib. 12. ca. 3. & 25. Fleta, lib. 3. ca. 5. 21 H. 7. 39. 29 E. 3. 14. 8 H. 6. 23. 12 H. 8. 8. (4 Co. 104.) 2 Inst. 121.

"*AN abbot, prior, or another man of religion, or of holy church.*" It is to be observed, that of ecclesiastical persons some be regular, and some be secular. They be called regular, because they live under certaine rules, and have vowed three things; true obedience, perpetuall chastity, and wilfull poverty. And when a man is professed in any of the orders of religion, he is said to be *a man of religion* or religious. Of this sort be all abbots, priors, and others of any of the said orders regular. Secular are persons ecclesiasticall; but because they live not under certain rules of some of the said orders, nor are votaries, ☞ they are for distinction sake, called secular, as bishops, deanes, and chapters, archdeacons, prebends, parsons, vicars, and such like. All which *Littleton* here includeth under these general words, *of holy church;* and none of these are in law said to be *men of religion*, or religious. [94. a.]

Where *Littleton* saith (*infeoffed an abbot and his covent*) his meaning is, that the abbot only is infeoffed: for he is only a person capable, and the covent are dead persons in law, and have power of assent only, and that they thereunto assent. But since *Littleton* wrote, all abbeys, priories, monasteries, and other religious

See the Statutes of 27 H. 8, not printed, but in the abridgment.

31 H. 8. cap. 13. and 32 H. 8. ca. 24, &c. Vide Sect. 530.

* *The word which lord Coke translates "Lessor," is in the original "Feoffor," but, as he evidently refers to a lease for lives, for which, before the statute of uses, Livery of Seisin was necessary, such a lease was a feoffment; so that the difference is immaterial.*

Mar. (the first statute conferring such a power) was restricted to *female* children, to children of *both* sexes, and thus supplied the means of still further preventing guardianship in socage.—In all other respects the tenure in socage seems to be under the same circumstances, and attended with the same consequences, as it was before the Restoration. But the statute of Charles the second goes farther than the mere alteration of socage; and having thus reformed and improved this favourite tenure, in the next place provides for the extension of it throughout the kingdom. This the statute effectually secures, by converting into socage all tenures by knight's service, and by taking from the crown the power of creating any other tenure than socage in future.—[Note 95.]

(1) The words between brackets are in L. and M. but not in Roh.

religious houses of monkes, canons, friers and nuns, &c. have been dissolved, and their possessions given to the crowne (2).

The ecclesiasticall state of *England*, as it standeth at this day, (which is necessary for our student to know) is divided into two provinces, or archbishopricks, (viz.) of *Canterbury* and of *Yorke*. The archbishop of *Canterbury* is styled *Metropolitanus et Primas totius Angliæ*, and the archbishop of *Yorke Primas Angliæ*. Each archbishop hath within his province suffragan bishops of several diocesses (3). The archbishop of *Canterbury* hath under him within his province, of ancient foundations, viz. *Rochester* his principall chaplaine, *London* his deane, *Winchester* his chancellor, *Norwich*, *Lincolne*, *Ely*, *Chichester*, *Salisbury*, *Exeter*, *Bathe* and *Wells*, *Worcester*, *Coventry* and *Litchfield*, *Hereford*, *Landaffe*, *St. David*, *Bangor*, and *St. Assaphe*, and four founded by king *Henry* 8, erected out of the ruins of dissolved monasteries (that is to say) *Gloucester*, *Bristow*, *Peterborow*, and *Oxford*. The archbishop of *Yorke* hath under him four, (viz.) the bishop of the county palatine of *Chester*, newly erected by king *Henry* 8, and annexed by him to the archbishopricke of *Yorke*, of the county palatine of *Durham*, *Carlile*, and the isle of *Man*, annexed to the province of *Yorke* by *H.* 8, but a greater number this archbishop anciently had, which time hath taken from him. The extent of every diocesse you may elsewhere read, the which for brevity I here omit. All the said archbishoprickes and bishoprickes of *England* were founded by the kings of *England*, to hold by barony, as hereafter shall be said (4). * And every archbishop and bishop hath his deane and chapter, whereof more shall be said hereafter. The archbishop of *Canterbury* hath the precedencie, next to him the archbishop of *Yorke*, next to him the bishop of *London*, and next to him the bishop of *Winchester* (5), and then all other bishops of both provinces after their ancientnesse.

(4 Inst. 321.)

Matth. Parker, de vitis archiepiscoporum. Lindwood. Camden Britannia. Vid. Rot. Parliam. anno. 36 H. 8. 1 E. 6. 5 E. 6. &c. Westminster also was newly erected a bishopricke by H. 8. but by queene Mary it was restored to be an abbey, and by queene Eliz. created a deanry collegiate. Chester had been anciently a bishop's see, and long since translated to Coventry. 33 H. 8. ca. 31. Camden, ubi supra. 26 H. 8. first fruits and tenths. Vid. Sect. 137. * 3 Co. 73. deane and chap. of Norwich case. Vide Sect. 134. 201. 31 H. 8. cap. 10.

Every diocesse is divided into archdeaconries, whereof there be 60; and the archdeacon is called *oculus episcopi;* and every archdeaconry

---

(2) The student will find a good history of the dissolution of monasteries in England in the excellent preface to that most valuable work the *Notitia Monastica*, by bishop Tanner.

(3) Here bishops are styled suffragans in respect of their relation to the archbishop of their *province;* but formerly each archbishop and bishop had also his suffragan, to assist him in conferring orders, and in other *spiritual* parts of his office within his *diocese*. These in our ecclesiastical law are called suffragan bishops, and resemble the *chorepiscopi* or *bishops of the country* in the early times of the christian church. How this *inferior* order of bishops *may* be elected and consecrated is regulated by the 26 H. 8. c. 14; but notwithstanding this statute, it is not usual to appoint them.—They should not be confounded with the *coadjutors* of a bishop; the *latter* being appointed in case of the bishop's infirmity to superintend his *jurisdiction* and *temporalities;* neither of which was within the interference of the former. See fully on this subject in Gibs. Cod. 1st ed. v. 1. 155.—[Note 96.]

(4) See ante 70. b. note 2. post. 164. a.

(5) This is a mistake; for the statute, by which precedency is principally regulated, gives the bishop of Durham place between the bishop of London and the bishop of Winchester. See 31 H. 8. c. 10. s. 3.—[Note 97.]

Sect. 138.

ALSO, if it be demanded, if tenant in frankmarriage shall do fealty to the donor or his heires before the fourth degree be past, &c. it seemeth that he shall. For he is not like as to this purpose to tenant in frankalmoign; for tenant in frankalmoign by reason of his tenure shall do divine service for his lord, as is said before; and this he is charged to do by the law of holy church and therefore he is excused and discharged of fealty; but tenant in frankmarriage shall not do for his tenure such service; and if he doth not fealty, he shall not do any manner of service to his lord, neither spiritual nor temporall, which would be inconvenient, and against reason, that a man shall be tenant of an estate of inheritance to another, and yet the lord shall have no manner of service of him (1). *And so it seemes he shall do fealtie to his lord before the fourth degree be past. And when he hath done fealtie, he hath done all his services.*

V. Sect. 87. 136. 201. 265. 440. 478. 665. 722. 40 Ass. 27.

WHICH would be inconvenient, &c." An argument drawne from an inconvenience is forcible in law, as hath beene observed before, and shall be often hereafter *Nihil quod est inconveniens, est licitum** And the law, that is the perfection of reason, cannot suffer any thing that is inconvenient. [97. b.]

Littleton, fo. 50. b. 42 E. 3. 5. 28 E. 3. 395. 20 H. 6. 28.

It is better, saith the law, to suffer a mischief that is peculiar to one, than an inconvenience that may prejudice many. See more of this after in this Chapter.

(Ante 23. a.)

Note, the reason of this diversitie between frankalmoigne and frankmarriage, standeth upon a maine maxime of law, that there is no land that is not holden by some service spirituall or temporall; and therefore the donee in frankmarriage shall do fealty, for otherwise he should do to his lord no service at all; and yet it is frankmarriage, because the law createth the service of fealty for necessity of reason, and avoiding of an inconvenience. But tenant in frankalmoigne doth spiritual and divine service, which is within the said maxime, and therefore the law will not cohort him to do any temporall service. See the next Section.

"*And against reason.*" And this is another strong argument in law, *Nihil quod est contra rationem est licitum*; for reason is the life of the law, nay the common law itselfe is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every man's naturall reason; for, *Nemo nascitur artifex.* This legall reason *est summa ratio.* And therefore if all the reason that is dispersed into so many severall heads, were united into one, yet could he not make such a law as the law in *England* is; because by many successions of ages it hath beene fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this realme, as the old rule may be justly verified of it, *Neminem oportet*

**See ante Mr. Hargrave's note* 1. to 66. a.

(1) *as it seemeth*, L. and M.

oportet esse sapientiorem legibus: no man out of his own private reason ought to be wiser than the law, which is the perfection of reason.

[98. a.]

☛ Sect. 139.

AND if an abbot holdeth of his lord in frankalmoign, and the abbot and covent under their common seale alien the same tenements to a secular man in fee simple, in this case the secular man shall doe fealty to the lord; because he cannot hold of his lord in frankalmoigne. For if the lord should not have fealtie of him, he should have no manner of service, which should be inconvenient, where he is lord, and the tenements be holden of him.

THIS case is worthy of great observation; for hereby it appeareth, that albeit the alienors held not by fealty nor any other terrene service, but onely by spirituall services, and those incertaine, yet the alienee shall hold by the certaine service of fealty, (and of this opinion is *Littleton*, agreeable with our bookes in former authorities) for the law createth a new temporall service out of the land to be done by the alienee, wherewith the abbot was not formerly charged, for the avoyding of an inconvenience, viz. that the feoffee should do no manner of service, and consequently that the land should be holden of no man. Wherein it is to be remembered, that (as hath bin said before) all the lands and tenements in *England*, in the hands of any subject, are holden of some lord or other, and that every tenant must do some kinde of service; and that all lands and tenements are holden either mediately or immediately of the king, for originally all lands and tenements were derived from the crown. And it is to be observed, that when the law createth any new tenure, it is the lowest, (viz. tenure in socage) and with the least service that can be done, and neerest to the freedome of the former service: as in this case a tenure in socage by fealty only is created by the law, which is the lowest and least service the law can create, because fealty is incident to every tenure except tenure in frankalmoigne; for if it should create any other service, it must create fealty also. And the law, according to equity and justice, giveth this fealty to the lord, of whom the land was before holden in frankalmoigne. And lastly, the law so abhorreth an inconvenience, as that it createth out of the land a new service for avoyding thereof. It appeareth by our bookes, that a seigniory in frankalmoigne may be granted over, and consequently the tenant shall hold of the grantee by fealty only; and therefore *Britton* said well, that no service could be demanded of a tenant in frankalmoigne, *tant come les terres remaine en les maines les feoffees.*

31 E. 3. Cessavit, 22. 33 H. 6. 67. 21 E. 4. 11. 9 Co. 128. Anth. Lowe's case. (2 Inst. 502. 3 Co. 3. b.)

(Ante 1. 2 Inst. 501.) 9 Co. 123, in Anth. Lewe's case.

42 Ass. pl. 6. Britton, 164. b.

Sect. 140.

ALSO, if a man grant at this day to an abbot, or to a prior, lands or tenements in frankalmoigne, these words (frankalmoign) are voide; for it is ordained by the statute which is called quia emptores terrarum, (*which was made* anno 18 E. 1.) *that none may alien nor grant lands or tenements in fee simple to hold of himselfe. So that if a man seised of certaine tenements, which he holdeth of his lord by knights service, and at this day he, &c. granteth by licence the same tenements to an abbot, &c. in frankalmoigne, the abbot shall hold immediately the tenements by knights service of the same lord of whom his grantor held, and shall not hold of his grantor in frankalmoigne, by reason of the same statute. So that none can hold in frankalmoigne, unless it be by title of prescription, or by force of a grant made to any of his predecessours before the same statute was made. But the king may give lands or tenements in fee simple to hold in frankalmoigne, or by other services; for he is out of the case of that statute.*

"*ORDAINED by the statute.*" Here it appeareth by the authority of *Littleton*, that this is a statute, and yet the king alone speaketh, viz. *Dominus rex in parliamento suo, &c. ad instantiam magnatum regni sui concessit, providit et statuit.* ☞ But because it is *dominus rex in parliamento, &c. concessit*, it is as much in this case (being an ancient statute) as *dominus rex authoritate parliamenti concessit.* [98. b.]

Vid. 8 Co. the Prince's case.

Secondly, it is, (amongst other acts of parliament) entered into the parliament roll, and therefore shall be intended to be ordayned by the king, by the consent of the lords and commons in that parliament assembled. Thirdly, it is a generall law, whereof the judges may take knowledge, and therefore it is to be determined by them, whether it be a statute or no (1). Now for the

(1) This observation on *general* or *public* statutes points at *two* important rules distinguishing between them and *particular* or *private* statutes.—According to the *first*, which relates to their several *degrees of notoriety*, the judges may and ought to take notice of *public* acts without pleading; but *private* acts *must* be pleaded. But there are some exceptions to *both* parts of this rule. See Law of *Nisi Prius*, ed. of 1775, p. 222, and 1 Sid. 209.—The *second* rule imports a difference in the *mode of trial*; for the existence of a *public* act must be tried by the judges, who are to inform themselves in the best manner they can; but a *private* act may be put in issue, and shall be tried by the *record*. See Hal. Hist. C. L. 15, and Com. Dig. *Parliament*, R. 5.—A *third* difference, which hath been taken between a *general* and a *particular* act, is, that the *latter* will not bind *strangers* though it is without a *saving* of their rights. However well founded this last difference *may* be, it certainly is usual in *modern private* acts, to insert a special saving clause, explaining how far the rights of strangers are intended to be affected.—A *fourth* difference relates to *offering statutes in evidence to a jury*; for it is said, that a *public* act, printed by the *king's printer, or other person authorized by the crown*, is good evidence to a jury; but that of a *private* act, there must be either an *exemplification under the great seal*, or *a copy sworn to be compared with the parliament roll*. Some authorities, however,

the divers formes of acts of parliament, you may read them in the Prince's case *ubi supra.*

"Called quia emptores terrarum." This statute is called so, because the statute beginneth with these words, *Quia emptores terrarum.* (Post. 143. 2 Inst. 500.)

"None may alien, &c. lands in fee simple to hold of himselfe." This is justly inferred upon the statute; but the letter of the statute is, that *feoffatus teneat terram illam de capitali domino, &c.* So as by the authority of *Littleton*, he that citeth a statute is not bound to recite the very words thereof, so long as he misseth not of the substance and necessary consequence thereupon; and yet the safer way is to vouch the words of a law, as they be. [2 Vent. 215.]

"Granteth by licence the same tenements, &c." Here *Littleton* speaketh of a licence, or a dispensation within the said statute of *quia emptores terrarum* (and mentioneth no other statute) which may be done by the king and all the lords immediate and mediate; for it is a rule in law, *alienatio licèt prohibeatur, consensu tamen omnium, in quorum favorem prohibita est, potest fieri*, and *quilibet potest renunciare juri pro se introducto:* and the licence of lords immediate and mediate in this case shall enure to two intents, viz. to a dispensation both of the statute of *quia emptores terrarum*, and of the statutes of mortmaine, as *Littleton* here implyeth, because their deedes shall be taken most strongly against themselves (1). But it 13 E. 3. tit. Release, 33. 27 H. 8. F. N. B. 211. I. [Cro. C. 215. Ante 45. b. Post. 223. b.] 44 Ass. pl. 19. 9 E. 4. b. 11. Pl. Com. 502, 503. Grendon's case. Vide 10 Co. 25, 26. 31. & 110. Vide Sect. 686. (5 Co. 56. 7 Co. 14.)

[99. a.]

however, do not correspond with this last difference; and others except out of it *private* acts concerning a whole county. See Vin. Abr. *Evidence*, A. b. 1. Law of Nisi Pri. ed. 1775, p. 225. 1 Stra. 446. It should also be remarked, that there is a difference between proving private acts *to a jury*, and proving them on the issue of *nul tiel record*, which never goes to a jury; nothing less than an *exemplification under the great seal* being sufficient in the latter case. 2 Salk. 566. For these and other differences between *general* and *particular* statutes, see further in Vin. Abr. *Statutes*, D. E. 2, 3, and Hatt. Treat. on Stat. cap. 2. p. 11. Though the book last cited is published with the name of sir Christopher Hatton, lord chancellor to queen Elizabeth, some doubt whether he was really the author. Nichols. Engl. Histor. Libr. 2d. ed. 192. However it is at all events a treatise well worth consulting. As to the different forms of statutes, besides the Prince's case in 8 Co. see Pryn. on 4 Inst. 13. Hal. Hist. Com. L. 13. Vin. Abr. *Statutes*, A. Com. Dig. *Parliament*, R. 3, the Preface to Ruffhead's edit. of Stat. and 2 Eunomus, 80.—[Note 107.]

(1) Here lord Coke explains the king's power of granting licences to alien in mortmain, notwithstanding the old statutes against such alienations, on a principle which makes the licence rather the waver or remission of a forfeiture, than a dispensation. The licence being considered in the former way, it is attributing to the king no greater power as lord paramount, than subjects, being mesne lords, may exercise in respect of the forfeitures to which they are entitled on alienations in mortmain. In other words, it is construing the statutes so as not to bring the case of a licence within them; and consequently dispensation became unnecessary. It should also be remembered, that the king's power of granting such licences seems recognized by a statute of Edward the third. See 18 E. 3. st. 3. c. 3. However, the pretended power of

it is a safe and good policy in the king's licence to have a *non obstante* also of the statutes of mortmaine, and not only a *non obstante* of the statute of *quia emptores terrarum*. But it appeareth by *Littleton* (which is a secret of law) that there needeth not any *non obstante* by the king of the statutes of mortmaine, for the king shall not be intended to be misconusant of the law; and when he licenseth expressly to alien to an abbot, &c. which is in mortmaine, he needs not make any *non obstante* of the statute of mortmaine, for it is apparent to be granted in mortmaine, and the king is the head of the law, and therefore *præsumitur rex habere omnia jura in scrinio pectoris sui*, for the maintenance of his grant to be good according to the law, for which cause of purpose *Littleton* maketh no mention of any licence in mortmain. *Dispensatio est mali prohibiti provida relaxatio, utilitate seu necessitate pensatâ.*

(Ante 70 b.) Lit. fol. 20. a. (2 Ro. Abr. 518.) 8 R 2. Reliefe, 14 3 H. 4. 2. a. (Ante 84. a.)

"The abbot shall hold, &c. by knights service." For although by the death of the abbot there is neither ward, marriage, nor relief due, yet he holdeth by knights service, albeit the lord cannot have the fruit of it; and if the abbot, with the consent of

Vide Little. fol. 20.

the

---

of suspending statutes by regal authority, without consent of parliament, being declared illegal at the Revolution; and it having been usual to grant licences to a lien in mortmain in a manner, which imported an exercise of suspending or dispersing power, that is, with a *non obstante* of the statutes of mortmain, and *quia emptores;* under these circumstances a jealousy of any thing, in the least connected with an assumption of dispensing power, might have influenced many to have confounded such licences with dispensation: and therefore it was deemed prudent to give them a parliamentary sanction. See 7 and 8 W. 3. c. 37. It is observable, that the statute made for this purpose authorizes the king to grant mortmain licenses, without any regard to the person of whom the lands were held; and declares, that they shall not be subject to *any* forfeiture. Before this last act the king's licence only prevented the forfeiture to himself; and if there was any mesne lord, he might take advantage of the mortmain statutes, notwithstanding the royal licence. See Fitzh. Nat. Br. 221. O. But the act of William seems to be expressed so as to *extend* the operation of the king's licence, and to render it effectual *universally*, by preventing a forfeiture to other lords as well as to the king himself. Another thing deserving of notice is, that the statute is quite silent as to the writ of *ad quod damnum;* which anciently was thought an essential preliminary to the licence, in order that the king might know what prejudice would arise to himself or others from granting it. Fitzherbert indeed tells us, that in his time it was become a common practice to purchase licenses to alien in mortmain without suing an *ad quod damnum*, and instead of it to add to the patent, granting the licence, special words to signify that it should be good without any writ. But he adds, that it seems dubious whether such patents were good, if they turned out to be prejudicial and disadvantageous to the king or others. See Fitzh. N. B. 222. D. Whether since the statute of William writs of *ad quid damnum* previous to licences from the crown to alienate in mortmain are necessary, may deserve consideration; for which purpose it may be material to inquire what the practice hath been.—Since writing the former part of this note, we are well informed, that writs of *ad quod damnum* have not been usual on granting mortmain licences since the statute of William.—[Note 108.]

the covent, alien the land over to a man and his heires, there is the ward, marriage, and reliefe revived. But by prescription (as it hath been said) the successor of an abbot may pay reliefe. An abbot or prior, &c. that holdeth lands by knights service, albeit he ought not in respect of his profession to serve in warre in proper person, yet must he find a sufficient man, conveniently arrayed for the warre, to supply his place. And if he can find none, then must he pay escuage, &c. for his profession doth not privileadge him, but that the king's service in his warre must be done, that belongeth to his tenure.

Nota, (reader) since *Littleton* wrote, a man might either in his life-time, or by his last will in writing, [*m*] give lands, tenements, &c. to any spirituall body politick or corporate, to be holden of himselfe in frankalmoigne, or by divine service, as by the statute of 1 and 2 *Phil. & Mariæ* (which indured for twenty years) appeareth; which statute, since that time, hath beene favourably and benignely expounded.

[*m*] 1 & 2 Phil. & Mar. c. 8. Mich. 8 & 9 Eliz. Dyer, fol. 255. 1 Co. 25.

"*So that none can hold in frankalmoigne, unlesse it be by title of prescription, &c.*" It is to be understood, that a man seised of lands may at this day give the same to a bishop, parson, &c. and their successors in frankalmoigne, by the consent of the king, and the lords mediate and immediate, of whom the land is holden; for the rule is, *quilibet potest renunciare juri pro se introducto.*

12 E. 4. 4.

27 H. 8. 2 E. 2. Avowrie, 185.

So if an ecclesiasticall person hold lands by fealty and certaine rent, the lord at this day may confirme [*n*] his estate, to hold to him and his successors in frankalmoigne; for the former services be extinct, and nothing is reserved but that he holds of him, and so he did before.

[*n*] 4 E. 3. 21. 22 E. 3. 15. 38 H. 6. 25. Litt. cap. Confirmat. 123.

"*But the king may, &c. for he is out of the case of that statute.*"

It is cleere that the king is out of the case of the statute: for the statute is, *quòd feoffatus teneat terram illam, &c. de capitali domino feodi, &c.* and this cannot be intended of the king, who is superior to all, and inferiour to none. But where the king is bound by acts of parliament and where not, *vide* 11 *Co.* 66. *Magdalen Colledge* case.

11 Co. 66. Magdalen Colledge case.

Sect. 141.

AND note, that none may hold lands or tenements in frankalmoigne, but of the grantor, or of his heires. And therefore it is said, that if there be lord mesne and tenant, and the tenant is an abbot, which holdeth of his mesne in frankalmoigne, if the mesne die without heire, the mesnaltie shall come by escheate to the said lord paramont, and the abbot shall then hold immediately of him by fealty only, and shall do to him fealty; because he cannot hold of him in frankalmoign, &c.

"*BUT of the grauntor, or of his heires.*"

14 E. 3. tit. Mesne, 7. 14 H. 3. tit. Disclaim Br. 33. 15 E. 3. Confirm. 8.

The tenure in frankalmoigne is an incident to the inheritable blood of the grantor, and cannot be transferred nor forfeited to any other, no more than a foundership of a house of religion, (which is intended to be in frankalmoigne, or homage ancestrel,

or

27 H. 8. b. Temps E. 1. Garr. 90. 45 E. 3. 23. 47 H. 3. Garr. 99. 11 H. 4. 52. 14 H. 4, 5. 10 H. 7. 11. 28 Ass. 33.

or the writ of *contra formam feoffamenti*, or the writ of ☞ *contra formam collationis*, or any other incident to their inheritable blood. But it is no incident [99. b.] inseparable; for the lord may release to the tenant in frankalmoigne, and then the tenure is extinct, and he shall hold of the lord paramount by fealty, as in the case of *Littleton*, Sect. 139.

18 E. 3. 18. 22 E. 3. 18. Corody, Broke, 5. 22 H. 6. 50. 4 E. 2. Avowry, 201, 202. 19 E. 3. ibid. 122. 11 E. 3. ibid. 100. 30 H. 6, 7. 33 H. 8. Dyer 51. F. N. B. 16. F. N. B. 211. C. 15 E. 3. Confirm. 8.

Vide 15 E. 4. (2 Ro. Abr. 447. contra—Hob. 130. Post. 143. 213. b.)

"*Or of his heires.*" Here (or) hath the sense of (and)*; for a man cannot at this day grant lands in taile and reserve a rent to his heires, and exclude the grantor himselfe; for the heire cannot take any thing in the life of the ancestor, neither can the heire take any thing by descent, when the ancestor himselfe is secluded. But if a man had granted lands at the common law to hold of his heires, these words (to hold of his heires) are void, and he shall hold of the grantor as he held over, which he should have done, if he had made no reservation at all.

33 E. 3. tit. Annuity, 52. 3 Ass. pl. 8. &c.

And albeit *Littleton* saith, that no man can hold lands in frankalmoign but of the grantor or his heires, yet might an abbot by assent of his covent, or a bishop with assent of his chapter, and such like, by license as is aforesaid, have given lands in frankalmoigne, to hold of them and their successors; and as *Littleton* himselfe agreeth, the king may give land in frankalmoigne, in which case the land shall be holden of him, his heires and successors.

"*And therefore it is said, if there be mesne and tenant, and the tenant is an abbot, &c.*" By this it appeareth, that if the seigniory be transferred by act in law to a stranger, and thereby the privity is altered, that the tenure in frankalmoigne is changed to a tenure in socage by fealty, as well as it appeareth before when the seigniory or tenancy is granted to another; and the law in this case also createth a new fealty, wherewith the land was not charged before.

2 E. 4. 46. (2 Ro. Abr. 501. 513.) 7 E. 4. 12. a. 2 Inst. 502.

"*The mesnaltie shall come by escheate to the said lord paramont.*" This new tenure, created by law, shall upon the escheate drowne the seigniory; for alwaies the seigniory neerer to the land drownes the seigniory that is more remote off; and yet the lord in this case, to whom the mesnaltie is escheated, shall hold by the same services that he held before the escheat.

Sect. 142.

AND note, that where such man of religion holds his tenements of his lord in frankalmoigne, his lord is bound by the law to acquite him of every manner of service which any lord paramount will have or demand of him for the same tenements; and if he doth not acquite him, but suffereth him to be distreyned, &c. he shall have against his lord a writ of mesne, and shall recover against him his damages and costs of suit, &c.

"*MAN*

* For cases of devises where *or* hath been construed, *and*, see Pollex. 645. 2 Str. 1175, and 8 Atk. 193. 390. And see post. 225. a.

"*MAN of religion.*" And yet this case extendeth to all ecclesiasticall persons that hold in frankalmoigne, be they secular or regular; for the mesne ought to acquit all of them; for they be bound [*a*] to make praiers for their founder and his heires; and in consideration of those prayers, the founder, &c. is bound to pay to the chiefe lord all rents and services issuing out of that land, as it appeareth by that which followeth.

[*a*] Pl. Com. 306. b. in Sharington's case. 33 H. 6. 6. 39 H. 6. 29. 14 E. 3. Mesne, 7.

[100. a.] "*To acquite him.* ☞ *Acquite* is compounded of *ad*, and the old verbe *quietare*, and signifieth in law [*b*] to discharge, or keepe in quiet, and to see that the tenant be safely kept from any entries, or other molestation for any manner of service issuing out of the land to any lord that is above the mesne. [*c*] And hereof commeth [*d*] acquitall, and *quietus est*, (that is) that he is discharged; and he that is discharged of a felony, &c. by judgment, is said to be acquitted of the felony, *acquietatus de felonià*; and if he be drawne in question againe, he may plead [*e*] *auterfoits acquite*. And therefore if such a tenant, as *Littleton* here speaketh of, be distrained by any lord paramount, the mesne (to keep the tenant quiet) may put his beasts in the pownd, instead of the beasts of the tenant.

[*b*] Fleta, lib. 2. ca. 43. Britton, fol. 58, 59. Vide hereafter in this Sect. in Writ of Mesne.

[*c*] Vide Sect. 142. 540.

[*d*] 8 E. 2. Corone 424. 20 E. 2. Ibid. 232. Staunf. Pl. Corone, 105.

[*e*] 4 E. 3. 33. 17 E. 3. 44.

7 H. 4. 18. 34 H. 6. 47. 13 E. 4. 6. F. N. B. 136. 9 Co. 110, 111, in Tresham's case.

There be three kinds of acquitals. 1. An acquitall by deed, 2. An acquitall by prescription. 3. An acquitall by tenure: and by tenure foure manner of wayes. 1. By owelty of services, for service acquits service. 2. Tenure in frankalmoigne, whereof *Littleton* here speaketh 3. Tenure in frankmarriage. 4. Tenure by reason of dower.

3 E. 3. 14. 77. 5 E. 3. 11. 4 H. 6. 28. 39 E. 3. 19. 11 H. 4. 52. 12 H. 4. 9. 14 H. 4. 17. F.N.B. 136. b. h.

39 H. 6. 30. 33 H. 6. 7. F. N. B. 135. M. 4 E. 4. 35. 12 H. 4. 9. 28 E. 3. 95. 17 E. 3. 39.

"*Of every manner of service.*" [*f*] And yet not of services onely, as homage, fealty, rentworkes, and other services, but also of improvement of services; as if he be distreyned for reliefe,* *aide pur file marier, aide pur faire fitz chivaler, &c.* Also for suite service to a hundred. [*g*] But for suit reall in respect of resiance within any hundred, leet, or turne, the mesne shall make no acquitall, for that is in respect of his person and resiancy.

[*f*] 59 H. 6. 31. a. 9 E. 4. 27. F. N. B. 136. M. 17 E. 2. Mesne. 5 E. 3. 49.

*Bracton, lib. 2. fol. 84.

[*g*] 4 E. 3. 42. For this writ see the Register fol. and F. N. B. fol. 135. Mirror, cap. 2. sect. 13. Bracton, lib. 2. fol. 84. Britton, fol. 58. Fleta, lib. 2. ca. 43. Westm. 2. cap. 9.

"*Writ of mesne,*" *breve de medio*, so called by reason of the words of the writ of mesne, which are, *unde idem A. quia medius est inter C. et præfatum B.* *A.* who is mesne, between *C.* that is the lord paramount, and B. that is the tenant paravaile. And note, that there be six writs in law, that may be maintained, *quia timet*, before any molestation, distresse, or impleading: as 1. A man may have his writ of *mesne* (whereof *Littleton* here speaks) before he be distreyned. 2. A *warrantia cartæ*, before he be impleaded. 3. A *monstraverunt*, before any distresse or vexation. 4. An *audita querela*, before any execution sued. 5. A *curia claudenda*, before any default of inclosure. 6. A *ne injustè vexes*, before any distresse or molestation. And these be called *brevia anticipantia*, writs of prevention.

"*And*

W. 2. ca. 9. Vide 8 Co. 134. Mary Shepley's case.

"And shall recover against him his damages." It is to be knowne, that there be two severall judgments in a writ of mesne, one at the common law, another by the statute of *W.* 2. ca. 9. At the common law he shall have judgment to recover his acquitall, and if he be distreyned or damnified, his damages and costs: and the processe at the common law was summons, attachment and distresse infinite, in the same county where the writ is brought. *The judgement by the said statute of *W.* 2, is a forejudger of the mesnalty, and that in two severall cases. One upon processe given by the said statute, viz. summons, attachment, and grand distresse, and if he commeth not, and the writ be returned, he shall be forjudged. The other case is, where the tenant recovereth his acquitall in a writ of mesne, if he be not acquited afterwards, he shall have a writ of *distringas ad acquietandum* against the same mesne, and if he commeth not, he shall be forjudged by his default of the mesnality; and so if he commeth, and it be found against him by verdict, he shall be forjudged: but forjudger in that case is not given against his heire, for that the statute speaketh only of the mesne, and not of his heires. And the judgment in case of forjudgment is, *quòd T. (le mesne) amittat servitia de A. (le tenant) de tenementis prædictis, et quòd omisso prædicto T. præfat' R. (le seignior paramount) modo sit attendens et respondens per eadem servita per quæ T. tenuit.* The said statute, in case of forjudgment, doth not bind a feme covert; and yet if such a judgment be given against a baron and feme, it is not void but erroneous, and to be reversed in a writ of error. And so a forjudgment against a tenant in taile shall binde the issue in taile in an avowry, untill he reverseth it by error. If two joyntenants bring a writ of mesne, and the one is summoned and severed, the other cannot forjudge the mesne: for he ought to be attendant to the lord paramount, as the mesne was, and that cannot he be alone. And so it is if there be two joyntenants mesnes, and in a writ of mesne brought against them, one maketh default, and the other appeares, there can be no forjudger.

*Bracton. lib. 2. fol. 84. Fleta, lib. 2. cap. 43.

46 E. 3. 31. 13 E. 2. tit. Mesne. F. N. B. 136. 2 H. 4. 7. 17 E. 3. Contra formam Collat. 1. F. N. B. 121.

(Post. 233. b.) 7 E. 3. 41. tit. Mesne, 18. 9 E. 2. ibid. 67. 14 E. 2. ibid. 70. 9 Co. 73. b. Doct. Hussey's case.

(10 Co. 134.)

2 Inst. 375.

☞ If the tenant be disseised, and the disseisor in a writ of mesne forjudge the mesne, this shall not bind the disseisee. And so if the mesne be disseised, and a forjudgment is had against the disseisor, this doth not binde the disseisee; for the words of the said statute are, *quando tenens sine præjudicio alterius quàm medii attornare se potest capitali domino.* [100. b.]

But if the daughter, the sonne being *en venter sa mere*, be forjudged, it shall bind the son that is born afterwards, because he had no right at the time of the forjudgment. And so if the tenant enter in religion, and his heire forjudgeth the mesne, and then the ancestor is deraigned, he shall be bound *causâ quâ suprà.* If there be lord, prior mesne, and tenant, the mesne cannot be forjudged; because he alone can doe nothing to the prejudice or the disherison of his church: and the like law is of a bishop, parson, and the like.

16 E. 3. Judgm. 117. (7 Co. 8. a.) W. 2. ca. 9.

No forjudgment can be, but when there is but one mesne betweene the lord distreyning and the tenant; because the tenant, upon the forjudgment, cannot be attendant to the lord distreyning, in respect there is a mesne between them, and so the said statute provideth for in express termes.

Nota, the plaintife, in a writ of mesne, may chuse either processe at the common law, or upon the said statute of *W.* 2. Forjudgment is called *forisjudicatio*, and he that is forjudged *foris judicatis.*

judicatus. And *Bracton* hath this writ, *Rex vicecomiti, &c. et non permittas, quòd A. capitalis dominus feodi illius habeat custodiam hæredis, quia in curiâ nostrâ foris judicatur de custodiâ, &c.* *Fleta* calleth it *abjudicationem*, and thereupon commeth *abjudicatus*; for he saith, *post proclamationem, &c. factam, abjudicetur medius de feodo et servitio suo* (1).

50 E. 3. 23. F. N. B. 137. Bract. l. 4, 256. b. Brit. f. 58. b. Flet. l. 2, c. 43.*

* *In the second edition of Fleta, and probably in every printed copy of the work, the passage cited by lord Coke is in* lb. 2. ca. 50. § 8.

Chap. 7. *Homage Auncestrel.* Sect. 143.

TENANT by homage auncestrel is, where a tenant holdeth his land of his lord by homage, and the same tenant and his auncestours, whose heire he is, have holden the same land of the same lord and of his auncestors, whose heire the lord is, time out of memorie of man, by homage, and have done to them homage. And this is called homage auncestrell, by reason of the continuance, which hath beene, by title of prescription, in the tenancie in the blood of the tenant, and also in the seigniorie in the blood of the lord. And such service of homage ancestrell draweth to it warrantie, that is to say, that the lord, which is living and hath received the homage of such tenant, ought to warrant his tenant, when he is impleaded of the land holden of him by homage ancestrel.

BY title of prescription, in the tenancie in the blood of the tenant, and also in the seigniorie in the blood of the lord." Here *Littleton* doth not define what homage auncestrell is, but putteth an example in one case. For in the 146 Section it appeareth that blood is not alwayes necessary on the lord's side. In this example here put, there must be a double prescription, both in the blood of the lord and of the tenant, and therefore I think there is little or no land at all at this day holden by homage auncestrel.

9 H. 3. Vouch. 277. 47 H. 3. Garr. 99. Temps E. 1. Garr. 90. 4 E. 2. Vouch. 245. 45 E. 3. 43. 11 H. 4. 50. 4 H. 6. 26.

And hereof it is sayd, *Autant est le seignior tenus a son homage, come le homage a son seignior forsque solement en reverence.* And herewith agreeth *Bracton: Est tanta et talis connexio per homagium inter dominum et tenentem, quòd tantùm debet dominus tenenti, quantùm tenens domino, præter solam reverentiam"*

Brit. fol. 170. a. Bract. fol. 78. Glanv. li. 9. ca. 4, 5, 6.

"*Draweth*

---

(1) There is not any thing in the 12th of Charles the second which in the least varies the tenure in *frankalmoigne*, it being expressly saved by the statute. See 12 Cha. 2. c. 24. s. 7. Indeed had the saving been omitted, we do not see how any of the other provisions in the statute could have affected this tenure; and therefore it is presumed, that the saving was merely the effect of an abundant caution. The statute adds, that it shall not subject tenures in frankalmoigne to *any greater or other services;* but what was intended to be guarded against by these latter words is not very obvious.—[Note 109.]

Vide Britton, ubi supra. 14 H. 6. 25. 18 H. 6. 2. b. Glanvil. lib. 9. c. 4, 5, and 6. 9 H. 3. Voucher, 277. 47 H. 3. Voucher, 270, 271. 43 E. 3. 3. a. (F. N. B. 134. F.)

"Draweth to it warrantie." ☞ Hereby appeareth, what a reverend respect the law hath to ancient inheritances continued in the blood of the lord and of the tenant; for in this example put, if the continuance hath not bin in the blood of both sides, no warranty belongeth to homage ancestrel; but if ancient continuance hath been on both sides, [*m*] then such homage ancestrell draweth to it warranty; so as ancient continued inheritance on both parties hath more priviledge and account in law, than inheritances lately, or within memory acquired. [101. a.]

[*m*] See the second Part of the Institutes upon the 6th chapter of the Statute of Bigamie. (Post. 384. a.)

18 H. 6. 2. b. per Newton,

If the lord grant the services of his tenant by homage ancestrel, the tenant shall not be compelled in a *per quæ servitia* to atturne, unlesse the conusee will grant in court to warrant the land unto him.

9 H. 3. Voucher, 277.

If the tenant vouch by force of this warrantie in law, it is a good counterplea, that the tenant (or any one of his ancestors) *recessit de servitio suo, et fecit servitium suum* A. B. *sine aliquâ coactione de suâ propriâ voluntate.*

[*a*] 9 H. 3. Voucher, 277. Temps E. 1. Gar. 90. 45 E. 3. 23. [*b*] Glanvil. lib. 9. c. 4, 5. and lib. 1. cap. 3. Bracton, lib. 2. fol. 83. [*c*] Britton, fol. 172, 173. 47 H. 3. Garrantie, 99.

"And hath received the homage of such tenant." [*a*] So as before homage received, the tenant could not absolutely bind the lord to warranty, and therefore of ancient time there lay [*b*] a writ *de homagio capiendo*, for the tenant against the lord, to compell him to receive his homage for the benefit of his warranty. Which writ you shall read in *Bracton* and [*c*] *Britton*, and the processe, and manner of triall thereupon, and the same you shall find in 47 *H.* 3.

Sect. 144.

AND also such service by homage ancestrell draweth to it acquittal, scil. *that the lord ought to acquite the tenant against all other lords paramont him of every manner of service.*

Sect. 142, and 540. (Ante 100.)

"DRAWETH to it acquittall." Of acquittall somewhat hath been said in the Chapter of Frankalmoigne.

Sect. 145.

AND it is said, that if such tenant be impleaded by a præcipe quod reddat, &c. *and vouch to warrantie his lord, who commeth in by process, and demands of the tenant what he hath to binde him to warranty, and he sheweth, how he and his ancestors, whose heire he is, have holden their land of the vouchee and of his ancestors time out of minde of man; and if the lord, which is vouched, hath not received homage of the tenant nor of any of his ancestors, the lord (if he will) may disclaime in the seigniory, and*

and so ouste the tenant of his warranty. But if the lord, who is vouched, hath received homage of the tenant, or of any of his ancestors, then he shall not disclaime, but he is bound by the law to warrant the tenant; and then if the tenant loseth his land in default of the vouchee, he shall recover in value against the vouchee of the lands and tenements, which the vouchee had at the time of the voucher, or any time after.

"A *PRÆCIPE quòd reddat.*" This is understood of the king's writ directed to the sherife of the county where the land lyeth, whereby the sherife is authorised to command the tenant of the land to yield the same to the demandant; and of these words of the writ (*præcipe quòd reddat*) the writ is so called. Writs ☞ of *præcipe* be of foure kindes, *præcipe quòd reddat, præcipe quòd faciat, præcipe quòd permittat*, and *præcipe quòd non permittat, &c.* as appeareth by the Register.

[101. b.]

(Post. 139. b.) Regist. 159.

"*And vouch to warrantie.*" *Vouch, avoucher*, (in *Latin vocatio*, or *advocatio*) is a word of art, made of the verbe *voco*, and is in [*d*] the understanding of the common law, when the tenant calleth another into the court that is bound to him to warrantie, that is, either to defend the right against the demandant, or to yield him other land, &c. in value, and extendeth to lands or tenements of an estate of freehold or inheritance, and not to any chattel real personall or mixt, saving only in case of a wardship granted with warranty (as shall be said more at large in the Chapter of Warranties;) for in the other cases concerning chattels, the partie, if he hath a warrantie, shall not vouche but have his action of covenant, if he hath a deed; or if it be by *parol*, then an action upon his case, or an action of deceipt, as the case shall require. Now seeing that no one *Latin*, *French*, or *English* word can have this particular signification, therefore the common lawyer, (that I may speake once for all) is driven, as the professors of other liberall sciences use to doe, to use significant words framed by art, which are called *vocabula artis*, though they be not proper to any language. He that voucheth is called the voucher *vocans*, and he that is vouched is called vouchee *warrantatus*.

[*d*] Mirr. cap. 5. sect. 1, and 5, Bract. li. 5. fo. 380, 381. Brit. c. 75, de Gar. Vouch. Fleta, li. 6. c. 23. 24, 25, 26, &c. optime. Lamb. Expli. Verb. Advocate. (Post. 365. 389. Hob. 3. 28. Noy, 131. 2 Ro. Abr. 738.)

(Cro. Jam. 307.)

[*e*] The proces whereby the vouchee is called, is a *summoneas ad warrantizandum*, whereupon if the sherife returneth that the vouchee is summoned, and he make default, then a [*f*] *magnum cape ad valentium* is awarded: when if he make default againe, then judgement is given against the tenant, and he over to have in value against the vouchee. If the vouchee doe appeare, and after make default, then *parvum cape ad valentiam* is awarded; and if he make default againe, then judgement as before. But if the sherife returne, that the vouchee hath nothing, then after writs of *alias* and *pluries*, a writ of *sequatur sub suo periculo* shall be awarded; and if the like returne be made, then shall the demandant have judgement against the tenant; but he shall not have judgement to recover in value, because the vouchee was never warned, and it appeareth that he hath nothing. But in the grand *cape ad valentiam*, it appeareth that he hath assets, and his making default after summons is an implyed confession of the warranty. And it is called a *sequatur sub suo periculo*, because the tenant shall lose his ☞ land without any recompence in value, unlesse he upon that writ can bring in the vouchee to warrant the land unto him: and if, at the *sequatur sub suo periculo*, the tenant and the vouchee make

[*e*] V. Reg. Jud. for all these judiciall writs.

[*f*] V. Vet. N. B. 179. 186. 39 E. 3. 28. 14 H. 6. 7. 17 E. 3. 41. 3 H. 4. 4. 11 H. 4. 72. 45 E. 3. 19. F. N. B. 134, 135.

(Post. 393. a.)

[102. a.]

(Post. 393.)

make default, and the demandant hath judgment against the tenant, and after brings a *scire facias* to have execution, the tenant may have a *warrantia cartæ*, and if he were impleaded by a stranger, he may vouche again; but if he had judgment to recover in value, he shall never have a *warrantia cartæ*, or vouche againe, for by this judgement to recover in value he hath benefit of the warrantie. And you shall finde in bookes a recovery with a single voucher, and that is when there is but one voucher; and with a double voucher, and that is when the vouchee voucheth over; and so a treble voucher, &c. Againe, you shall finde there also a foraine voucher; and that is, when the tenant, being impleaded within a particular jurisdiction, (as in *London* or the like) voucheth one to warranty, and prayes that he may be summoned in some other county out of the jurisdiction of that court. This is called a foraine voucher, but might more aptly be called a voucher of a forainer, *de forinsecis vocatis ad warrantizandum*. Note, that by the civill law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no expresse warranty; but the common law bindeth him not, unlesse there be a warranty, either in deed or in law; for *caveat emptor*, as shall be said more at large in the Chapter of Warrantie in the Third Booke.

Glouc. c. 12. F. N. B. 6. G.

(Cro. Jam. 4. 1 Ro. Abr. 96. F. N. B. 94.)

Brit. 174.

"*The lord (if he will) may disclaime in the seigniory.*" *Disclaime, disclamare*, is compounded of *de* and *clamo*, and signifieth utterly to renounce the seigniorie.

[a] 47 H. 3. Disclaim. 35. 16 H. 7. 1. 20 E. 2. tit. Nuper Ob. 14. F. N. B. 197. & 151. B. 45 E. 3. 19. 21 E. 3. 50 E. 3. 23. &c. (Doctr. Plac. 131.)

[a] Note, there be divers kinds of disclaymer, that is to say, a disclaimer in the tenancie; a disclaymer in the bloud; and a disclaymer in the seigniorie; whereof *Littleton* here putteth his case.

[b] 14 H. 3. tit. Disclaim. B. 33.

[b] But if the tenant in frankalmoigne bring a writ of mesne against his lord, the lord cannot disclayme in the seigniorie; because he cannot hold of any man in frankalmoigne, but of his donor and his heires. And so note a diversity between a tenure in frankalmoigne, whereby divine service is maintained, and homage ancestrell, which respecteth temporall service. But if the lord will not disclayme in the seigniory, in the case of homage ancestrell, then albeit he hath not received homage, he shall warrant the land.

47 H. 3. Disclaim. 35. Vide Bract. l. 4. 252. b. 16. H. 7. 1. Brit. 173, 174. (Doctr. Plac. 131.)

"*If the lord, who is vouched, hath received homage, &c. he shall not disclaime.*" Therefore it is good for the tenant, to the intent to oust the lord of his disclaymer, in his voucher to allege, that the lord hath taken homage of him; and if he alledge it not, and the lord offer to disclayme, the tenant may counterplead the same by acceptance of homage. And the reason that the lord cannot disclayme in that case is, for that he hath accepted his humble and reverent acknowledgement, to become his man of life and member and terrene honour, and to be faithfull and loyall to him, for the tenements which he holds of him, and against the acceptance hereof the lord cannot disclayme.

"*Which he had at the time of the voucher.*" Hereby it appeareth, that the tenant shall not be driven to recover in value only those lands, which the lord had from that ancestor, which created the seigniory, for that were in a manner impossible, for that the seigniory must be created before time of memory; and the first creation of the seigniory did not create the warranty, but the

the continuance of both sides time out of minde created the warranty. And that is the reason that a writ of annuity shall not [c] lye against the heire by prescription; because it cannot be knowne, whether he hath any land by descent from the said ancestor, that first granted the annuity. And here is a point worthy of observation, that in the case of homage auncestrell (which is a special warranty in law) by the authority of *Littleton*, the lands generally, that the lord hath at the time of the voucher, shall be liable to execution in value, whether he hath them by descent or purchase. But in the case of an expresse warrantie, the heire shall be charged but only for such lands as he hath by descent from the same ancestor which created the warranty.

[c] 46 E. 3. 5. b. 10 E. 4. 10. b. 19 H. 6. 74. 37 H. 6. 19. 5 H. 7. F. N. B. 152.

Note what privilege this ancient warranty (created by operation of law) hath more than the expresse warranty. And so you may observe, that in this case *firmior et potentior est operatio legis quàm dispositio hominis.*

28 E. 1. Vouch. 291. 9 E. 2. War. Car. 29. 19. Fines, 127.

"*At the time of the voucher, or any time after.*" This is evident and worthy of diligent observation, viz. that the lands of the vouchee shall be liable to the warranty that the vouchee hath at the time of the voucher, for that the voucher is in lieu of an action; and in a *warrantia cartæ*, the land which the defendant hath at the time of the writ brought, shall be lyable to the warranty.

29 E. 3. 3. 18 E. 3. 1. 2 H. 4. 10. 23 E. 3. Recov. in valu. 3. 16 E. 3. Vouch. 85. 19 E. 3. Vouch. 24. 22 E. 3. Fitz. Nat. Bre. 134 F.

Upon a judgment in debt, the plaintiffe [d] shall not have execution, but only of that land which the defendant had at the time of the judgment, for that the action was brought in respect of the person, and not in respect of the land. But if an action of debt be brought ☞ against the heire, and he alieneth, hanging the writ, yet shall the land which he had at the time of the original purchase, be charged, for that the action was brought against the heire in respect of the land. [e] If a man be nonsuit, the land only which he had at the time of the amerciament assessed, shall be charged, and not that which he had at the finding of the pledges. For the amerciament is not in respect of the land, but of his want of prosecution, which was a default in his person. But the issues of a juror shall be levied upon the feoffee, albeit they were not lost before the feoffment, because he was returned and sworne in respect of the land. Note the diversity.

[d] 9 H. 4. 14. 42 E. 3. 1. 42 Ass. 17. 9 E. 2. tit. Execut. 249. (1 Ro. Abr. 898. 891, 892.)

[102. b.]

[e] 22 Ass. pl. 82. (Finch L. 353.) Dalton S. 56. a. 10 Vin. Abr. 562.

If a man give lands in fee with warranty, and binde certaine lands specially to warranty, the person of the feoffor is hereby bound, and not the land, unlesse he hath it at the time of the voucher.

32 E. 1. Voucher, 202. (2 Ro. Abr. 771.)

Sect. 146.

AND it is to be understood, that in every case where the lord may disclaime in his seigniorie by the law, and of this he will disclaime in a court of record, his seigniorie is extinct, and the tenant shall hold of the lord next paramount to the lord which so disclaimeth. But if an abbot or prior be vouched by force of homage auncestrell, &c. albeit that he never tooke homage, &c. yet he cannot disclaime in this case, nor in any other case; for they cannot take away or devest a thing in fee, which hath beene vested in their house.

"*HIS*

Vide Britton, fol. 58. 110. (Doctr. Plac. 133.)

"*HIS seigniorie is extinct, and the tenant shall hold of the lord next paramount, &c.*" Here two things are to be observed: first, that by this disclaymer in the seigniory, the seigniory is [*f*] extinct in the land.

[*f*] 45 E. 3. 7. 22 E. 4. 35.

Secondly, that after the disclaymer the tenant shall hold of the next lord paramount by the same services as the mesne so disclayming held before.

Vide Sect. 143.

"*If an abbot or prior be vouched, &c. albeit, &c. yet he cannot disclaime, &c.*" Here it appeareth of the lord's side, that continuance of bloud is not necessary; but yet there must be privity of succession time out of minde in one politicke body; for if that body be once dissolved, though a new one be founded of the same name, and all the possessions be granted to them, yet the homage ancestrell is gone. But if a prior and covent be translated, *concurrentibus hiis quæ in jure requiruntur*, to an abbot and covent, or to deane and chapter, there the homage ancestrell remains; for though the name be changed, yet the body was never dissolved, but in effect it remaineth still. If the body politique were founded within time of memory, there cannot be homage ancestrell, for that continuance faileth: and though ancestor is ever properly applyed to a naturall body, yet it is called homage ancestrell when the tenure is of a body politique, for that it is ancestrell of the tenant's side. But on the other side, an abbot or prior cannot hold by homage ancestrell; for, as appeareth by *Littleton's* examples, it must ever be ancestrell on the tenant's side. And where *Littleton* putteth his case of an abbot or prior, the same law is of a bishop, deane, archdeacon, prebend, parson, vicar, and the like. Another thing here to be observed is, that an abbot or prior cannot disclaime, &c. for regularly it is true, *quòd meliorem conditionem ecclesiæ suæ facere potest prælatus, deteriorem nequaquam;* and againe, *ecclesiæ suæ conditionem meliorem facere* ☞ *possunt sine consensu, deteriorem non possunt sine consensu.* And therefore an abbot, prior, bishop, deane, archdeacon, prebend, parson, vicar, or any other sole corporation, that is seised in *auter droit*, cannot disclaime; because, as *Littleton* saith, they alone cannot devest any fee which is vested in their house or church. For the wisdome of the law would never trust one sole person with the disposition of the inheritance of his house or church. But an abbot and prior had their covent, the bishop his chapter, the parson and vicar their patron and ordinarie, and the like of other sole corporations, without whose assent they could passe away no inheritance.

14 H. 6. 12. 2 H. 6. 9. 38 Ass. p. 22. 37 Ass. 6. 3 Co. 73, &c. Deane and Chapter de Norwich case.

[103. a.]

40 E. 3. 27. 5 E. 4. 1. 6 E. 3. 51, 52. (7 Co. 10, 11.)

10 E. 4. 2. a. 21 H. 7. 20.

"*They cannot take away or devest a thing in fee, &c.*" These generall words have certaine exceptions; for in a *quo warranto*, at the suit of the king, against a bishop, abbot, or prior, for franchises and liberties, if the bishop, abbot, or prior, disclaime in them, this should bind their successors. If an abbot or prior had acknowledged the action in a writ of annuitie, this should have bound the successor; because he cannot falsifie it in an higher action, and there must be an end of suits. *Expedit reipublicæ, ut sit finis litium.* But if the abbot levie a fine, or acknowledge the action in a *præcipe quòd reddat*, the successor shall be bouud *pro tempore*, but he may have a writ of right, and recover the land.

6 E. 3. 51, 52. 38 E. 3. 33. 16 E. 3. tit. Abbot, 13. 19 E. 3. tit. Abbot, 12. 7 R. 2. Abbot, 7. 12 H. 4. 11. 20 H. 6. fo. ultimo. 4 H. 7. 2. 2 H. 4. 6. 34 Ass. p. 7. 14 E. 4. tit. Abbot, B. 8 E. 3. 28. 12 H. 8. 7.

"*By*

"*By force of homage ancestrall, &c.*" Here (*&c.*) implyeth or by any other warrantie [*i*], as by the reason, which our authour here yieldeth, appeareth.

[*i*] 12 H. 8. 7.

"*A thing in fee.*" [*k*] For if in an action of debt upon an obligation against an abbot, the abbot acknowledgeth the action, and dieth, the successor shall not avoid execution, though the obligation was made without the assent of the covent; for he cannot falsifie the recoverie in a higher action, *et res judicata pro veritate accipitur*, and this is but a chattell. And so it is of a statute or recognisance acknowledged by an abbot or prior.

[*k*] 7 R. 2. tit. Abbot, 7. See the bookes next above. (6 Co. 8. a.)

Sect. 147.

ALSO, if a man, which holds his land by homage ancestrel, alien to another in fee, the alienee shall doe homage to his lord: but he holdeth not of his lord by homage ancestrell; because the tenancie was not continued in the blood of the ancestors of the alienee; neither shall the alienee have warrantie of the land of his lord; because the continuance of the tenancie in the tenant and to his bloud by the alienation is discontinued. And so see, that if the tenant, which holdeth his land of his lord by homage ancestrell alieneth in fee, though he taketh an estate againe of the alienee in fee, yet he holds the land by homage, but not by homage ancestrell.

"*ALIEN to another in fee.*" For hereby the privity of the estate is altered, and the continuance of it in the bloud of the tenant is dissolved. But if the tenant maketh a lease for life or a gift in taile, this is a continuance of the privitie and estate in the tenant in respect of the reversion that remaineth in him: for the fee, whereof *Littleton* heere speaketh, was not out of him. But if the tenant maketh a feoffment in fee upon condition, and dieth, his heire performeth the condition, and re-entreth, the homage ancestrell is destroyed in respect of the interruption of the continuance of the privitie and estate; and this case was put and not denied in the argument [*m*] of the case betweene the lord *Cromwell* and *Andrewes*, *Mich.* 14 & 15 *Eliz.* which I myselfe heard and observed. As if *cestuy que use* had made a feoffment in fee upon condition, and entred for the condition broken, he should have detained the land ☞ against the feoffees for ever, for that the estate and privitie was for the time taken out of the feoffees, and thereby dissolved for ever. But if the land were recovered against the tenant upon a faint title, and the tenant recover the same againe in an action of a higher nature, there the homage ancestrell remaines; for the right was a sufficient meane for the continuance. So it is if he had reversed it in a writ of error. [*n*] If the alienee be impleaded in *Littleton's* case, and vouche the alienor that held by homage ancestrell, albeit he commeth in by fiction of law to many purposes in privitie of his former estate, yet to this purpose he cannot come in as tenant by homage ancestrell, because of the discontinuance of the estate and privitie, and as *Littleton* saith, the tenancy was not continued in the blond. [*o*] And *Britton* saith, *et come ascun nequedent soit vouche per homage, et le seigniour tende de averrer, que le tenement, dount il vouche,*

(Post. 202. a.)

[*m*] 1 Mich. 14. & 15 Eliz. 5 H. 7.

[103. b.]

(F. N. B. 135.)

[*n*] 5 E. 3. per Cantrel.

[*o*] Britton, fol. 170. a.

vouche, fuit translate hors del sanke del primer purchasor, per feoffment ou per ascun auter translation, en tiel case soit le tenant charger de voucher son feoffor ou ses heires.

"Though he taketh an estate againe of the alienee in fee, &c." For the cause aforesaid, in respect of the interruption of the privitie and continuance of the estate. And herewith agreeth our bookes in cases of warranties in deed, or warranties in law. See more of this in the Chapter of Warranties.

38 E. 3. 20. 11 H. 4. 22. 17 E. 3. 47. 59. 73. 74. 26 E. 3. 56. 18 E. 3. 56. 16 E. 3. Voucher, 87. 18 E. 3. 30. 44 E. 3. Litt. fol. 169.

Sect. 148.

ALSO, it is said, that if a man holds his land of his lord by homage and fealty, and he hath done homage and fealty to his lord, and the lord hath issue a son, and dies, and the seigniorie descendeth to the son; in this case the tenant, which did homage to the father, shall not doe homage to the sonne because that when a tenant hath once done homage to his lord, he is excused for the terme of his life to doe homage to any other heire of the lord. But yet he shall doe fealtie to the sonne and heire of the lord, although he did fealtie to his father.

"SHALL not doe homage to the sonne." If *A.* holdeth of *B.* as of the manor of *Dale*, whereof B. is seised in taile; *B.* discontinueth the estate taile, and taketh backe an estate in fee simple: *A.* doth homage to *B.*, *B.* dieth seised, the issue in taile entreth; *A.* shall doe homage againe to the heire in taile of *B.* because he is remitted to the estate taile; and the estate in fee that his father had, in respect whereof the homage is done, is vanished, and the heir in taile is in of a new estate, in respect whereof he ought to doe a new homage. [*p*] But regularly it is true, which *Littleton* saith, that when a tenant hath done once homage to his lord, he is excused for the terme of his life to make homage to any other heires of the lord. But he shall doe fealtie to his sonne, albeit he hath done fealtie to the father.

(Post. 348. a.)

[*p*] Britton, 175, 176.

☞ Sect. 149. [104. a.]

ALSO, if the lord, after the homage done unto him by the tenant, grant the service of his tenant by deed to another in fee, and the tenant atturneth, &c. the tenant shall not be compelled to doe homage. But he shall doe fealty, altho' he did fealty before to the grantor; for fealty is incident to every atturnement of the tenant, when the seigniory is granted. But if any man be seised of a mannor, and another holds of him the land, as of the mannor aforesaid by homage, which tenant hath done homage to his lord who is seised of the mannor, if afterwards a stranger bringeth a præcipe quod reddat *against the lord of the mannor, and recovereth the mannor against him, and sues execution; in this case the tenant shall againe doe homage to him, which recovered the mannor, although he had done homage before; because the estate of him, which received the first homage, is defeated*

defeated by the recovery, and it shall not lye in the power of the tenant to falsifie or defeat the recovery which was against his lord. And so see a diversitie in this case, where a man cometh to a seigniorie by recovery, and where he commeth to the same by discent or grant.

"ALSO, *if the lord, &c. grant the service of his tenant by deed, &c.*" Note a diversitie, when the lord alieneth the seigniorie, and when the tenant alieneth the tenancy; for when the tenant hath done homage, and the seigniory is transferred to another, either by the act of the party as alienation, or by act in law as descent, yet the tenant shall not iterate homage, as he shall do fealty; but when the tenant doth homage, and alieneth the tenancy, there is a new tenant, which never did homage, and therefore he ought to doe homage to the lord, albeit his alienor had done it before. And it is to be observed, that none shall doe [*] homage, but the tenant of the land to the lords of whom it is holden; and therefore if homage be due to be done by the tenant, if the tenant alieneth the land to another, the alienor cannot be compelled to doe homage.

Britton, 176. 13 E. 1. tit. Per quæ servitia 22 & tit. Gar. 91. (8 Co. 102.)

[*] 8 E. 4. 27 b.

"*Atturneth, &c.*" Here by (*&c.*) is to be understood, that albeit he pay his rent, perform his annual services, and doe fealtie, which is a part of homage, yet homage he shall not doe.

[104. b.]

"*But if anyman be seised of a mannor, &c.*" Here it appeareth, that the case of the recovery of the seigniorie differeth from the alienation of the lord, which is his own act, or the descent of the seigniorie to the heire, which is an act in law. And the reason of this diversitie is, for that by the recoverie the state of him that received the homage is defeated; for it shall not lie in the mouth of the tenant to falsifie, or to frustrate or defeat the recovery, which was against his lord of the mannor or seigniory, for that the tenant had nothing therein, and every man by law ought to meddle in such cases with that which belonged unto him, which is worthy of observation concerning falsifying of recoveries.

Vid. Sect. 551. 33 E. 3. Avowrie, 255. 37 H. 6. 33. 39 H. 6. 34. 7 H. 7. 11. Doct. & Stud. fol. 45. 28 H. 8. Dyer, 41.

Note, that to falsifie, in legall understanding, is to prove false, that is, to avoyd, or, as *Littleton* here saith, to defeate, in *Latine falsare, seu falsificare,* [*i*] *falsum facere.*

[*i*] 7 H. 8. cap. 4.

But since *Littleton* wrote, it is recited by act of parliament, that whereas divers, &c. have suffered recoveries against them of divers mannors, &c. for the performance of their wills, for the suretie of their wives joyntures, &c. and the recoverors had no remedy to compell the freeholders and tenants, &c. to attourne unto them, nor could by order of law attaine to the rents, services, &c. that act doth give the recoverors power to distreyne and avow; whereupon many have thought, that this doth impugne *Littleton's* case of the recovery. But *distinguendum est. Littleton* intendeth his case, either upon a recovery by title, (for he saith, that the state of the tenant in the recovery is defeated, or without any consent upon pretence of title, which is all one; for the tenant cannot falsifie, and the lord should avow as one that came in of a former title. And *Littleton* hath good authority in law to warrant [*a*] his opinion, and the statute of 7 *H.* 8, extendeth to common recoveries had by consent and agreement, as

[*a*] 39 H. 6. 22. 37 H. 6. 38. 35 H. 6. 22.

as appeareth by the act itselfe, which then was, and yet is a common assurance and conveyance, whereof the law taketh notice, and whereupon (as appeareth by the act) an use might be limited. So as it is apparent, that such recoverors came in meerely under the state of the lord, &c. and had no remedy (as the statute saith) to compell the freeholders and tenants to attourne, and without attournement could neither distreyne nor avow. Wherefore this statute gave recoverors remedy to distreyne, and a form to avow and justifie, which they had not before, as it appeareth by the *Doctor and Student*, who lived at that time. The bodie of the act is, *That such recoverers may distreyne and make avowrie, &c. as those persons against whom the said recoverie is, should have done, &c. if the same recoverie had not been had, and have like remedie, &c.*

8 H. 8. Dyer, 41.

If a man had made a lease for yeares to begin at *Michaelmas*, reserving a rent, and before *Michaelmas* he had suffered a common recovery, the recoveror should distreyne for that rent, which the lessor before the recovery could not. But if the recovery had not beene had, then he might have distreyned, and so it is within the statute. But if a fine had been levied of a mannor, and before attournement the conusee had suffered a common recovery, the recoveror should not distreyne, &c. because the conusee against whom the recovery was had, could not.

(Post. 215. a. 321. a.)

But this act extended onely to distresses and avowries for rents, services, and customes, and gave also a forme of a *quare impedit*. But upon this statute it was holden, that the recoveror could not have an action of debt against the lessee for yeares, nor an action of wast against tenant for life or yeares; and therefore remedy was provided in these cases, by the statute of 21 *H.* 8.

21 H. 8. cap. 15.

Sect. 150.

ALSO, if a tenant, which ought by his tenure to doe his lord homage, commeth to his lord, and saith unto him, Sir, I ought to doe homage unto you for the tenements which I hold of you, and I am here ready to doe homage to you for the same tenements; and therefore I pray you, that you would now receive the same from me.

"*COMMETH to his lord.*" The tenant ought to seeke the lord to doe him homage, if the lord be within *England*; for this service is personall as well of the lord's side as of the tenant's side, for law requireth order and decency. And therefore *Bracton* saith, *et sciendum quòd ille, qui homagium suum facere debet, obtentu reverentiæ quam debet domino suo, adire debet dominum suum ubicunque inventus fuerit in regno, vel alibi si possit commodè adiri, et non tenetur dominus quærere suum tenentum, et sic debet homagium ei facere.* And the same law it is for fealty; and the diversity between these services and the rent is, because that these are personall, and the rent may be payd and received by other, and therefore a tender of the rent upon the land is sufficient.

[105. a.]

Bracton, fol. 80. a. And Britton, fol. 171. agreeth herewith.

Sect.

Sect. 151.

AND if the lord shall then refuse to receive this, then after such refusall the lord cannot distreine the tenant for the homage behinde, before the lord requireth the tenant to doe homage unto him, and the tenant refuse to do it.

AND the reason hereof is, for that when the tenant hath done his endeavour and duty to offer his corporall service, and the lord refuseth the same, or doe not accept his service upon his tender thereof, (which is a refusall in law), then the law, in respect of the lord's fault, requireth that when the lord can distreine for it, that he doth require the tenant to doe that service; and if he either refuse to doe it, or doe it not when he is required, it is a refusal in law.

Vide Bracton, fol. 83. Britt. 171, 172. 21 E. 3. 24. 21 Ass. p. 73. 20 E. 3. Avowry, 233. 45 E. 3. 9. 7 E. 4. 4. 21 E. 4. 17. 20 H. 6. 31. (9 Co. 79.)

Sect. 152.

ALSO, a man may hold his land by homage auncestrell, and by escuage, or by other knight service, as well as he may hold his land by homage auncestrell in socage.

SO as homage ancestrell may belong as well to a tenure by escuage or knight's service, as to a tenure in socage, or to a tenure in nature of socage; whereof there hath somewhat been spoken in the Chapter of Socage (1).

CHAP.

---

(1) The statute of 12 Cha. 2, having taken away *all tenure by homage* in *general*, words without any exception, either express or implied, of *homage auncestrel*, the latter, though not particularly named, yet as being one species of homage was virtually included. See 12 Cha. 2, c. 24, s. 1, 2. But most probably it had expired before the statute; for lord Coke doubted, whether even in his time there was any relic of this tenure. Ante 100. b. An early extinction of homage auncestral is easily accounted for, by recollecting that a *double prescription*, one in the lord's *blood* and another in the tenant's, or a *privity of succession time out of mind*, which was much the same in effect, was essential to homage auncestral; and consequently, that if one alienation, either of the seigniory or the tenancy, had been made within time of memory, the *homage auncestral*, was destroyed, and it became *simple homage*. In a former note we had occasion to make a general observatian on the reason for discharging tenures from *homage*, and on the advantages arising from it, whilst it remained, both to the lord and tenant, particularly to the latter, where the homage was *auncestrel*. Ante 67. b. note 1. We have only to add here, that though amongst us homage of *every kind*, so far as it relates to tenures, is now wholly at an end, yet, so intimately blended are the various branches of our system,

☞CHAP. 8. *Grand Serjeantie.* Sect. 153. [105. b.]

TENURE by grand serjeanty is, where a man holds his lands or tenements of our sovereign lord the king by such services as he ought to do in his proper person to the king, as to carry the banner of the king, or his lance or to lead his army, or to be his marshall, or to carry his sword before him at his coronation, or to be his sewer at his coronation, or his carver, or his butler, or to be one of his chamberlaines of the receipt of his exchequer, or to do other like services, &c. And the cause why this service is called grand serjeanty is, for that it is a greater and more worthy service, than the service in the tenure of escuage. For he, which holdeth by escuage, is not limited by his tenure to do any more especiall service then any other, which holdeth by escuage, ought to doe. But he, which holdeth by grand serjeanty, ought to doe some speciall service to the king, which he, that holds by escuage, ought not to doe.

[a] Glanv. lib. 9. ca. 4.
[b] Bracton. lib. 2. 35. & 84, 85. lib. 1. cap. 10. *Fleta, lib. 1. cap. 10. lib. 2. cap. 9. in fine.
[c] Britton, cap. 66. fol. 164, 165. Ockam, cap. Quod non absolvitur. 45 E. 3. 25. per Finchden. Fleta, ubi supra.

"*TENURE by grand serjeanty.*" Serjeanty commeth of the *French* word (*serjeant*) *i. satelles*, and [*a*] *serjeantia idem est quod servitum.* And it is called [*b*] *magna serjeantia*, or *serjanteria**, or *magnum servitium*, great service, as well in respect of the excellency and greatness of the person to whom it is to be done (for it is to be done to the king only) as of the honour of the service itselfe; and so *Littleton* himselfe in this Section saith, that it is called *magna serjeantia*, or *magnum servitium*, because it is greater and more worthy than knights service, for this is *revera servitium regale*, and not *militare* onely. *Fleta* saith, *magna autem serjeantia dici poterit, cùm quis ad eundum cum rege in exercitu, cum equo cooperto, vel hujusmodi, ad patriæ tuitionem fuerit feoffatus.*

Bracton, lib. 2. 84. 11 H. 4. 34. 10 H. 4. Avowry, 267. F. N. B. 83. 10 H. 6. Ant. Demesne, 11.

"*Of our lord the king.*" This tenure hath seven special properties. 1. To be holden of the king only. 2. It must be done, when the tenant is able, in proper person. 3. This service is certaine and particular. 4. The relicfe due in respect of this tenure differeth from knights service. 5. It is to be done within the realme (1). 6. It is subject to neither *aid pur faire fitz chivaler* or *file marier*. And 7, it payeth no escuage.

"*As*

---

system, and in subjects of jurisprudence so dependent is a knowledge of the *present* state of things on a reference to the *ancient* one, that the remnant of tenures in this country can never be duly comprehended, without the aid of a general outline, as well of homage and its effects, as of the other perished parts of the same venerable structure.—[Note 110.]

(1) *Generally* the service of *grand serjeanty* was of such a kind as necessarily to be *within* the realm; but *some* services, which amount to grand serjeanty, might be due *out of* the realm as well as *within*, and both Littleton and Coke gives us instances of such reservations. See Sect. 155. b. here, and post. 106. b.—[Note 111.]

"As to carry the banner of the king, or to lead his army." This great service to the king may (as it appeareth hereby) concerne the warres and matters ☞ military; for some grand serjeanties are to be done in the time of war for the safety of the realme; and some in time of peace, for the honour of the realme. [106. a.]

23 H. 8. tit. Gard. Stat. de Ward. et Relev. 28 H. 1.

"Or to be his marshall." [*] If the king giveth lands to a man, to hold of him to be his marshall of his host, or to be marshall of *England*, or to be constable of *England*, or to be high steward of *England* [†], chamberlayne of *England*, and the like, these are grand serjanties; and these and such like grand serjanties are of great and high jurisdiction, and some of them concerne matters military in time of war, and some services of honour in time of peace. And this is to be observed, that though there were divers lords marshalls of *England* before the raign of [z] *R.* 2, yet king *R.* 2, created *Thomas Mowbrey* duke of *Norfolke* the first earle marshall of *England per nomen comitis marischalli Angliæ.*

(4 Inst. 123.)
[*] Fleta, lib. 1. cap. 10. 11 Eliz. Dier, 285. Camd. Brit. 286, 287.
[†] Ockam, cap. Officium Constabularii.
[z] In Rot. Patent. de anno 20 R. 2.

"Or to carry his sword, &c. or to be his sewer at his coronation, &c." These and such like grand serjanties at the king's coronation are services of honour in time of peace.

"To be one of his chamberlaines, &c. or to do other like services." It is also a tenure by grand serjanty to hold [a] by any office to be done in person concerning the receipt of the king's treasure; *Quia thesaurus regis respicit regem et regnum;* and *census regius est anima reip.* So it is *firmamentum belli, et ornamentum pacis.*

(4 Inst. 106.)
[a] Vid. 51 H. 3. statut. 5. 10 E. 3. c. 11. 14 E. 3. c. 14. 26 H. 8. ca. 2. 34 & 5 H. 8. ca. 16.

Milites camerarii dicuntur, quia pro camerariis ministrant; and concerning their office, this is the effect, as *Ockam* [b] saith, *officium camerariorum in recepta consistit in tribus, scilicet, claves arcarum, &c. bajulant, pecuniam numeratam ponderant, et per centenas libras in formulas mittunt.* But discontinuance in effect hath worne out their office. And yet they continue their name, and keep the keyes of the treasure where the records do lye.

11 E. 4. fo. 1. Pl. Com. 207, 208.
[b] Ockam, cap. Quid sit Scaccarium. Gervasius Tilburiensis in Libro Nigro sub custodia camerariorum.

And another saith, *camera riusdicitur à camera, quia camera est locus in quem thesauras recolligitur, vel conclave in quo pecunia reservatur.* So as *camerarius* in legall signification *est custos regii censûs:* and *Willielmus de Bollocampo comes Warwici* held *officium camerarii in saccario.*

Rot. claus. 6 E. 1. memb. 1.

Or by any office concerning the administration of justice, *quia justitiâ firmatur solium.*

Ex lecturâ Marrowe.

It appeareth by an ancient record, [c] that *Varianus de Sancto Petro tenuit de domino rege in capite medietatem serjantiæ pacis per servitium inveniendi decem servientes pacis ad custodiendam pacem in Cestriâ.*

[c] Ex inquisitione post mortem Variani de Sancto Petro, 4 E. 2. Cestr. Vid. 7 Ass. 12. 7 E. 3. 57.

See *Ockam* of the first institution and ancient order of the exchequer, *Dier*, 4 *Eliz.* 213, the usherie of the exchequer holden by grand serjanty.

"Like services, &c." Here by (*&c.*) is to be understood other like services not expressed, as partly appeareth by that which hath beene said, viz. to be steward of *England*, constable of *England*,

England, chamberlayne of *England*, and other honourable services, whereof more shall be said in this Chapter.

"*Some speciall service to the king.*" That is to say, that this great service be specially set downe; for it may consist of divers branches, as to go with the king in his warre in the foreward, and to returne in the reareward; and also to pay rent, &c. but yet it must be certaine and particular.

23 H. 8. Gard. 148.

Sect. 154.

(Ante 83. a.) *ALSO if a tenant which holds by escuage dyeth, his heire being of full age, if he holdeth by one knight's fee, the heire shall pay but a C. s. for reliefe, as is ordained by the statute of* Magna Charta, c. 2. *But if he which holdeth of the king by grand serjeanty,* ☞ *dieth, his heire being of full age, the heire shall pay to the king for reliefe one yeares value of the lands or tenements which he holdeth of the king by grand serjeantie over and besides all charges and reprises* (1). *And it is to be understood, that* serjeantia *in Latine is the same* quod servitium, *and so* magna serjeantia *is the same* quod magnum servitium.

[106. b.]

11 H. 4. 72. b. "*SHALL pay to the king for reliefe one yeares value of the lands, &c.*" And herewith agreeth 11 *H.* 4. 72. b.

"*Serjeantia is the same quod servitium.*" Hereby it appeareth that the explanation of ancient words and the true sense of them are requisite, and to be understood *per verba notiora*.

Sect. 155.

ALSO, they, which hold by escuage, ought to doe their service out of the realme; but they, which hold by grand serjeantie, for the most part ought to doe their services within the realme.

"*TENANTS by escuage ought to do their service out of the realme.*"

F. N. B. 83. E. (4 Co. 88.) For he, that holdeth by cornage or castle-gard, holdeth by knights service, and is to doe his service within the realme; but he holdeth not by escuage; and therefore *Littleton* materially said tenant *by escuage*, and not tenant by knights service (2).

"*For*

---

(1) See as to reliefs, ante 69. b. 76. a. 83. a.

(2) Here lord Coke shows, that escuage, though usually an incident to knight's service, is not always so; that is, that knight's service *may* be without escuage. On the other hand, escuage, if *uncertain*, which we must understand it to be when mentioned *generally*, *cannot* be without knight's service. To express this in fewer words, escuage is inseparable from knight's service, but knight's service is not so from escuage. This tends to confirm what we observed

"*For the most part.*" For to bear the king's banner, or his lance, or to lead his host, and to be his marshall, &c. may be as well without the realme; and therefore *Littleton* said (for the greatest part).

Sect. 156.

ALSO, it is said, that in the marches of Scotland *some hold of the king by cornage, that is to say, to winde a horne, to give men of the countrie warning, when they heare that the* Scots *or other enemies are come or will enter into* England; *which service is grand serjeanty. But if any tenant hold of any other lord, than of the king, by such service of cornage, this is not grand serjeanty, but it is knights service; and it draweth to it ward and marriage* (2); *for none may hold by grand serjeanty but of the king only.*

"*IN*

observed in a former note, that escuage ought to be considered rather as an incident to the tenure by knight's service, than as a distinct tenure. However, it at the same time seems to point out the reason for calling some tenures by knight's service tenures by escuage; because such a denomination distinguished that species of knight's service, to which escuage was incident, from cornage, castle-guard, and such other tenures by knight's service as were not liable to escuage. We think this a more satisfactory way of justifying Littleton against the censure of Mr. Madox for using the term of *tenure by escuage*, than resorting to the distinction suggested by sir Martin Wright; who, as we have formerly hinted, attempts to prove, that though generally escuage was an incident to tenure by knight's service, yet sometimes it was a tenure of itself. Ante 73, note 2. But still we must confess the justice of Mr. Madox's animadversion, so far as it applies to the calling *homage* and *fealty* tenures; because the former being incident to every species of knight's service, except where the tenant was exempt from it by profession, and the latter being an incident to all tenures except tenures at will or at sufferance, it could answer no purpose of discrimination thus to denominate any tenure. In fact, it was not the practice to call any tenure a tenure either by fealty or by homage, except in the case of homage auncestrel; and though Littleton begins his account of tenures with homage and fealty, yet we may very well suppose his previous explanation of them and escuage, or a least of the former, to have been made merely as an introduction to the description of knight's service. We should not be thus prolix in observing on a controversy, which is more verbal than any thing else, if it was not for the sake of convincing the reader, that however properly Mr. Madox guards against confounding the incidents of a tenure with the tenure itself, still it would be an injustice both to Littleton and Coke to impute any such misconception to them; and therefore, that so far as Mr. Madox's animadversion hath this tendency, respectable as his writings are, it ought to be rejected. Indeed it is highly improbable, that grave and learned authors, like Littleton and Coke, to both of whom, particularly the former, the whole doctrine of tenures was so much more familiar than it can possibly be in modern times, when the *practice* in respect to tenures is confined to a very narrow circle, and we are mere *theorists* as to the greater part of the subject, should adopt an error so fundamental.—[Note 112.]

(2) * This passage seems rather to imply, that wardship and marriage were not incident to tenure by *cornage*, when it was of the king, and therefore called grand serjeanty. But this was not the meaning of Littleton, as appears from a

* *This is note 2, of* 107, *a. in the* 13*th and* 14*th editions.*

subsequent

4 H. 5. cap. 7. 22 E. 4. cap. 8. Camden in Britannia.

"*IN the marches of Scotland.*" *Marches* is either a *Saxon* word, and signifieth *limites, bourdours*, or an *English* word, viz. Markes. *Nota*, for that it lyeth neer to *Scotland*, it is sayd in the marshes of *Scotland*, and yet the land, ☞ whereof *Littleton* here speaketh, lyeth in *England* (1). [107. a.]

"*By cornage.*" *Cornagium* is derived (as *cornuare* also is) *à cornu*, and is as much (as before hath been noted) (3) as the service of the horne. It is also called in old bookes *horngeld.*

23 H. 3. tit. Gard. 148. 8 E. 2. 3. 66. in fine. 16 E. 3. Avowrie, 90. F. N. B. 83.

Note, a tenure by cornage of a common person is knights service, of the king it is grand serjeanty: so as the royall dignity of the person of the lord maketh the difference of the tenure in this case (4). And I find that there were *cornicularii* amongst the *Romans; et dicti fuerunt cornicularii quia cornu faciebant excubias militares;* and *magna serjeantia* is appropriated only to this tenure.

Sect. 157.

ALSO, a man may see in anno 11 H. 4. *that* Cokayne, *then chiefe baron of the exchequer, came into the common place, and brought with him the copy of a record in these words.* Talis tenet tantam terram de domino rege per serjeantiam, ad inveniendum unum hominem ad guerram ubicunque infra quatuor maria, &c. *And he demanded, if this were grand serjeanty or petite serjeanty. And* Hanke *then said, that it was grand serjeanty; because he had a service to do by the bodie of a man, and if he cannot find a man to doe the service for him, he himself ought to doe it.* (5). Quod alii justitiarii concesserunt. *Then saith* Cokaine, *Ought the tenant it this case to pay reliefe to the value of the land by the yeare?* Ad quod non fuit responsum.

"*AND*

---

subsequent Section, in which he is more explicit, and expressly tells us, that *all* tenures by grand serjeanty were liable both to ward and marriage. See Sect. 158.—[Note 113.]

(1) See further as to the *marshes* of Scotland, 4 Inst. 281, and Nichols. Leges March.

(3) See ante 69. b.

(4) See post. 108. b. where for a like reason a service, which if it was to be done to a *subject* would be *socage*, is distinguished by the denomination of *petit serjeanty.*

(5) Particular respect is due to the opinions of ancient times on the subject of tenures; but in the instance of the case here mentioned to be put to the judges, their resolution seems so inconsistent with the nature of grand serjeanty, as described both by Littleton and Coke, that it may be allowable to doubt the propriety of the opinion. Littleton states the doing the service to the king in *proper person* as a thing essential to grand serjeanty; and lord Coke enumerate it amongst the special properties of this tenure, with the exception only of performing the service by deputy when the tenant himself is incapable. Ante 106. b. But if this be so, how can a service, expressly reserved to be done by *any* person, fall within the description? It is observable indeed, that Littleton recites the opinion of the judges without the least approbation; and that even they themselves, when pressed to declare what the relief ought to be, whether

"*AND if he cannot find a man to doe the service for him, &c.*" Hereby it appeares, that tenant by grand serjeantie may in some cases make a deputy; and therefore the diversitie is, that where the grand serjanty is to be done to the royall person of the king, or to execute one of those high and great offices, there his tenant cannot make a deputie without the king's licence; and therefore *Littleton* hath said before that such services are to be done in proper person. But he that holdeth to serve him in his warre within the realme or by cornage, may make a deputie. 11 H. 4. 72. 24 E. 3. 32. Vide Hill. 8 E. 1. Middl. inter, Placita de Banco. sir John Moyse's case. 16 Vin. 115, (T) W. Jones, 125. 11 H. 4. 72.

[*] *Johannes de Archier qui tenet de domino rege in capite per serjantiam archeriæ, &c. in comitatu Glouc. hæres in custodiâ.* [*] Claus. 18 H. 3. m. 5.

"*Infra quatuor maria.*" That is, within the kingdome of *England*, and the dominions of the same kingdome (6). Rot. Escaetor. 41 H. 3. nu. 23. Stephen Haringdon's case.

Now

---

whether 5*l.* as for a tenure by escuage, or a *year's value of the lands* as for a grand serjeanty, avoided answering; from which hesitation it seems as if they were not disposed to adhere to their first opinion in all its consequences. On the other hand, if the tenure in question was not *grand serjeanty*, but mere *knight's service*, it tends to prove, that though the personal service, in lieu of which escuage was payable, was *in general* due only on *foreign expeditions*, yet by *special* reservation it might be due *within the realm*. However, reserving service in war within the realm was a thing so unusual in *practice*, that the service for which escuage was a commutation was called *servitium foreinsecum;* a denomination which, according to lord Hale, is founded on the circumstance of its being due *out of the realm*. See ante 69. b. note 8. In a former note on escuage we adopted lord Hale's opinion as to the reason of calling knight's service *servitium forinsecum;* because we thought his conjecture a probable one. Ante 74. a. note 1. But the reader should recollect, that others explain the denomination in a different way. Ante 74. b.—[Note 114.]

(6) On many occasions it may be of importance thoroughly to understand the phrase of *infra*, or, as according to classical style it ought to be, *intra quatuor maria;* for there are various subjects, as well of the *law of nations*, as of *municipal law*, which are necessarily connected with it. Of the former kind are the *sea-dominion* claimed by our king, and its incidental rights; especially the right of salutation by striking of the flag and lowering the top-sail to our ships of war; a ceremony, which, however it may be construed by foreigners, as a mere *compliment*, is considered by ourselves as a *recognition* of sovereignty. Of the latter sort are the doctrine concerning essoins *de ultra mare*, and all those cases which turn upon the *allegation of being beyond sea;* as questions of legitimacy, of outlawry, and on the statutes of limitation particularly may. But notwithstanding the necessity of knowing, for such a variety of purposes, what is the sense of the term of being *within the four seas*, we do not find the subject sufficiently enlarged upon either by lord Coke, or indeed scarce any other writers deserving of being called *original;* except Mr. Selden, who is very copious upon it; and sir Philip Medows, who, though not so favourable to our claim of *sea-dominion*, nor so generally known as the former, is well entitled to notice. See Seld. Mar. Claus. lib. 2. per tot. but more particularly in cap. 1. and 24, and Medows's Observat. concerning the Dominion, &c. of the Seas, in a small tract, which was published in 1689. In this scarcity of information on the subject, it may be acceptable to the reader to be assisted in his inquiries by a short but pointed view of the subject; for which purpose we shall first mention the origin of the phrase of the *four seas*, and explain its most general and extended sense.

The appellation of the *four seas* takes its rise from the four parts into which the

Now it is good to be seene what persons that hold by grand serjantie may doe and performe that honourable service in person, and who ought not to be received ☞ thereunto, but ought to make a sufficient deputy. At the coronation of [a] king *R.* 2. *John Wilshire* citisen of *London* exhibited his petition to the high steward of *England* in his court, that where the said *John* held certain lands in *Hayden* in the county of *Essex* of the king by grand serjeantie, viz. to hold a towell when the king should wash his hands before dinner the day of his coronation &c. and prayed that he might be accepted to doe this office of grand serjeantie, the judgement followeth. *Et quia apparet per record' de Scaccario domini regis in curiâ monstrat' quòd prædicta tenementa tenentur de domino rege per servitium prædictum, ideo dictus Johannes admittitur ad servitium suum hujusmodi faciendum per Edmondum comitem Cantabrigiæ deputatum suum, et sic idem comes in jure ipsius Johannis manutergium*

[107. b.]

[a] 1 R. 2. Rot. Claus. m. 45.

---

the sea encompassing Great Britain, by reference to the four cardinal points of the globe, is divided. All these parts taken together, are sometimes called the *British seas;* but considered separately each varies in its denomination with the coasts of the island. To the *West* our sea is by ancient writers called *Vergivian,* not only including the sea between Great Britain and Ireland, but extending over the Atlantic ocean, which washes the western coast of the latter; and this western part of our sea is subdivided; for so much as runs between England and Ireland is called *St. George's Channel,* or the *Irish sea;* and the sea on the west coast of Scotland is sometimes named the *Caledonian, Deucaledonian,* or *Scottish* sea, and sometime the *North* sea. On the *North* side of our island there is also the *Scottish* or *North* sea. To the *East* we have the *German* ocean, which is bounded principally by the opposite coasts of Germany and the United Provinces. Lastly, to the *South* there is the *British Channel,* or *sea,* as some denominate it; which runs along the *French* coast, and comprehending the Bay of Biscay, ends with the northern coast of *Spain.* See Seld. Mar. Claus. lib. 2, cap. 1, and the introductory account of the British ocean prefixed to the description of Ireland, in Camd. Britan. Such is the description of the four seas, as we have it principally from Mr. Selden. But it should be observed, that the description is framed with a view to the whole island of Great Britain, as in Mr. Selden's time it became united under the government of the same king; and not to *England* as distinct from *Scotland,* according to the sense of our English law-books before the reign of James the first; for in them the four seas were understood with more restriction, and to be those which encompassed England only. See Medows's Observ. on the Domin. of the Seas, 11. Seld. Mar. Claus. lib. 2, cap. 31, and Justice's Treat. on Sea-Laws, 1st ed. 165. Another thing, very necessary to be attended to is the very large and comprehensive terms of the description, so far as they regard the *West* and *North* parts of the British seas; the former seeming to reach to the eastern shore of the continent of America, and the latter to be in some measure without any certain limits. Even the two other parts do not seem to be marked out with that nice precision, the want of which, as the reader will readily conceive, may under some circumstances be the cause of considerable embarrassments, both in transactions with foreign states, and in the exercise of judical authority amongst ourselves. See Seld. Mar. Claus. lib. 2, c. 30, 31, 32. The difficulties arising from this uncertainty will be best understood, by considering what the extent of the phrase of the *four seas* is in some particular instances. But this illustration shall be attempted in another place, where lord Coke gives the opportunity of resuming the subject. See post. 244. a. 260. b.—[Note 115.]

tergium tenuit, quando dominus rex lavabat manus suas dicto die coronationis suæ ante prandium.

By which record it appeareth, that the said *John Wilshire*, being of his quality and having not any dignitie, could not doe and performe this high and honorable service to the royall person of the king, but did make an honorable deputy, who performed it in his right; which is worthy of observation.

At the same coronation *William Furnevall* exhibited his petition in the same court, that where he held the mannor of *Farnham*, in the county of *Buck.* with the hamlet of *Cere* in the same county, by the service to find to the king at his coronation a glove for his right-hand, and to support the king's right hand the same day, while he held in his hand the verge royall, the judgement followeth. *Quâ quidem petitione debitè intellectâ, et factâ publicâ proclamatione, si quis clameo ipsius Willielmi in eâ parte contradicere vellet, nemineque ei contrariente, consideratum fuit, quòd idem Willielmus, assumpto per eum primitùs ordine militari, ad servitium prædictum admitteretur faciendum; et postmodo (videlicet) die Martis proximo ante coronationem prædictam dominus rex ipsum Willielmum apud Kenington honorificè præfecit in militem, et sic idem Willielmus servitium suum prædictum dicto die coronationis, juxto considerationem prædictam, perfecit et in omnibus adimplevit.* By which it appeareth, that a knight is of that dignity, that he may performe this high and honourable service in his owne person; and although this *William Furnevall* was descended of an honorable family, yet before he was created knight he could not performe it. Vid. 1 R. 2. mem. 45.

And sir *John de Argentine, chivalier*, performed the service of grand serjeanty, to be the king's cup-bearer at the same coronation.

[*m*] *Anne*, which was the wife of sir *John Hastings* earle of *Pembroke*, who held the mannor of *Ashley* in *Norfolke* of the king by grand serjeantie, viz. to performe the office of the napery at his coronation, was adjudged to make a deputy, because a woman cannot doe it in person; and thereupon she depnted sir *Thomas Blount*, knight, who performed the same in her right. *John*, sonne and heire of *John Hastings* earle of *Pembroke*, exhibited in the same court his petition, shewing that by his tenure he was to carrie the great spurres of gold before the king at his coronation, &c. The judgement is, *Auditâ et intellectâ billâ prædictâ, pro eò quòd dictus Johannes est infra ætatem et in custodiâ domini regis, quanquam sufficientur ostenditur per recorda, et evidentias, quòd ipse servitium prædictum facere deberet, consideratum extitit, quod esset ad voluntatem regis, quis dictum servitium istâ vice in jure ipsius Johannis faceret; et super hoc dominus rex assignavit Edmundum comitem Marchiæ ad deferendum dicto die coronationis prædicta calcaria in jure præfati hæredis, salvo jure alterius cujuscunque. Et sic idem comes Marchiæ calcaria illa prædicto die coronationis coram ipso domino rege deferebat.* By which it appeareth, that the heire, before he hath accomplished his age of one and twenty yeares, cannot performe his great and honourable service, but during the minoritie the king shall appoint one to performe the service. [*m*] Vid. 1 R. 2. m. 45. Vid. 1 R. 2. m. 45.

Sect.

Sect. 158.

AND note, that all which hold of the king by grand serjanty, hold of the king by knights service; and the king for this shall have ward, marriage and reliefe; but he shall not have of them escuage, unlesse they hold of him by escuage.

46 E. 3. 15. a. per Finchden.

HERE *Littleton* saith, that he, that holds by grand serjeantie, doth hold by knights service, which is so said of the effects. And therefore *Littleton*, doth add, that the king shall have ward, marriage and reliefe, which are the effects of knights service, &c. [108. a.]

(Ante 75. a.) 69. a.

Sometimes in ancient records, *servitium militare* is called *servitium hauberticum*, or *servitium brigandinum*, or *servitium loricatum*. And a *haubert* or *brigandine* signifieth a coat of maille (1).

---

(1) The tenure by grand serjeanty still continues, though it is so regulated by the 12 of Cha. 2, as to be made in effect *free and common socage*, except so far as regards the merely honorary part of grand serjeanty; for the first part of the statute, which destroys the incidents to tenures by knights service, of which grand serjeanty was the highest species, is expressed with a generality sufficient to reach grand serjeanty; but then a proviso follows, by which the *honorary* services of this tenure are expressly saved. It is observable, that the proviso for this purpose is penned with an inaccuracy, which leads to a very mistaken idea of the incidents to grand serjeanty. The honorary services are preserved with a cautious exception of several burthensome properties, such as *marriage*, *wardship* and *voyages royal*; to which are added *escuage* and the *aids pur faire fitz chivaler et file marier*, though *these latter* were certainly quite foreign to grand serjeanty. See ante 105. b. From this undistinguishing mode of expression, and from the confusion and redundancy so conspicuous in most parts of the statute, we are inclined to infer, that those who attribute the framing of it to lord chief justice Hale, found themselves on a loose report very injurious to the memory of that shining ornament of his profession. See Gilb. Eq. Rep. 176.—[Note 116.]

CHAP. 9. *Petite Serjeantie.* Sect. 159.

TENURE by petite serjeanty is, where a man holds his land of our soveraigne lord the king, to yield to him yearly a bow or a sword, or a dagger, or a knife, or a lance, or a paire of gloves of maile, or a paire of gilt spurs, or an arrow, or divers arrowes, or to yield such other small things belonging to warre.

"*OF our lord the king.*" And so *Littleton* concludeth this Chapter, that a man cannot hold by grand serjeanty or petite serjeanty but of the king, and of the king as of his person, and not of any honour or manor (2) And it is to be observed, that regularly a tenure of the king as of his person is a tenure *in capite*, so called κατ' ἐξοχην, *propter excellentiam;* because the head is the principall part of the body, and he that holdeth of any common person as of his person, he in truth holdeth *in capiete;* but againe κατ' ἐξοχην, it is only in common understanding applyed to the king, and that seigniory of a common person is called a tenure in grosse, that is, by itselfe, and not linked or tied to any mannor, &c. Britton, fol. 164. Bracton, lib. 2. fol. 35. Fleta, lib. 2, cap. 9. Ockam, cap. Quid de avibus oblatis. (6 Co. 6.) Ante 73. a.

And this tenure of the king *in capite*, is said [*a*] to be a tenure of the king as of his crowne, that is, as he is king. [*b*] And therefore if one holdeth land of a common person in grosse as of his person, and not of any mannor, &c. and this seigniory escheateth to the king yea though it be by attainder of treason) he holdeth of the person of the king, and not *in capite;* because the originall tenure was not created by the king. And therefore it is directly said, that a tenure of the king *in capite*, is when the land is not holden of the king as of any honor, castle, or mannor, &c. but when the land is holden of the king as of his crowne (3). [*a*] Bracton, lib. 2. fol. 87. (2 Ro. Abr. 504.) [*b*] 3 E. 3. Tenures, B. 94. 30 H. 8. 43. 28 H. 8. Livery, B. 57. 29 H. 8. ibid. 58. 6 H. 8. Dier, 58. Vide Le statute de 1 E. 6. cap. 4. Mad. Ex. 432.

F. N. B. 5. K. (2 Ro. Abr. 72, 73.) Br. Tenure, pl. 94.

Note,

---

(2) In a former note we mentioned Mr. Madox's disapprobation of calling any tenures of the king *by way of distinction* tenures *ut de personâ*. We shall here explain his reasons for rejecting the phrase more fully. The phrase seems *unnecessary;* for *that* of *ut de coronâ* fully answers the same purpose of distinction. It also seems *injudicious*, and to tend to an erroneous idea of tenures; because it supposes that *some* tenures are *not* of the *person*, whereas in truth *all are*, and none can hold feudally of an inanimate thing, or otherwise than of a man's person. Mad. Baron. Angl. 167. This is the substance of Mr. Madox's objections to the phrase; and we still think, that in strict propriety of speech, his animadversion on those who use it, is justifiable. However, in justice to lord Coke, it should be remembered, that he was not the inventor of the phrase; Mr. Madox himself tracing its origin to the latter end of the reign of Henry the eighth.—[Note 117.].

(3) Mr. Madox is not less adverse to thus distinguishing tenure *in capite* from tenure *ut de honore*, than to the distinction of *ut de personâ;* nor are his reasons less convincing. Tenure *in capite*, in its genuine sense, signifies a tenure of another *sine medio*, that is, immediately, and without the interposition of any mesne or intermediate lord; and therefore when an honor or other seigniory came into the hands of the crown by escheat or otherwise, its tenants were

Note, that an honor is the most noble seigniory of all others, and originally created by the king, but may afterwards be granted to others. See for the creation of an honor, 13 *H.* 8. cap. 5. 33 *H.* 8. cap. 37, 38. 37 H. 8. cap. 18. (4)

And it is to be observed, that a man may hold of the king *in capite*, or of his crowne, as well in socage, as by knight's service (5).

Magna Chart. cap. 27. *"To yield to him yearly a bow or a sword, &c."* As grand serjeanty must be done by the body of a man, so petite serjeanty hath nothing to do with the body of a man, but to render some things touching warre; as a bow, a sword, a dagger, a knife, a launce, a pair of gantlets of iron, or shafts, and such like.

Regist. fo. 2. F. N. B. fo. 1. It is to be observed, that grand serjeanty or knights service is not in law called *liberum servitium*, as socage is, but *per feodum unius militis, &c.* But to find the king so many ships for

---

were as much tenants *in chief* to the king, as those who were so by original grant from the crown. In proof of this Mr. Madox selects from ancient records a great variety of instances between the 8th of Richard 1. and the 20th of Henry 6. in which tenures *ut de honore* are *expressly* styled tenures *in capite*; and as Mr. Madox adds no instances of a later time than Henry the eighth and queen Elizabeth, in which the words *in capite* are omitted, it may be conjectured that the error complained of by Mr. Madox originated soon after the time of Henry the sixth. Mad. Baron. Angl. 181. The design of excluding tenures *ut de honore* from the description of *tenures in capite* was to distinguish those estates which were held of the king by a tenure originally created by the king from those held of him by a tenure commencing by the subinfeudation of a subject: between which there were many differences in point of incident very essential both to the lord and tenant. Mad. Baron. Angl. 12. But it should have been recollected, that the distinction aimed at was already marked, with equal sufficiency and more correctness, by denominating tenures of the first sort tenures *ut de coronâ*, and those of the second tenures *ut de honore*. The influence of this mistaken notion of tenancy *in capite* is very evident, as well throughout the statute of Charles the second for taking away the oppressive fruits of knight's service and tenure *in capite*, as those grants from the crown, which in the *tenendum* are expressed to be *ut de honore et non in capite*. See Mad. Excheq. fol. ed. 432. But great as this error about tenure *in capite* may be, lord Coke is excusable for conforming in his language to it; because before his time it had been adopted by the Legislature. See 37 H. 8. c. 20. s. 2, 3, 4. 1 E. 6. c. 4. s. 1. 2, & 3, and Mad. Baron. Angl. 233.—[Note 118.]

(4) The first book of Mr. Madox's *Baronia Anglica* is principally employed in explaining the nature of an *honor*. He objects to the propriety of the statutes of Hen. 8. referred to by lord Coke; and as they only create *titular* honors, and therefore cannot give a just idea of the nature of the *genuine* honor, which is a *land barony*, blames lord Coke for his reference. Mad. Bar. Angl. 8, 9, 10, and 236.—[Note 119.]

(5) See Mad. Baron. Angl. 238, 239, where the learned author observes on the inaccuracy of language in the 12 Cha. 2. about tenure *in capite*. The title of the act expresses that it was made for taking away tenure *in capite*; and the first enacting clause proceeds on the same idea. But had the act been accurately penned, it would simply have discharged such tenure of its oppressive fruits and incidents; which would have assimilated it to *free and common socage*, without the appearance of attempting to annihilate the *indelible* distinction between holding *immediately* of the king, and holding of him through the *medium* of other lords. See ante note 3.—[Note 120.]

[108. b.] ☞ for his passage is called *liberum servitium;* and therefore it is said, *per liberum servitium, ad inveniendum nobis quinque naves ad transitum nostrum ad mandatum nostrum.* And therefore clearly such a tenure is neither grand serjeanty, nor knights service; because nothing is to be done by the body of any man, nor in that case touching war, but ships to be found. And this is the reason that *Littleton* yieldeth of the examples he doth here put, because that such a tenant by his tenure ought not to go, nor to doe any thing in his person, touching war. And herewith agreeth *Bracton, ex parvis serjeantiis, quæ non respiciunt regem nec patriæ defensionem, nullum competere debet maritagium nec custodiam, &c.* Bract. li. 2. fo. 35.

If a man holdeth land of the king, to finde an horse of such a price, and a saddle and a bridle by forty dayes, or any other time when the king goeth with his army against *Wales*, this is petite serjeanty, and no grand serjeanty, for the cause aforesaid. 9 H. 3. Gard. 145.

Sect. 160.

AND such service is but socage in effect; because that such tenant by his tenure ought not to goe, nor do any thing, in his proper person, touching the warre, but to render and pay yearly certaine things to the king, as a man ought to pay a rent.

"*SUCH service is but socage, &c.*" But as it hath beene said, the dignity of the person of the king giveth the name of petite serjeanty, which in case of a common person should be called plain socage, *ab effectu;* for it shall have such effects or incidents as belong to socage, and neither ward nor marriage, &c. for they belong to knights service. 9 H. 3. Gard. 145.

Of this tenure the Great Charter in the person of the king saith thus: *Nos non habebimus custodiam hæredis, &c. occasione alicujus parvæ serjantiæ, quam tenet de nobis per servitium reddendo nobis cultellos, sagittas, &c.* Mag. Chart. ca. 28. Vid. stat. de Wardis & Relevies, 28 E. 1.

Sect. 161.

AND note, that a man cannot hold by grand serjeanty, nor by petite serjeanty, but of the king, &c.

OF this sufficient hath beene sayd before, saving that *parva serjeantia* is only appropriate to this tenure (1.) Vide Sect. 1.

CHAP.

---

(1) The tenure of petite serjeanty is not named inthe 12 of Cha. 2. but the statute is not without its operations on this tenure. It being necessarily a tenure *in capite*, though in effect only so by socage, *livery* and *primer seisin* were of course incident to it on a descent; and these are expressly taken away by the statute from every species of tenure *in capite*, as well *socage in capite* as *knight's service in capite*. See ante 77. a. But we apprehend, that in other respects *petite serjeanty* is the same as it was before; that it continues in denomination, and still is a dignified branch of the tenure by socage, from which it only differs in name on account of its reference to *war*.—[Note 121.]

Chap. 10. *Tenure in Burgage.* Sect. 162.

TENURE in burgage is, where an ancient burrough is, of which the king is lord, and they, that have tenements within the burrough, hold of the king their tenements; that every tenant for his tenement ought to pay to the king a certaine rent by yeare, &c. And such tenure is but tenure in socage.

Bracton, lib. 3. Tract. 2. Britton, fol. 164. Mirror, cap. 2. sect. 18.

"BURGAGE," in *Latine burgagium*, is derived of this word *burgus*, which is *vicus*, *pagus*, or *villa*, a towne (2); and it is called a burgh (3), because it sendeth burgesses to parliament (4).

10 Co. 123, 124. the Mayor of Lynn's case. 40 Ass. p. 27. 43 E. 3. 32. 21 E. 4. 53 & 54. 21 H. 7. 15. 2 E. 3. cap. 3.

[b] Bracton, lib. 3. fol. 124. Fleta, lib. 1. cap. 47.

Of burghs some be incorporate, and some not; and some be walled, and some not. [b] It ☞ was in former times taken for those companies of ten families [109. a.] which were one another's pledge; and therefore a pledge is in the *Saxon* tongue *borhoe*, whereof some take it that a burgh came: whereof also commeth headborough or borowhead, *capitalis plegius*, a chiefe pledge, viz. the chiefe man of the borhoe, whom *Bracton* calleth *frithburgus;* and hereof also commeth burgbote, which, as *Fleta* saith, signifieth *quietantiam reparationis murorum civitatis aut burgi.*

Every city is a burgh, but every burgh is not a city; whereof more shall be said hereafter. And the termination of this word *burgagium* (as before hath beene noted), signifieth the service whereby the burgh is holden. And of this word (*burgh*) two ancient and noble families take their names, viz. *de Burgo*, and *de Burgo caro, Burchier.*

Ante 86. a. b.

F. N. B. 64. D.

" *Of which the king is lord.* But it may be holden of another, as by that, which immediately followeth, appeareth.

Sect.

---

(2) For the difference between *town* and *borough*, see post. 115. b.

(3) For the etymology of *borough*, besides Spelman, Du Fresne, and the other glossarists, see Whitl. on Parliam. 497. Brad. on Bor. 1. and Mad. Firm. Burg. 2.

(4) Mr. Madox cautions his readers against this derivation of *borough*. Mad. Firm. Burg. 2. His reason, we presume, was, that *borough* was a word far more ancient than the practice of sending burgesses to parliament. However, it is possible, that some boroughs might be denominated towns, till they were allowed to choose representatives in parliament; and that they acquired the name of *boroughs* from the circumstance of having that privilege. If any *towne* did become *boroughs* in this way, it in *some degree* accounts for lord Coke's explication of the word, though it will not wholly justify him as an etymologist. —[Note 122.]

Sect. 163.

AND the same manner is, where another lord spirituall or temporall is lord of such a burrough, and the tenants of the tenements in such a burrough hold of their lord to pay, each of them yearly, an annual rent.

THIS is evident, and needeth no explanation. Only this by the way is to be observed, that bishops, being lords of parliament, have not been called lords spirituall so lately as some have imagined. 16 R. 2. ca. 5. 1 H. 4. ca. 2, &c.

Sect. 164.

AND it is called tenure in burgage, for that the tenements within the burrough be holden of the lord of the burrough by certaine rent, &c. And it is to wit, that the ancient townes called burroughes be the most ancient towns that be within England; *for the townes that now be cities or counties, in old time were boroughes, and called boroughes; for of such old townes called boroughs, come the burgesses of the parliament to the parliament, when the king hath summoned his parliament* (1).

"*BY certaine rent, &c.*" By (*&c.*) here is implyed fealtie, or other service, as to repaire the house of the lord, &c.

"*The ancient townes called burroughes.*"

So as a burgh is an ancient towne, holden of the king or any other lord, which sendeth burgesses to the parliament.

And it is to be observed, that *Burgh* and *Burie* have all one signification; as *Canterburie, Burie St. Edmond, Sudburie, Salisburie, Banburie, Heytesbury, Malmesburie, Shaftesburie,* ☞ *Teukesbury*, and others send burgesses to the parliament. *Vide pro villis, parochiis et hamlettis, postea, Section* 171.

[109. b.]

"*Cities,*" *Civitas*, whereof commeth the word city. A city is a borough incorporate (2); which hath or hath had a bishop; and

(1) See ante 108. b. note 4.

(2) This implies, that unless a borough is *corporate* it *cannot* be a city. But if this was lord Coke's idea, it is not quite accurate; for though in general the description may be true, yet it is not universally so. Westminster is a *city*, and also a *borough*, so far at least as the sending members to parliament can entitle it to that denomination; and yet it certainly is not corporate. Mr. Madox mentions Westminster as a borough *not corporate;* and we ourselves have seen papers in the archives of the dean and chapter of Westminster which confirm his idea. Mad. Firm. Burg. 49. This fact is material to another purpose. Westminster not being corporate, and yet having, as we apprehend, first sent members to parliament in the reign of Edward the sixth, is an instance that the inhabitants of a town may acquire the right of having representatives in parliament *within time of legal memory* without being incorporated, and therefore seems inconsistent with the doctrine of lord chief justice Holt on this subject in Ashby and White. See 3 Pryn. Brev. Parl. sect. 7. p. 188. 1 Will. Notit.

and though the bishopricke be dissolved, yet the city remaineth.

In the time of *William* the Conquerour it is declared in these words: *Item nullum mercatum vel forum sit, nec fieri permittitur, nisi in civitatibus regni nostri, et in burgis clausis et muro vallatis, et castellis, et locis tutissimis, ubi consuetudines regni nostri, et jus nostrum commune, et dignitates coronæ nostræ, quæ constitutæ sunt à bonis prædecessoribus nostris, deperire non possunt, nec defraudari, nec violari, sed omnia ritè et per judicium et justitiam fieri debent: et ideo castella et burgi et civitates sunt et fundatæ et ædificatæ; scilicet ad tuitionem gentium et populorum regni, et ad defensionem regni, et idcirco observari debent cum omni libertate et integritate et ratione.* So as by this it appeareth, that cities were instituted for three purposes. First, *Ad consuetudines regni nostri, et jus nostrum commune, et dignitates coronæ nostræ conservand'.* 2. *Ad tuitionem gentium et populorum regni.* And thirdly, *Ad defensionem regni.* For conservation of laws, whereby every man enjoyeth his owne in peace; for tuition and defence of the king's subjects; and for keeping the king's peace in time of sudden uprores; and lastly, for defence of the realme against outward or inward hostility.

Lamb. fol. 125.

Civitas et urbs in hoc differunt, quòd incolæ dicuntur civitas, urbs verò complectitur ædificia; but with us the one is commonly taken for the other. *Villeins sont coultivers de fife demurrants in villages upland; car de ville est dit villeine, et de boroughes burgesses, et de cities citizens.*

Mirror, cap. 2. sect. 18. Britton, fol. 87.

Every borough incorporate, that had a bishop within time of memory, is a citie, albeit the bishopricke be dissolved; as *Westminster* had of late a bishop, and therefore it yet remaines a city (3). The burgh of *Cambridge*, an ancient city, as it appeareth by a judiciall record (which is to be preferred before all others) where *mos civitatis Cantabrigiæ* is found by the oath of twelve men, the recognitors of that assise; which (omitting many others) I thought good to mention, in remembrance of my love and duty *almæ matri academiæ Cantabrigiæ.*

Mich. 7 R. 1. Rot. 1. (which was in Anno Dom. 1195) in an Ass. of Darreine Presentment for the Church of St. Peter's in Cambridge.

There

Notit. Parl. 7, and 21, of the preface. Car. Rights of Elect. part 2. page 233. 1 Stow's Survey, Stripe's ed. of 1720, p. 8 and 10, of the second appendix, and 2 Dougl. Hist. of Cas. of Controv. Elect. 296, 297, 298. It is with great pleasure that we cite Mr. Douglas's work, as it affords the opportunity of congratulating the student on the accession of a collection of excellent reports on the law of parliamentary election, accompanied with an instructive historical preface, and very judicious annotations. This is the only work of the kind, except one lately published from Mr. Glanville's manuscript; and they are both particularly valuable, on account of their tendency to *diffuse* the knowledge of a branch of law, which *before* was too much confined to the narrow circle of a few favourites in possession of the *practice*.—[Note 123.]

(3) This is rather an unapt example of the truth of lord Coke's position; for Westminster, as we have already stated, is *not* a borough *incorporate*. See supra, note 2. As to Westminster's being a *city*, it became so by *express creation*, and not *singly* by making it the see of a bishop, however sufficient *that* of itself might have been; the letters patent, which erected the bishopric, ordaining, *quòd tota villa nostra Westmonasterii extunc et deinceps in perpetuum sit civitas, ipsamque civitatem Westmonasterii vocari.* See the letters patent in 1 Burn. Reform. page 246, of the Appendix.—[Note 124.]

There be within *England* two archbishoprickes, and twenty-three other bishoprickes. Therefore so many cities there be; and *Cambridge* and *Westminster* being added, there are in all twenty-seven cities within this realme, and may be more, than at this time I can call to memory.

It is not necessary that a citie be a countie of itselfe; as *Cambridge*, *Ely*, *Westminster*, &c. are cities, but are no counties of themselves, but are part of the counties where they be.

"*Counties*," or Shires; the one taken from the *French*, the other from the *Saxon*, in *Latine Comitatus*. Counties are certaine circuits or parts of the kingdome, into which the whole realme was divided for the better government thereof, so as there is no land but it is within some county. And every of them is governed by a yearly officer, which we call a Shireve; which name is compounded of these two *Saxon* words *shire* and *reve* [*i. e.*] *præpositus* or *præfectus comitatûs*. But hereof more hereafter in his proper place shall be spoken. There be in *England* forty-one counties, and in *Wales* twelve. (Post. 168. a.)

"*Come the burgesses of the parliament to the parliament, &c.*" Parliament is the highest and most honourable and absolute court of justice in *England*, consisting of the king, the lords of parliament, and the commons. And againe, the lords are here divided into two sorts, viz. spirituall and temporall. And commons are divided into three parts, viz. into knights of shires or counties, citizens out of cities, and burgesses out of burroughes; the words of the writ to the sherife for the election being, *duos milites gladiis cinctos magis idoneos et discretos comitatûs tui,* [110. a.] *et de quâlibet civitate comitatûs tui duos cives, et de quolibet burgo duos burgenses de discretoribus, et magis sufficientibus, &c.* all which have voyces and suffrages in parliament. You shall reade in the parliament rolls, that (as hath beene said) there is *lex et consuetodo parliamenti, quæ quidem lex quærenda est ab omnibus, ignorata à multis, et cognita à paucis.* Of the members of this court some be by descent, as ancient noblemen; some by creation, as nobles newly created; some by succession, as bishops; some by election, as knights, citizens, and burgesses. 10 Co. 123, 124. Vid. devant Sect. 97. Vide Sect. 3. (4 Inst. 2.)

It is called parliament, because every member of that court should sincerely and discreetly *parler la ment* (1) for the general good

(1) The latter part of this etymology is justly exploded; but it is some excuse for lord Coke, that it did not first come from him, it being to be found in preceding authors of eminence. See Lamb. Archeion, in the chapter of *Parliament*, and 1 Whitl. on Parliament, 174. A learned writer of the present time suggests, that perhaps *parliament* may be a compound of *parly* and *ment*, two Celtic words, the *former* answering to *parler* in French, and the *latter* signifying *abundance*, and both together importing the same as *great talk amongst* the Indians of North America. Barringt. Obs. on Ant. Stat. 2d ed. 56. But though we do not doubt that there are two such words in the Celtic language, we are scarce more satisfied with this derivation than with that expressed by lord Coke. The opinion adopted by Mr. Lambard seems far the most probable; and this is, that *parliament* is not a *compound* word, but *simply* derived from the French verb *parler*, with the addition of *ment* in the termination; which mode of converting *verbs* into *nouns* as well as into *adverbs*, is common in the *French* tongue. Lamb. Archeion, in the chap. of *Parliament*. A like practice prevailed

4 H. 8. cap. 8.

[a] Treatise de Modo tenend. Parliam. 21 E. 3. fo. 60. n. Johannes de Rupicella tempore regis Johannis. Pol. Virgil. li. 3. tempore H. 1. W. 1. 3 E. 1. in the title. (Doct. & Stud. 164. 3 Inst. 125. 179.

good of the common wealth; which name it hath also in *Scotland* (2); and this name before the Conquest was used in [a] the time of *Edward* the Confessor, *William* the Conqueror, &c. (3). It was anciently before the Conquest called *michel sinoth, michel gemote, ealsa witena gemote;* that is to say, the great court or meeting of the king and of all the wisemen, sometime of the king with the counsell of his bishops nobles and wisest of his people. This court the *Frenchman* calleth *les estates*, or *l'assemble des estates*. In *Germany* it is called a *diet*. For those other courts in *France* that are called parliaments, they are but ordinary courts of justice; and (as *Paulus Jovius* affirmeth) were first established by us. 4 Inst. 53.)

[b] Bracton, lib. 1. cap. 2. Regist. 280.

[c] 27 Aug. 5 H. 4.

The king of *England* is armed with divers councils, one whereof is called *commune concilium*, and that is the court of parliament, and so it is legally called in writs and judiciall proceedings *commune concilium regni Angliæ*. And another is called [b] *magnum concilium:* this is sometime applied to the upper house of parliament, and sometime out of parliament time to the peeres of the realme, lords of parliament, who are called *magnum concilium regis;* for the proofe whereof take one [c] record for many in the fifth yeare of king *H.* 4. at what time there was an exchange made betweene the king and the earle of *Northumberland*, whereby the king promiseth to deliver to the earle lands to the value, &c. *per advice et assent des estates de son realme et de son parliament (parensi que parliament soit devant le feast de St. Lucy) ou autorment*

---

vailed in the formation of the *Roman* language; and thence the true source of derivation for *testamentum*, and other similar Latin words: though an injudicious desire to render them more significant and expressive of the qualities of the subjects to which they are applied than their true deduction would warrant, gave birth to a forced and fanciful kind of etymology, like that now so properly rejected in the instance of the word *parliament*. This false taste in respect to etymology is of very ancient date; nor were Lord Coke and his cotemporaries more chargeable with it than some of the most admired and pure classical writers of antiquity, not excepting even *Cicero*. See Menag. Jur. Civil. Amœn. cap. 39, particularly in his observations on the word *testamentum*, and Tayl. Elem. Civ. L. 7. See also Atk. on Pow. Parl. fo. ed. p. 18, and 1 Ralp. Use and Abuse of Parl. 3. It seems to have originated from not attending to the real office of etymology, and confounding it with the definition of the subject to which a word is applied; two things quite distinct in their nature, though it frequently happens that they reflect light on each other.—[Note 125.]

(2) For a history of the origin and constitution of the parliament in Scotland before the union of the two kingdoms in the reign of Queen Anne, and of the change made by the establishment of one Parliament for Great Britain, see the Treatise on the Laws of Election for Scotland, with which Mr. Wight hath lately obliged the public.—[Note 126.]

(3) Mr. Lambard guesses, that the word *parliament* was introduced here soon after the Conquest. He cites *Westminster the first* as the most ancient statute in which he had observed the word to be used; though from a passage in the statute of Edward the second, mentioning *parliaments* in the times of that king's *progenitors*, he infers, that the word had been adopted several reigns *before*. Lamb. Archeion, cap. *Parliament*, and Westm. 1. 3 E. 1, and Articuli Cleri, 9 E. 2. One of Mr. Prynne's arguments against the great antiquity of the *modus tenendi parliamentum* is the frequent use of the word *parliament*, he insisting, that it was never applied to denote the *great council of the nation* in any of our ancient records or writings prior to the reign of Hen. 3. See Pryn. on 4 Inst. 2. See further, Brad. Introduct. to Engl. Hist. 71.—[Note 127.]

ment per advice de son graund councell, et auters estates de son realme, que le roy ferra assembler devant le dit feast, in case que le parlement ne soit. And herewith agreeth the act of parliament in 37 *E.* 3. cap. 18, where it is said, before the chancellor, treasurer and great councell. (4) Thirdly (as every man knoweth), the king hath a privy councell for matters of state; (as for example) [d] *Henricus de Bellomonte baro de magno et de privato concilio regis juratus*, and many others before and after. The fourth councell of the king are his judges of the law for law matters; and this appeareth frequently in our [e] bookes; and must be intended, when it is spoken generally by the councell, it is to be understood *secundum subjectam materiam;* for example, if it be legall, then by the king's councell of the law, viz. his judges (5).

[d] In dors. Claus. 16 E. 2. m. 5. (7 Co. 36.)

[e] 43 Ass. 15. 27 H. 6. 5. 1 R. 3. 11. Regist. 191. 122, 123.

4 E. 3. 2. 39 E. 3. 35. 3 Ass. 15. 19 E. 3. Judgement, 174. W. 1. ca. 1. Lestat. de Templar. 16 R. 2. Stat. de Præmunire. See the same published by Mr. Lambard.

Now

---

(4) In the controversy about the origin of the *Commons* in parliament, Mr. Tyrrel contends, that anciently *commune consilium* sometimes denoted an assembly distinct from parliament, and one composed of fewer persons; and particularly, that the *commune consilium*, mentioned in the clause of king John's *Magna Charta*, about assessing escuage, which enumerates only archbishops, bishops, abbots, counts, and the greater barons, was of this sort. Tyrr. Biblioth. Politic. 311. 314.—See Hale's Jurisd. of Lords of Parl. c. 2. p. 8.—[Note 128.]

(5) Lord Coke in another place repeats the expression that *for matters of law the judges are the king's counsel.* Post. 304. a. But he omits explaining whether they are so called on account of their *judicial* opinions in the king's courts, of their opinions in parliament when advised with by the lords, or any *extra-judicial* opinions the king may be entitled to demand from them. As to the latter, they were not favoured by lord Coke, as appears by his behaviour in the great case of Commendams in the reign of James the first, when the king severely reprimanded the judges for disobeying his mandate to postpone proceeding in a cause concerning the prerogative, till they were consulted by him. Though lord Coke was deserted by the other judges, who asked pardon for having remonstrated against the king's command; and though the privy council decided, that the command was agreeable to law; yet lord Coke bluntly refused either to retract or apologize. See lord Coke's life in the Biograph. Britan. One thing much relied on by those who justified the king's order, was the oath of the judges, which is printed in the statute-book as a statute of Edward the third, and expressly requires them to *counsel the king in his business.* See 18 E. 3. stat. 4. But what is thus called a statute lord Coke denies to be one, and indeed very properly; for it has not the least resemblance of a statute, being simply the form of an oath. 3 Inst. 146. 224. However, it must be admitted, that there are various instances of the king's consulting the judges, and of their giving their opinions *extra-judicially.* Several of these instances are referred to in the Reports of lord Fortescue, who endeavours to show, that even in the case of ship-money the *extra-judicial* opinion first given was condemned, not because it was extra-judicial, but because it was grossly contrary to law. Fortes. Rep. 386. 389. Rushw. vol. 3. Append. 212. Some instances of such consultations have happened since the Revolution, particularly some few years after, in sir John Fenwick's case, and in the reign of George the first, when it was made a question whether the education and marriage of the prince of Wales's children belonged to the king or to their father, and still more recently in the case of admiral Byng during the last reign. See Fortesc. Rep. 385. But however numerous and strong the precedents may be in favour of the king's *extra-judicially* consulting the judges on questions in which the crown is interested, it is a right to be understood with many exceptions, and such as ought to be exercised

with

Now for the antiquity of this high court of parliament, whereof *Littleton* here speaketh, it appeareth, that divers parliaments have beene holden long before and until the time of the Conqueror, which be in print, and many more appearing in ancient records, and manuscripts (6). [*f*] *Le roy Alfred assembler' les counties, &c. et ordeina pur usage perpetual, que deux foitz per an ou pluis sovent pur mister in temps de peace se assemblerent a Londres, a parlementur sur le guidement del people de Dieu, et coment soy garderont de pecher, viveront en quiet, et receiveront droit per usage et sanits judgements. Per ceste estate se fieront plusors ordinances per plusors roys jesque a temps le roy que ore est, que fuit le roy E.* 1. The conclusion of that great parliament holden by king *Ethelstan* at *Grately* is very remarkable, which I have seene in these words. *All this was enacted in that great synod or councell at Grateley, whereat was the archbishop Wolfehelme, with all the noblemen and wise men, which king Athelstan called together.*

[*f*] Mirror, ca. 1. sect. 2. Vide Statutes de 4 E. 3. ca. 14. & 36 E. 3. ca. 10.

There have beene in the time of, and since the Conquest, in the reignes of *H.* 1, king *Stephen*, *H.* 2. *R.* 1, king *John*, *H.* 3, &c. 280 sessions of parliament, and at every session divers acts of parliament made, no small number whereof are not in print (7).

Mirr. ca. 2. sect. 4. 7. 10. 14. ca. 4. de Defaults, & cap. de Homicide, cap. 1. sect. 13. cap. 4. de Poyns. Ockam quid cum Ven. Matth. Paris, 212, 213.

The

---

with great reserve; lest the rigid impartiality so essential to their *judicial* capacity should be violated. The anticipation of *judicial* opinions on causes *actually depending*, should be particularly guarded against; and therefore a wise and upright judge will ever be cautious how he *extra-judicially* answers questions of such a tendency. So far one may venture to qualify the right; because even the house of lords have declined taking the opinion of the judges for a reason of this sort, though their attendance on that assembly is confessedly, in some degree, for assisting the lords in matters of law. See Fortesc. Rep. 384, 385. But it would be a presumption in us, if we were to be more particular on a subject of so much delicacy, by attempting to mark the bounds to a right, the extent of which we do not find clearly ascertained by precedent or authority. See further on this subject Fost. 199. 241.—[Note 129.]

In 3 Inst. 29, see strong passages against giving of opinions by the judges beforehand in criminal cases.

Instances of extra-judicial opinions of the judges in answer to the king or his privy council, besides those adverted to in the notes; viz. the case of Corporations, in 40 El. 4 Co. 77. b.; the case of Strode and Long, St. Tri. 8vo. edit. 236; D. of Buckingham's case, Keil.

Instances of a declining by the judges to answer questions proposed to them by the lords in parliament, see Rot. Parl. 39 H. 6. n. 12; on right of succession to the crown, 31 & 32 H. 6. n. 26. a privilege of parliament; so as to king's prerogative, Journal Dom. P. 17 February and 3 March 1620; 23 May 1614; 1 May 1626. See also Rot. Parl. 27 H. 6. n. 17, cited in 1 Dug. Bar. 323. See further Wilmot's notes, 77. Questions put by the house of lords to the judges, and their answers on the habeas corpus bill brought in by lord Camden.

(6) The statutes of Edward the third cited by lord Coke in the margin require a parliament to be holden once every year; but it seems doubtful whether they were meant to limit the duration of each parliament, or merely the intermission of holding parliaments. The 16 Cha. 2. c. 1, which directs that the sitting of parliaments shall not be discontinued above three years, is certainly for the *latter* purpose, and therefore still continues in force, notwithstanding the modern stautes for making parliaments first triennial and afterwards septennial, these being for the *former* purpose. See 6 W. & M. c. 2. 1 Geo. 1. c. 38.—[Note 130.]

(7) See Pref. to Ruffhead's Stat. 21.

The jurisdiction of this court is so transcendent, that it maketh, inlargeth, diminisheth, abrogateth, repealeth, and reviveth lawes, statutes, acts, and ordinances, concerning matters ecclesiasticall, capitall, criminall, common, civill, martiall, maritime, and the rest. None can begin, continue, or dissolve the parliament, but by the king's authority. Of which court it is said, [a] *Que il est de tres grand honor et justice, de que nul doit imaginer chose dishonorable.* [b] *Habet rex curiam suam in concilio sua in parliamentis suis, præsentibus prælatis, comitibus, baronibus, proceribus, et aliis viris peritis, ubi terminatæ sunt dubitationes judiciorum, et novis injuriis emersis nova constituuntur remedia, et unicuique justitia prout meruerit retribuetur ibidem.* But this properly doth belong to the jurisdiction of courts, and therefore this little taste hereof shall suffice.

[a] Pl. Com. 398. b. Doctor & Stud. ca. 55. fol. 164.
[b] Fleta, lib. 2. ca. 2. Fortescue, de Laudibus Legum Angliæ. Bract. lib. 1. ca. 2. (Doct. & Stud. 32.)

[110. b.] ☞ Sect. 165.

ALSO, for the greater part such boroughes have divers customes and usages, which be not had in other towns. For some boroughes have such a custome, that if a man have issue many sonnes and dyeth, the youngest son shall inherit all the tenements which were his father's within the same borough, as heire unto his father by force of the custome; the which is called borough English (1)†.

"*CUSTOMES and usages.*" *Consuetudo* is one of the main triangles of the laws of *England*; those lawes being divided into common law, statute law, and custome. Of which it is said, [*] that *consuetudo quandoque pro lege servatur in partibus, ubi fuerit more utentium approbata, et vicem legis obtinet; longævi enim temporis usus et consuetudinis non est vilis authoritas* [c] *Longa possessio* (*sicut jus*) *parit jus possidendi, et tollit actionem vero domino.*

(Post. 115. b.)
[*] Bract. lib. 1. ca. 3. fol. 2.
[c] Idem. lib. 2. fol. 52. (Dav. 33. a.)

Of every custome there be two essentiall parts, time and usage; time out of minde, (as shall be said hereafter) and continuall and peaceable usage without lawful interruption.

"*Which be not had in other towns.*" It is necessary to be knowne what customes may be alledged in an upland towne, which is neither citie nor borough. [*] In an upland towne, that is neither citie nor borough, such a custome to devise lands cannot be alledged. Neither in an upland towne can there be a custome of borough *English* or gavelkinde; but these are customes, which may be in cities or boroughes. [d] Also, if lands be within a mannor fee or seigniory, the same by the custome of the mannor fee or seigniory may be devisable, or of the nature of gavelkinde or borough *English*. [*] But an upland towne may alledge

(Doct. Plac. 104. 5 Co. 84. a.)
[*] 44 E. 3. 33. 40 Ass. 4. 27. 41. 21 E. 4. 54. 43 E. 3. 32.
[d] 21 E. 4. 53. 54. (6 Co. 59. b.)
[*] 21 E. 454. 15 E. 4. 29. 11 H. 7. 14. 44 E. 3. 18. 21. H. 7. 40.

† *This reference seems misplaced, as the note was probably meant to refer to the second paragraph of the Commentary on sect. 165, ending with the words,* "without lawful interruption."

(1) Another thing essential to a good custom is, that it be *reasonable*; which doctrine together with the other *general* rules concerning customs, is well explained and applied in the famous Irish case of *Tanistry* reported by sir John Davies. See Dav. 31. b.—[Note 131.]

alledge a custome to have a way to their church, or to make by-laws for the reparations of the church, the well ordering of the commons, and such like things. And it is to be observed, that in special cases, a custome may be [e] alledged within a hamlet, a towne, a burgh, a city, a mannor, an honor, an hundred, and a county; but a custome cannot be alledged generally within the kingdome of *England;* for that is the common law (2).

[e] Bract. lib. 4. 271. 34 E. 1. Detinue, 60. 17 E. 2. Detinue, 58. 3 E. 3. Det. 156. 30 E. 3. 25.

"*The youngest son shall inherit.*" And yet by some customes the youngest *brother* shall inherit; for *consuetudo loci est observanda* (3).

39 E. 3. 6. 9. 10. 31 E. 3. Render, 6. 17 E. 3. 27. 21 E. 4. 28. 22 E. 4. 8. 7 E. 3. 51. 30 E. 3. 23. 34 H. 8. Dier, 54 F. N. B. 122. 5 E. 3. Tresp. 13. Vid. Glanvil. lib. 7 ca. 3. 9.

"*All the tenements.*" Either in fee simple, fee taile, or any other inheritance. If lands of the nature of borough *English* be letten to a man and his heires during the life of *I. S.* and the lessee dyeth, the youngest sonne shall enjoy it (4).

"*Borough* English:" So called, because this custome was first (as some hold) in *England* (5).

Sect.

---

(2) This doctrine, about the restriction of customes to places of a particular denomination, will appear more satisfactory, by considering the reason of having some restraint, and the nature of that which lord Coke points out as the established one. The policy of some restraint is founded on the uncertainty and confusion which would ensue from an infinite diversity of customs, if every place, however small and inconsiderable, should be allowed to set up special customs in direct opposition to the general custom of the realm. On this principle the privilege of having *special* customs, derogating from the common law, is in general denied to *inferior* places, such as *upland towns*, not being either *cities* or *boroughs*, and *hamlets;* though it is allowed to *larger* or more important districts, such as *counties, manors, hundreds, honors, cities*, and *boroughs*. The *special* cases, hinted at by lord Coke as an exception to this restraint, seem to be those, in which the custom tends to advance some right recognized by the common law. Thus a town's having a church, being a right at common law, a custom for a way to or repairing the church operates, by rendering the exercise of that right more effectual. See Robins. Gavelk. 32, and 225. However, the case of dower by custom, mentioned by lord Coke in the Chapter on Dower, seems to be an instance within the exception, without being within the reason of it. But of this example lord Coke writes doubtfully; for, after inferring from the text of Littleton, that customary dower may be within a *town*. he observes, that it is safer to allege it within a *manor*. See ante 33. b.—[2 Term Rep. 753.]—[Note 132.]

(3) But the extension of Borough English to the *collateral* line must be specially pleaded. See Robins. on Gavelk. 38. 43. 93, and in the Appendix. —[Note 133.]

(4) See acc. as to estates *tail* in Gavelkind land, though expressly limited to the heirs male of the body at common law, Dy. 179. b. See also ante fol. 10. a. note 3. But as Borough English may be *extended* by special custome, so may it be *restrained;* and therefore the customary descent may be confined to *fee simple*. See Appendix to Robins. Gavelk. and March 54, there cited.—[Note 134.]

(5) See as to the denomination of Borough English and the subject in general, Append. to Robins. Gavelk.

Sect. 166.

ALSO, in some boroughes, by custome, the wife shall have for her dower all the tenements which were her husband's.

AND this is called frank banke, *francus bancus. Consuetudo est in partibus illis, quòd uxores maritorum defunctorum habeant francum bancum suum de terris sockmannorum tenent' nomine dotis.* Bract. lib. 4. Tract. 6. ca. 13. F. N. B. 150. O. Pl. Com. 413. (Ante 33. b.)

[111. a.] ☞ *"Which were her husbands, &c."* Here is implyed by (*&c.*) that in some places the wife shall have the moiety of the lands of her husband, so long as she lives unmarried; as in gavelkinde. And of lands in gavelkinde a man shall be tenant by the curtesie without having of any issue (1). In some cases the widow shall have the whole, or halfe, *dum sola et casta vixerit*, and the like. 10 E. 3. Aide. 129. Ante 30. a.

Sect. 167.

ALSO, in some boroughes by the custome, a man may devise by his testament his lands and tenements, which he hath in fee simple within the same borough at the time of his death; and by force of such devise, he to whome such devise is made, after the death of the devisor, may enter into the testaments so to him devised, to have and to hold to him, after the form and effect of the devise, without any liverie of seisin thereof to be made to him, &c. (4)

"DEVISE." Deviser: This is a *French* word, and signifieth *sermocinari* to speake, for *testamentum est testatio mentis, et index animo sermo* (2). So as *to devise by his testament* is to speake by his testament, what his minde is to have done after his decease. (5 Co. 73. b.)

"By his testament." Testamentum est [*m*] *duplex.* 1. *In scriptis.* 2. *Nuncupativum, seu sine scriptis.* And in some cities and boroughs, lands may [*n*] passe as chattels by will nuncupative or paroll without writing (3). *Revera* [*o*] *terminatum est,* [*m*] Vide Sect. 58. [*n*] Britton, fo. 164. 212. b. [*o*] Bract. lib. 4. fol. 272. Fleta, lib. 5. cap. 5. & lib. 2. cap. 50.

quòd

---

(1) Accord. ante 30. a. All the differences between curtesy and dower of gavelkind land, and the same estates at common law, are minutely explained and commented upon in Mr. Robinson's book on Gavelkind. See page 155, and 159.—[Note 135.]

(4) The *&c.* is not in L. and M.

(2) See ante fol. 110. a. note 1.

(3) But now by the 29 Cha. 2. c. 3, a will of *lands* devisable by *custom* is not good, unless it is in writing, and signed and attested in the same manner as a will of lands devisable by *statute.* See post. 111. b. *Nuncupative* wills of *personalty,* except

quòd potest legari, ut catallum, tam hæreditas, quàm perquisitum, per barones London' et burgenses Oxon. Ideo verum est, quòd in burgis non jacet assisa mortis antecessoris. But in law most commonly *ultima voluntas in scriptis* is used, where lands or tenements are devised, and *testamentum*, when it concerneth chattels.

4 E. 3. 53. 7 H. 6. 1. 14 H. 8. 5. 22 Ass. 78.

"His lands or tenements." And by the same custome he may devise a rent out of the same lands and tenements (5).

Abbr. Ass. 113. b.

4 E. 2. Mort-danc. 39. 47 E. 3. 17. F. N. B. 196. 21 H. 6. 38. a. 7 E. 2. tit. Mort-danc.

"Which he hath in fee simple." For lands in taile are not devisable by will; and therefore he in this place necessarily added (*which he hath in fee simple*) and purposely omitted the same in the clause concerning borough *English*; because there an estate taile is included.

F. N. B. 199. Regist. in ex gravi Querela. (10 Co. 46.)

"May enter." Note, the custome of a city or borough concerning the devise of lands is, *quòd liceat unicuique civi sive burgensi, &c. ejusdem civitatis sive burgi tenementa sua in eâdem civitate sive burgo in testamento suo in ultimâ voluntate suâ, tanquam catalla sua, legare cuicunque voluerit, &c.* [p] Now if a man deviseth, either by speciall name or generally, goods or chattels reall or personall, and dyeth, the devisee cannot take them without the assent of the executors (6). But when a man is seised of lands in fee, and deviseth the same in fee, in taile, for life, or for yeares, the devisee shall enter; for in that case the executors have no meddling therewith. And in the case of a devise by will of lands, whereof the devisor is seised in fee, the freehold or interest in law is in [q] the devisee before he doth enter and in that case nothing [r] (having regard to the estate or interest devised) descendeth to the heire. But if the heire of the devisor entreth and holdeth the devisee out, he may either enter as *Littleton* here saith, or have his writ called *ex gravi querelâ*; and this writ (without any particular usage) is incident to the custome to devise; for otherwiee, if a descent were cast before the devisee did enter, the devisee should have no remedy. After an actuall possession this writ lyeth not; for then the devisee may have his ordinary remedy by the common law.

[p] 2 H. 6. 16. 27. H. 6. 8. 2 E. 4. 13. 21 E. 4. 21. 4 H. 7. 16.

[q] 4 Mar. Br. tit. Devise, 49. [r] Regist. fol. 244. 39 Ass. pl. 6. 3 E. 3. Devise, 12. 29 Ass. 31. 34 E. 3. tit. Formedon, pl. postr. 30 H. 8. Devise, 28. F. N. B. 198, 199, &c.

Britton, fol. 212. b. (Post. 240. b. Cro. Cha. 201. 1 Sid. 191.)

And

---

except those of soldiers in actual service and mariners at sea, are also newly regulated by the same statute.—[Note 136.]

(5) But it was formerly much controverted, whether a rent *charge in esse*, issuing out of such lands, and having commenced *within time of memory*, was within the custom of devising; and it was not settled to be so till the case of Randal and Jenkins in the time of lord Hale. See 1 Mod. 112, and Robins. on Gavelk. 79 to 84. As to rents *service*, they of course followed the nature of the reversion or seigniory, to which they were incident; nor was there any doubt as to the custom's extending to *other* rents, if they had existed *immemorially*.—[Note 137.]

(6) Acc. Perk. sect. 488. 570. and 572 to 576. The other authorities relative to this doctrine will be found in Vin. Abr. *Devise*, A. a. and Com. Dig. *Administration*, C. 5.

[111. b.] ☞ And well said *Littleton*, that lands and tenements were devisable in burghes by custome; for that [s] at the common law no lands or tenements were devisable by any last will and testament, (1) nor ought to be transferred

[s] 27 H. 8. cap. 10. Britton, fol. 212. 78. b. 164.

Vide before in this Sect. 32 H. 8. cap. 1. 34 H. 8. c. 5.

from

(1) The *testamentary* power over *land* was certainly in use among our Anglo-Saxon and Danish ancestors; though it seems to have been rather adopted from the remnant of the Roman laws and customs they found here, than brought from their own country: for as Tacitus, writing of the ancient Germans, says, *successores sui cuique liberi et nullum testamentum.* Spelm. Posthum. 21. 127. After the Norman Conquest the power of devising land ceased, except as to *socage* lands in some particular places, such as cities and boroughs, in which it was still preserved; and also except as to *terms for years or chattel interests* in land, which, on account of their original imbecility and insignificance, were deemed personalty, and as such were ever disposable by will. This limitation of the testamentary power proceeded, partly from the solemn form of transferring land by livery of seisin introduced at the Conquest, which could not be complied with in the case of a last will; partly from a jealousy of deathbed dispositions; but principally from the general restraint of alienation incident to the rigours of the feudal system, as it was *established* or at least *perfected* by the *first William.* See Wright's Ten. 172. In the reign of Edward the first, the statute of *Quia emptores* removed in great measure this latter bar to the exercise of testamentary power: that is, in respect to all *freeholders*, except the king's tenants *in capite.* But the two former obstructions still continued to operate; though indeed this was in *name* and *appearance* only; for soon after the statute of *Quiæ emptores* feoffments to *uses* came into fashion, and last wills were enforced in Chancery as good declarations of the *use;* and thus through the *medium* of *uses* the power of devising was continually exercised in *effect* and *reality.* But at length this practice was checked, not *accidentally*, but *designedly*, by the 27 Hen. 8, which, by transferring the *possession* or *legal estate* to the use, *necessarily* and *compulsively* consolidated them into one, and so had the effect of wholly destroying all distinction between them, till the means to evade the statute, and, by a very strained construction, to make its operation dependant on the intention of parties, were invented. However, the bent of the times was so strong in favour of every kind of alienation, that the legislature, in a few years after having interposed to restrain an *indirect* mode of passing land by last wills, expressly made it devisable. This great change of the common law was effected by the statutes of 32 & 34 Hen. 8, which, taken together, gave the power of devising to all having estates in fee simple, except in *join-tenancy*, over the *whole* of their *socage* land, and over *two-thirds* of their lands holden by *knight's service.* The operation of these statutes was further extended by the conversion of *knight's service* into *socage* in the 12 Cha. 2. But still *copyhold* lands, and also, as the best opinion seems to have been, estates *pur autre vie* in *freehold* lands, remained undevisable. On the one hand, they were not devisable at *common law;* because they came within the description of *real* estate. On the other hand, they, or at least the former, are not within the statutes of Hen. 8, these requiring, that the tenure should be *socage*, which a *copyhold* is not; and that the party should have an estate in *fee simple*, which is more than a *tenant pur autrie vie* can be said to have. See as to *copyhold* lands 2 Ro. Rep. 383, and as to estates *pur autre vie* in freehold lands Cro. Eliz. 804. Mo. 625. 1 Saund. 261. 1 Salk. 619. This defect of provision in the statutes of wills is now supplied as to estates *pur autre vie* by the 29 Cha. 2. c. 8, which makes them devisable in the same manner as estates in fee simple. But no provision is yet made in respect to *copyhold* estates;* and therefore the power of devising

* *The 55 Geo. 3. c. 192, seems to make disposition by will of copyhold estates effectual without previous surrender.*

from one to another, but by solemne livery of seisin, matter of record, or sufficient writing (2); but as *Littleton* here saith, that by certaine private customs in some burghes they are devisable. But now since *Littleton* wrote, by the statutes of 32 & 34 *H.* 8, lands and tenements are generally devisable (3) by the last will in writing of the tenant in fee simple, whereby the ancient [*t*] common law is altered, whereupon many difficult questions, and most commonly diaherison of heires (when the devisors are pinched by the messengers of death) doe arise and happen. But [*u*] these statutes take not away the custome to devise, (4) whereof *Littleton*

[*t*] Vide 3 Co. 25, &c. in Butler and Baker's case. 6 Co. 16. & 76. 8 Co. 84, 85. 9 Co. 133. 10 Co. 82, 83, 84. 11 Co. 24. 1 Co. 25. a.

[*u*] Dier, 4 & 5 Phil. & Mar. 155. an. 6 Eliz. Dalison. Pasch. 29 Eliz. betweene Barber and his wife, plaintife, and William Long, defendant, in a writ of partition. Bendloe's adjudged. (9 Co. 133.)

speaketh:

---

devising is now indirectly exercised over these by an application of the doctrine of uses, similar to that which was anciently resorted to in respect to freehold lands; for the practice is to surrender to the use of the owner's last will; and on this surrender the will operates as a declaration of the use, and not as a devise of the land itself. See 2 Ro. Rep. 383. 2 Atk. 37. Gilb. on Uses, 36. 1 Ves. 225. 2 P. Wms. 258. From this deduction it appears, that the *testamentary* power is *now* exercisable, either *directly* or *indirectly*, over land of every tenure now in use, and also every sort of interest in land, which, not being fettered with intails, can be transferred by alienation taking effect in the owner's lifetime.—[Note 138.]

(2) See fol. 111. b. note 1.

(3) But a statute made since lord Coke's time, requires a number of forms, besides *writing*, in a will of lands or tenements devisable by the *statute of wills;* for by the statute against frauds and perjuries a will of such property is void, unless it is *signed* by the testator, or by some person for him in his presence and by his direction, and is also *attested* and *subscribed* in his presence by three witnesses. See 29 Cha. 2. c. 3. Also by the last-mentioned statute the same forms are required, as well in devises by *custom* as in those of estates *pur autre vie*. But these regulations do not extend to *copyhold* estates and *terms for years;* the statute of frauds and perjuries, so far as it regulates devises of land, being expressly confined to the three former kinds of devises. As to *copyholds*, a devise of them operates only as a declaration of uses on the surrender to the use of the will; and therefore if the form required by the surrender, which is usually nothing more than a testamentary declaration in writing, is observed, it is sufficient without any witness; and even a *nuncupative* will of copyholds was an effectual declaration of the uses, where the surrender was silent as to the form, till the 29 Cha. 2, required all declarations of trusts to be in *writing*. See 2 Atk. 37, and Barnard. Ch. Rep. 9. In respect to *terms for years*, they, falling within the description of personal estate, are disposable by will accordingly. But this must be understood with some distinction. Thus if they are terms, not in *gross*, but vested in trustees *to attend the inheritance*, they so follow the nature of the latter, that if the owner devises the land *generally* by a will not so attested as to pass the inheritance, not even the *trust* of the term will pass. See 2 P. Wms. 236. Also as to terms in *gross*, though a testator being possessed of such may *transmit* them by the same unsolemn kind of will as other personalty, yet he cannot *create* them by will, without observing all the forms essential to a devise of real estate; because the interest, in right of which the testator creates the term, is *real* estate, and creating the term is a *partial* devise of it. Besides appointing new forms of executing wills of real estate, the 29 of Cha. 2, prescribes how devises shall be revoked.—[Note 139.]

(4) Whilst the power of devising depended wholly on the statutes of Henry the eighth, it was frequently of importance to resort to the custom of devising, as being most beneficial for the devisee. The *power by custom* might be *larger* than

speaketh: for though lands devisable by custome be holden by knights service, yet may the owner devise the whole land by force of the custome, and that shall stand good against the heire for the whole. But the devise of lands holden by knights service by force of the statutes is utterly void for a third, and the same shall descend to the heire. If he hath any lands holden by knights service *in capite*, and lands in socage, he can devise but two parts of the whole; but if he hold lands by knights service of the king, and not *in capite**, or of a meane lord, and hath also lands in socage, he may devise two parts of his land holden by knights service, and all his socage lands. If he holds any land of the king *in capite*, and by act executed in his life-time he conveyeth any part of his lands to the use of his wife or of his children, or payment of his debts, though it be with power of revocation, he can devise by his will [x] no more, but to make up the land so conveyed two parts of the whole. And if the lands so conveyed amount to two parts or more, then he can devise nothing by his will. But if he hath land onely that is holden in socage, then he may devise by his will all his socage land; so as it is apparent, that the benefit of the lords was more carefully provided for, than the good of the heire.

[x] 6 Co. 17, 18, sir Edward Clere's case. 3 Co. 34. b. Butler and Baker's case.

But if a man holding some land of the king by knights service *in capite*, convey two parts of his land to the use of his wife for life, now (as hath been said) he can devise no part of the residue, but yet he may by his will devise the reversion of the two parts so conveyed to his wife: for the intention of the act is to give power to dispose of two parts intirely.

10 Co. 80, 81. Leon. Lovey's case.

Leon. Lovey's case, and Butler & Baker's case, ubi supra.

If the devisor leave a full third part of the land immediately to descend in fee simple or in taile, he may devise the other two parts in fee simple. If a third part be not left, it shall be made up according to the act. But hereditaments, that are not of any yearely value, as *bona et catalla felonum et fugitivorum*, waifes, estrayes, and the like, can neither be left to descend for any part of the third part, or devised as part of the two parts. But yet if such

* *See ante fol.* 108. *a. n.* 3, *where Mr. Hargrave points out the error of considering a tenure of the king* ut de honore *as not a tenure* in capite.

---

than the *statutory power;* the former sometimes enabling to devise the *whole*, where the latter could only be exercised over *two parts*. 2 Sid. 153. There was also an essential difference between the two powers in the *mode of execution;* for a will in *writing* was conceived to be necessary to a devise under the *statutes*, but a *nuncupative* will might be sufficient under the *custom*, 2 Sid. 154. But these differences do not now subsist any longer. As on the one hand the 12 of Cha. 2, by communicating to all freehold lands the qualities of the land by *common socage*, has rendered the power of devising the *whole* under the statutes of Henry the eighth *universal;* so on the other hand the 29 of Cha. 2, against frauds and perjuries, requires the same solemnities of writing, signing, and attestation to a devise by custom, as to one under the statutes. See ante fol. 111. b. note 1, and 111. a. note 3. The two powers of devising being thus assimilated, and made for the most part commensurate, it can *seldom* happen, that it should be necessary to call the power by *custom* in aid; though it is *possible*, as where the custom enables an infant of fourteen, or a feme covert, neither of which is capable of devising under the statutes. As to the *infant*, see 37 Hen. 6. 5. Perk. sect. 504. 2 And. 12. 5 Co. 84; and as to the *feme covert*, 5 Com. Dig. 14, where it is said, that by the custom of London she may devise to her husband, but without citing any authority.—[Note 140.

such franchises of uncertaine value be holden of the king *in capite*, they shall restraine the devise of all his lands, and make it void for a third part. So it is if a man hath a reversion expectant upon an estate taile dry and fruitless holden of the king by knights service *in capite*, yet that shall restraine him to devise but two parts of his lands only. And where the statute speaks of a remainder, it is to be intended only of such a remainder as may draw ward and marriage by the common law. As if a reversion upon a state for life be granted to one for life, the remainder in fee, during the life of the grantee for life it is not within the statute; but if he dyeth, this is such a remainder as is within the statute, although it be dry and fruitless. If a gift in taile or a lease for life be made, the remainder in fee, this remainder in fee is not within the statute. But if a man hath lands holden by knights service *in capite* in possession, reversion, or remainder, and is also seised of socage land, and devise by his will all his lands, and after he selleth away the *capite* land, or that land is recovered from him, the will is good for the whole socage land. The valuables both of the third part and the two parts of the lands shall be taken as they happen to be at the time of the death of the devisor; for then his will takes effect.

(1 Sid. 56.) Loon. Lovey's case, ubi supra, fol. 81.

He that holds by knights service in chiefe, deviseth by his will a rent, common, or other profits as shall amount to the value of two parts out of all his lands: this rent issueth only out of the two parts, and the third part is free of it. And if he hath lands holden by knights service, and not *in capite*, he may charge two parts of the knights service land as is aforesaid, and all his socage land, &c. And if he hath onely socage land, he may by his will charge it at his pleasure, so as the king's and lord's third part is free, and the heire's two parts charged; and this is onely by force of the statute of 34 H. 8.

3 Co. 84, 85, sir Richard Pexhall's case. 3 Co. 33. Butler and Baker's case.

6 Co. 17, 18, in Sir Edward Clere's case. (8 Co. 173. Post. 271. Cro. Cha. 38.)

If a man make a feoffment in fee of his lands holden by knights service to the use of such person and persons, and of such estate and estates, &c. as he shall appoint by his will, in this case, by operation of law the use and state vests in the feoffor, and he is seised in a qualified fee. In this case, if the feoffor limit estates by his will, by force, and according to his power, there the uses and estates growing out of the feoffment are good for the whole, and the last will is but directory (5). But in that case, if the feoffor had devised the land (as owner thereof) without any reference to the feoffment and power thereby given, then taking effect by the will, it is void for a third part. But if he had formerly conveyed two parts to the use of his wife, &c. and after devised the residue by his will without any reference to his power by the feoffment, yet this will shall enure to declare the use upon the feoffment, because he had no power as owner of the land to devise any part of it (1). But if the feoffment had been made to the use of his last will, although

1 Vent. 194. 4 Ves. 637. 7 T. R. 146. 1 B. & P. 192. 2 Ves. 294.

[112. a.]

(5) Adjudged acc. in Mytton and Lutwich, W. Jo. 7.

(1) This was the point adjudged in sir Edward Clere's case; and though, as the *whole* of the land is now devisable, the doctrine of that case is no longer of consequence in respect to the extent and exercise of the power of devising, yet it may be material for other purposes; for it comprehends a *general* rule, settling how an act shall operate, where it may take effect in two ways, that is, either as the execution of a power derived from *interest*, or as the execution of

although he deviseth the land with reference to the feoffment, yet it taketh effect only by the will, and not by the feoffment (2). (Mo. 280.) All which and many other points of intricate and abstruse learning you shall more largely read in my Reports.

"*Without any liverie of seisin to be made to him, &c.*" For in his life time livery of seisin could not be made, because his will is ambulatorie till his death, and no estate passeth during his life; neither can livery be made after his decease, for then it cometh too late. 40 Ass. 38.

Here (*&c*) (3) implyeth, that the devise is good without any attornement of any lessee or tenant.

Sect. 168.

ALSO, though a man may not grant, nor give, his tenements to his wife during the coverture, for that his wife and he be but one person in the law; yet by such custome he may devise by his testament his tenements to his wife, to have and to hold to her in fee simple, or in fee taile, or for tearme of life, or yeares, for that such devise taketh no effect but after the death of the devisor. And if a man at divers times makes divers testaments, and divers devises, &c. yet the last devise and will made by him shall stand, and the others are voyd (5).

"*A MAN may not grant, nor give, his tenements to his wife, &c.*" This opinion is [*a*] cleere, for by no conveyance at the common law a man could during the coverture, either in possession, reversion, or remainder, limit an estate to his wife. But a man may by his deed covenant with others to stand seised to the use of his wife, or make a feoffment or other conveyance to the use of his wife; and now the state is executed to such uses by the statute [*b*] of 27 *H.* 8. for an use is but a trust and confidence, which by such a mean might be limited by the husband to the wife. But a man cannot covenant with his wife to stand seised to her use; because he cannot covenant with her, for the reason that *Littleton* here yieldeth (4). [*a*] 4 H. 7. [*b*] 27 H. 8. cap. 10. (Plowd. 111. Dy. 106. a. 2 Ro. Abr. 788.)

"*During*

---

of a power, not arising from *interest*, but *specially reserved*. In the great case of *Commendams* the doctrine is well explained by lord Hobart, and finely applied. Hob. 160.—[Note 141.]

(2) The distinction here made, between a feoffment *to the use of a last will*, and one *to such uses as the feoffor should appoint by last will*, seems extremely subtle. However, lord Coke reports it as adopted by the judges in sir Edward Clere's case; and, according to Moore, the same point was adjudged in Battey and Trevilian. Mo. 278. But then as to the former of these cases, the opinion on this point must have been extra-judicial, the feoffment having been to *such uses as should be appointed by will*, and not *to the use of the will itself;* and as to the latter case, it went off finally on another point. The reasoning in support of the distinction will be found post. 271. b. and more at large in Mo. 516.—[Note 142.]

(3) See note 4 of fol. 111. a.

(4) The word *and the others are voyd* are not in L. and M.—Roh.—nor P.

(5) See further on this subject ante note 1, fol. 3. a. [See also, 3 Atk. 72. Law Uses & T. 53. 5 Term. Rep. 381.]

"During the coverture." That is, during the continuance of the marriage. For to cover in *English* is *tegere* in *Latine*, and is so called, for that the wife is *sub potestate viri*, and she is disabled to contract with any without the consent of the husband.

[c] Bracton, lib. 2. c. 15. [c] *Omnia, quæ sunt uxoris, sunt ipsius viri. Non habet uxor potestatem sui, sed vir.*

"One person in the law." *Vir et uxor sunt quasi unica persona, quia caro una, et sanguis unus. Res licèt sit propria uxoris, vir tamen ejus custos cùm sit caput mulieris.*

Idem, lib. 5. Tract. 5. cap. 25. (Hob. 2. Cro. Eliz. 129. Plowd. 414.) 10 H. 7. 20.

If *Cestuy que use* had devised that his wife should sell his land, and made her executrix and dyed, and she tooke another husband, she might sell the land to her husband, for she did it *in auter droit*, and her husband should be in by the devisor (6).

"By his testament." *Testamentum* is (as is said before) *testatio mentis* (7), and is favourably to be expounded according to the meaning of the testator. *In contractibus benigna, ☞ in testamentis benignior, in restitutionibus benignissima interpretatio facienda est.* [112. b.]

"To his wife." And *Littleton* himselfe yieldeth the reason; [d] because the devise doth not take effect till after the decease of the devisor. And in some [e] places the custome is generall, that

[d] 4 E. 2. tit. Devise, 23.

[e] 44 Ass. p. 36. 44 E. 3. 33. 18 E. 3. 8.

---

(6) Acc. post. 187. b. It is agreed in the books, that a wife may, without her husband, execute a *naked authority, whether given before or after coverture*, and though no special words are used to dispense with the disability of coverture: and in the case put by lord Coke the devise gives no more. The rule is the same, where both an *interest* and an authority pass to the wife, if the authority is *collateral* to and doth not flow from the interest; because then the two are as unconnected as if they were vested in different persons. See 1 Ves. 157. 1 Ch. Ca. 17. 2 Freem. 91. Wing. 156. Amb. 467. 473. 1 Ves. 23. 305. 3 Br. P. C. 308. 2 Ves. 191. Com. Rep. 496. Rep. temp. Finch, 346. As too a feme covert may without her husband convey lands in execution of a mere *power* or *authority*, so may she with equal effect in performance of a *condition*, where land is vested in her on condition to convey to others. W. Jo. 137, 138. The reason why in these instances the wife may convey without her husband, seems to be, that he can receive no prejudice from her acts, but a great one might arise to others, if his concurrence should be essential. Yet if the legal estate of lands is vested in a married woman on trust for another, some hold that she cannot pass it to *cestui que trust*, unless the husband joins; and therefore that if she makes feoffment or fine without him, the first will be void, the latter voidable. This was the opinion of judge Jones in the case of Daniel and Upley; but the judges Whitlock and Dodridge dissented from Jones, and held, that the husband's joining was not any more requisite than in the other cases. W. Jo. 137. Perhaps however Jones's opinion may be most conformable to strictly legal doctrine; and his thus distinguishing a *trust* from a *power* and a *condition* may be accounted for. Trusts are properly the subjects of consideration for the courts of equity only; and though in them the legal estate is made subservient to the trust, yet the courts of law take notice of trusts for very few purposes, nor will it be easy to find an authority for departing from any rule about the effect of legal conveyances, merely in respect of their being a performance of trusts. See further as to acts by a feme covert without her husband, under the titles *Baron* and *Feme, Executor* and *Administration*, in the Abridgments.—[Note 143.]

(7) See the note on this sort of etymology in fol. 110. a.

that he may devise any lands, &c. in some [*f*] places lands onely which the devisor purchased; in some places that he may devise any estate; in some places for life onely, &c.

[*f*] Britton, 264.

But albeit the last will doth not take effect until after his decease, yet if a feme covert be seised of lands in fee, she cannot devise the same to her husband, because at the making of her will she had no power, being *sub potestate viri*, to devise the same; and the law intendeth it should be done by coertion of her husband.

"*Divers testaments.*" For *voluntas testatoris est ambulatoria usque ad mortem* (as hath beene said before) and the latter will doth countermand the first. And it is truely sayd, that the first grant and the last will is of the greatest force.

2 H. 5. 8. 2 R. 3. 22. (Cro. Eliz. 9. Cro. Jam. 49. 290. 649.)

"*Divers devises, &c.*" Here by (*&c.*) is to be understood as well devises of chattels reall or personall, as of freehold and inheritance: also that in one will where there be divers devises of one thing, the last devise taketh place. *Cùm duo inter se pugnantia reperiuntur in testamento, ultimum ratum est* (1).

Sect. 169.

ALSO, by such custome a man may devise by his testament, that his executours may alien and sell the tenements that he hath in fee simple, for a certaine sum, to distribute for his soule (2). *In this case, though the devisor*

(1) There is a great contrariety in the books, on the effect of two inconsistent devises in the same will. Some hold with lord Coke that the second devise revokes the first. Plowd. 541. 3 Atk. 374. Others think, that both devises are void on account of the repugnancy. Ow. 84. But the opinion supported by the greatest number of authorities is, that the two devisees shall take in moieties. The authorities for and against lord Coke's opinion are well collected and arranged in a note in the English edition of Powden. See page 541.—Also amongst those who think that both devises shall operate, there is some difference as to the manner in which the two devisees ought to take. In some of the old books it is said generally that there shall be a join-tenancy. But according to the modern opinion, and, as it seems, the best, there will be a join-tenancy or a tenancy in common, according to the words used in limiting the two estates; by which we presume it is meant, that if the two estates given by the will have the unity or sameness of interest in point of quantity essential to a join-tenancy, the devisees shall be join-tenants, but otherwise shall be tenants in common. See 3 Atk. 493.—[Note 144.]

(2) The distribution here meant probably was giving money to the church to have masses for the testator's soul; a superstition very common in the time of Littleton, and then not inconsistent with any law. Afterwards indeed uses and trusts of land for such purposes were restrained by the 23 of Hen. 8. c. 10, commonly called the statute of *superstitious* uses, though not *wholly*, the statute allowing them if they were not appointed for more than twenty years, and without any limitation of time in the instance of cities and towns corporate having customs to devise in mortmain. But now we apprehend, that, independently of the statute of Henry the eighth, devises of this kind could not have effect; for either they would be void by the mortmain statutes, or, when not

devisor die seised of the tenements, and the tenements descend unto his heire; yet the executors, after the death of the testator, may sell the tenements so devised to them, and put out the heire, and thereof make a feoffment, alienation and estate by deed, or without deed, to them to whom the sale is made. And so may ye here see a case, where a man may make a lawful estate, and yet he hath nought in the tenements at the time of the estate made. And the cause is, for that the custome and usage is such (1). *For a custome, used upon a certaine reasonable cause, depriveth the common law* (Quia consuetudo, ex certâ causâ rationabili usitatâ, privat communem legem.)

"*THAT his executours may alien and sell his tenements.*" And that, which in *Littleton's* time a man might doe by custome, in some particular places, he may now doe by the statutes of 32 and 34 *H.* 8. generally.

32 H. 8. cap. 1.
34 H. 8. cap. 5.

"*The executors, after the death of the testator, may sell.*" Here it appeareth, that the executors having but a power, as *Littleton* putteth the case, to sell, they must all joyn in the sale. Then put the case, that one dies, it is regularly true, that being but a bare authoritie, the survivors cannot sell. But if a man deviseth his land to *A.* for terme of life, and that after his decease his lands shall be sold by his executors generally, (as *Littleton* here putteth his case) and make three or foure executors, and during the life of *A.* one of the executors dieth, and then *A.* dieth, the other two or three executors may sell, because the land could not be sold before, and the plurall number of his executors remaine. But if they had beene named by their names, as by *I. S. I. N. D.* and *I. G.* his executors, ☞ then in that case the survivors could not sell the same, because the words of the testator could not be satisfied; and I myself knew this case adjudged. [*] A speciall verdict was found, that *A.* was seised of certaine lands in fee, and devised the same in taile; and if the donee died without issue, that his said land should be sold by his sons in law, he in truth having five sons in law. One of his sons in law died in the life of the donee, and after the donee dyed without issue, and then the foure of the sonnes in law sold the land, and it was adjudged that the sale was good, because they were named generally by his sonnes in law, and the lands could not be sold by them all; and the words of the will in a benigne interpretation are satisfied in the plurall number, albeit that they had but a bare authority: but if they had been particularly named, it had been otherwise. But if a man deviseth lands to his executors to be sold, and maketh two executors, and the one dieth, yet the survivor may sell the land; because as the state, so the trust shall survive; and so note the diversity

49 E. 3. 16.
29 Ass. 17.
39 Ass. 17.
9 H. 6. 24.
15 H. 7. 12. 21.
14 H. 8. 6.
30 H. 8. tit. Devise, Br. 31.
2 Eliz. Dyer, 177. (6 Co. 16.
1 Ro. Abr. 328.
Mo. 61, 62. 147.
Cro. Cha. 382.)

[118. a.]

(1 Co. 173.)
[*] Hill. 26 El. inter Vincent & Lee in the King's Bench. (Cro. Eliz. 26.
1 Leon. 285.
Mo. 147.
5 Co. 68.
Cro. Cha. 382.
1 Ro. Abr. 328.)

39 Ass. p. 17.
4 Eliz. Dier, 210.
23 Eliz. Dier. 371. Pasch.
32 Eliz. Ro. 1307, in Communi Banco, and so resolved in Vincent's case. 1 Sid. 6. Post. 118. b. 236. a. 315. b.)

betweene

---

not within the reach of any of them, would be deemed superstitious by our courts of equity; which would therefore direct the money to be applied to some use really charitable, at the court's discretion; or, should the determined cases not be thought strong enough to warrant the exercise of a discretion so large, would consider the divisee as a trustee for such as would be entitled if there was no devise. See the cases referred to in Vin. Abr. *Charitable Uses*, D.—[Note 145.]

(1) *&c.* in L. and M.

betweene a bare trust, and a trust coupled with an interest. In both those cases the executors may [a] sell part of the land at one time, and part at another, as they may finde purchasers.

[a] 1 Co. 173. in Digges's case.

In *Littleton's* case admit that one executor had refused to sell, then, as the law stood when *Littleton* wrote, it was cleare that the others could not sell. But now by the statute [b] of 21 *H.* 8. it is provided, that where lands are willed to be sold by executors, that though part of them refuse, yet the residue may sell. And albeit the letter of the law extendeth only where executors have a power to sell, yet being a beneficiall law, it is by construction extended where lands are devised to executors to be sold. Yet in neither of those cases, albeit one refuse, can the other make sale to him that refused, because he is party and privy to the last will, and remains executor still. Mine advice to them that make such devises by will, to make it as certaine as they can, is, that the sale bee made by his executors, or the survivors or survivor of them, if his meaning be so, or by such or so many of them as take upon them the probate of his will, or the like. And it is better to give them an authority than an estate; unlesse his meaning be, they should take the profits of his lands in the meane time; and then it is necessary that he deviseth, that the meane profits till the sale shall be assets in their hands, for otherwise they shall not be so. But hereof thus much shall suffice (2). "*And*

[b] 21 H. 8. cap. 4.

(1 Leon. 60.) Tr. 27 H. 8. in the Common Place. Serjeant Bendloe's Report. (1 Rol. Abr. 329. 1 Leon, 87. 225.)

(2) What my lord Coke advances in this and the preceding folio, about the effect of a will devising that executors shall sell land, is open to a variety of observation.—He first supposes, that such a devise passes no *interest* or estate to the executors, but merely a *power* or *authority;* and thence he infers, that, like common naked authorities, it will not survive. 1 Br. Ch. Ca. 136. Pow. Dev. 303. Swin. 390. But these positions seem at least controvertible, having been expressly contradicted by decisions since lord Coke's time: and though both should be admitted to be true in point of *law*, they would not avail in a court of *equity;* as this jurisdiction, notwithstanding the extinction of the power at law, would compel its execution in favour of those for whose benefit the power was given. As to the power's not surviving for want of an interest, lord Coke himself, both here and in other places, concedes, that if one *devises lands to be sold by his executors*, an *interest* will pass. See post. 181. b. 236. a. Now such a devise so resembles *devising that executors shall sell the land*, as to give the distinction made between them the appearance of too curious and overstrained a refinement; such as rather consists in the formal arrangement of words, than of any thing substantial. But the subtlety of the distinction is not the only objection to it; lord Hale, whilst he was chief baron of the exchequer, referring to a case, in which it was adjudged against the distinction. Hardr. 419. However, it has been adopted in cases since the first publication of the Coke upon Littleton. Thus in the case of Lovell and Barnes, in the 12th of Charles the first, though the judges held that such a power of selling given to *two* executors survived, yet they disavowed founding themselves on the will's passing an interest. See W. Jo. 352, and Cro. Cha. 382. Nay, even in a case of much later date, lord chancellor King acted as if he deemed the distinction settled at law; for he directed the heir to join in a sale, in which his concurrence would otherwise have been unnecessary. See Yates and Compton, 2 P. Wms. 308. In respect to the operation of such a devise, considered as mere authority, the strict notion about *naked powers* is certainly with lord Coke; and some of the old books, besides those cited by him, very much favour its application to the case of executors. Dy. 119. ed. 1688, the case in marg. and Mo. 61. But there are some respectable

49 E. 3. 16.
38 Ass. 3.
39 Ass. 17.
13 E. 3. Devise, 3.
14 H. 8. 10.
15 H. 7. 12. b.
(9 Co. 77. a.)

"And thereof make a feoffment." For albeit the executors in this case have no estate or interest in the land, but only a bare and naked power, yet this feoffment amounteth to an alienation, to vest the land in the feoffee, as it appeareth here, and the feoffee shall be in by the devisor.

"By

---

respectable authorities the other way: for Perkins is of opinion, that the power of selling may be exercised by the surviving executor; and Brook infers the same doctrine to be the point adjudged in a case of Edward the third; and further, it was held accordingly, by three Judges in the reign of Charles the first, on a reference to them out of chancery. Perkins, sect. 550. Bro. Abr. *Devise*, 50. and the case of Lovell and Barnes, Cro. Cha. 382. W. Jo. 352. This *latter* opinion seems most likely to conform to the meaning of a will in cases of this sort; for it can scarcely be imagined, that a testator, when he intrusts his executors with a power of selling land, should mean to have those for whose benefit he directs the sale disappointed by the death of one of the persons invested with an authority, which the survivor is equally capable of executing. Perhaps too it may be possible to justify the opinion, by proving a power of selling thus given to executors to be something more than the case of a naked power. Where a naked power is vested in two or more *nominatim*, without any reference to an office in its nature liable to survivorship, as an executorship is, it without doubt would be a contradiction of the general rule to allow the power to survive. But where a power of selling is given to *executors*, or to persons *nominatim* in *that character*, it is not wholly irreconcilable with the rule to deem a surviving executor a person within the description; for by the death of one executor, the whole character of executors becomes vested in the survivor, and the power being annexed to the executors *ratione officii*, and the office itself surviving, why should not the power annexed to it also survive, as well as where it survives by reason of being coupled with an interest? This manner of accounting for the opinion, that a power of selling annexed to an executorship may survive, is only a conjecture, hazarded for the sake of reconciling a *particular* case with a *general* rule; the reasons which influenced those who adopted the opinion not appearing in any book we have seen. However, the conjecture is agreeable to the manner in which lord Hale, in a manuscript note on a Coke upon Littleton we have been favoured with, is represented to have considered the power as surviving when given to *two* executors, as in the case of Lovell and Barnes. The words of the note are these: *Hale, chief baron, says it is so, because they were to sell by reason* officii; *yet the law stands that authorities shall not survive; and perhaps it had been otherwise, if he had ordered his land to be sold by A. and B. not being named executors, and one of them had died, for that seems to be a personal trust.* The conjecture also receives great countenance from some books, in which it is said, that such a power of selling given to *executors* shall *pass* to their executors and administrators; for if an authority, not being coupled with an interest, becomes *transmissible* in the way of succession *in infinitum* till executed, by reason of its being given to executors, much more may it *survive* for a like reason. Kelw. 44. 2 Brownl. 194. If indeed the doctrine in the books we refer to is well founded, it will prove a power of selling land given to executors capable both of *transmission* and *survivorship*. But whether lord Coke's notion of the power not surviving, or the opposite one, most conforms to *strictness of law*, is not now of any great importance; as such a power, though extinct at *law*, would certainly be enforced in *equity*. This has long been the practice of our courts of equity; these rightly deeming the purpose for which the testator directs the money arising from the sale to be applied, to be the substantial part of the devise, and the persons named to execute the power of selling to be mere trustees; which brings the case within the general rule of equity,

"*By deed or without deed.*" And therefore if by the custome a man deviseth, that a reversion or any other thing that lyeth in grant shall be sold by the executors, they may sell the same without deed (3); for the vendee shall be in by the devisor, and not by the executors, as hath beene said. 19 H. 6. (1 Leon. 31.)

"*Consuetudo ex certâ causâ rationabili usitatâ privat communem legem.*" *Quia consuetudo contra rationem introducta potiùs usurpatio quàm consuetudo appellari debet. Consuetudo præscripta et legitima vincit legem.*

"*Privat communem legem.*" For no custome or prescription can take away the force of an act of parliament (4): and therefore *Littleton* materially speaketh here of the common law. 4 E. 4. 4. 11 H. 4. 7. 39 H. 6. 39. 7 H. 6. 1, 2.

9 H. 6. 56. 8 H. 7. 4. 8 Eliz. Dier, 247. (2 Roll. Abr. 266. 4 Inst. 274. 298. 303.)

Sect.

---

equity, that a trust shall never fail of execution for want of a trustee, and that if one is wanting the court shall execute the office. The relief is administered by considering the land, in whatever person vested, as bound by the *trust*, and compelling the heir, or other person having the legal estate, to perform it. There are many printed precedents of thus executing not only powers actually extinct at law, or supposed to be so, but also such as, in point of law, either for want of the will's naming by whom they should be executed, or because those named had died before the testator, never could exist or take effect. Some of these precedents are as early as the reign of Charles the first. See Locton and Locton, 2 Freem. 136, and 1 Cha. Cas. 179. Garfoot and Garfoot, 1 Cha. Cas. 35. Gwilliam and Rowel, Hardr. 204. Pitt and Pelham, 2 Freem. 134. 1 Cha. Rep. 283, and 1 Cha. Cas. 176. T. Jo. 25. 1 Lev. 304. See also Max. of Eq. 57, and Vin. Abr. *Devise*, Q. e. and S. e. Nor do the courts of equity appear ever to have confined this relief, as they certainly do many kinds of aid, to persons of particular and favoured descriptions, such as wife, children, or creditors; for though in some of the old cases, the persons relieved were of one or other of these descriptions, yet in others nearly of the same time the parties are not stated to have fallen within either of them; and we have not heard of any case, in which relief has been refused on that account. See Locton and Locton already cited, and the case of Tenant and Browne cited in 1 Cha. Cas. 180. The reason of not favouring particular persons in this instance will appear evident, when it is considered, that testamentary powers to sell are deemed to be *in the nature of trusts*, and trusts are executed in equity for *all* persons *indiscriminately*.—Lord Coke next takes for granted, that if there is a devise *to A. for life, and that after his decease the lands shall be sold by the testator's executors*, they cannot sell the *reversion*, but must wait till the death of the wife: and the case cited from Bro. Abr. *Devise*, pl. 1, countenances this opinion. But in one report judge Haughton argues, that the words *after the decease* of the tenant for life, mean only to mark the determination of his estate, *not to limit the time for sale*, and therefore, that a sale may be in his life-time; and in another, judge Clench expresses himself almost to the same purpose. 2 Bulst. 125. Godb. 46. There is also a case against lord Coke in 2 Leon. 220, and the point is doubted in Cro. Cha. 382*.—See further in respect to such devises, Vin. Abr. K. e. to S. e.—[Note 146.]

(3) The case cited in the margin from 19 H. 6. is in fo. 23.

(4) See 115. a. ante 81. b. [See also 1 Term R. 723. 3 Term. R. 271.]

* *But see Anon. Exchcq.* 1806, *cited in Mr. Sugden's Treatise of Powers, 3d ed. p.* 273.

Sect. 170.

AND note, that no custome is to bee allowed, but such custome, as hath bin used by title of prescription, that is to say, from time out of minde. But divers opinions have beene of time out of minde, &c. and of title of prescription, which is all one in the law. For some have said, that time out of mind should bee said from time of limitation in a writ of right; that is to say, from the time of king Richard *the first after the Conquest, as is given by the statute of* Westminster *the first, for that a writ of right is the most high writ in his nature, that may be. And by such a writ a man may recover his right of the possession of his ancestors of the most ancient time, that any man may by any writ by the law, &c. And in so much that it is given by the said estatute, that in a writ of right none shall be heard to demand of the seisin of his ancestors of longer time than of the time of king* Richard *aforesaid, therefore this is proved, that continuance of possession, or other customs and usages used after the same time* (puis le dit temps)*, is the title of prescription, &c. And this is certaine. And others have said, that well and truth it is, that seisin and continuance after† the limitation, &c. is a title of prescription* (puis le dit limitation (1) est un title de prescription), *as is aforesaid, and by the cause aforesaid. But they have sayd, that there is also another title of prescription, that was at the common law before any estatute of limitation of writs, &c. and that it was, where a custome, or usage, or other thing, hath beene used, for time whereof mind of man runneth not to the contrary. And they have said, that this is proved by the pleading, where a man will plead a title of prescription of custome.* (2). *Hee shall say, that such custome hath beene used from time whereof the memory of men runneth not to the contrary, that is as much as to say, when such a matter is pleaded, that no man then alive hath heard any proofe of the contrary; nor hath no knowledge to the contrary; and insomuch that such title of prescription was at the common law, and not put out by an estatute,* ergo, *it abideth as it was at the common law; and the rather, insomuch that the said limitation of a writ of right* (3) *is of so long time passed* (4). Ideo quære de hoc. *And many other customes and usages have such ancient boroughes.*

(4 Co. Luttrel's case. 9 Co. 57. 2 Roll. Abr. 265, 266. 1 Sid. 161. 1 Roll. Abr. 560. 566. Cro. Cha. 175.) (4 Co. 36.)

"*PRESCRIPTION.*" Prescription is a title taking his substance of use and time allowed by the law. *Præscriptio est titulus ex usu et tempore substantiam capiens ab authoritate legis.* In the common law [113. b.] a prescription, which is personal, is for the most part applyed to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath; or in bodies politique or corporate and their predecessors; for as a naturall body is said to have ancestors, so a body politique or corporate

* *The French word* pius *seems here to signify* from *or* ever since *and not* after *as lord Coke translates it. See Mr. Ritso's Intr. p.* 110, 111.

† *See the note above, and Mr. Ritso's Intr. ubi supra.*

(1) *&c.* in L. and M. and Roh.
(2) *&c.* in L. and M. and Roh.
(3) *&c.* in L. and M. and Roh.
(4) *&c.* in L. and M. and Roh.

corporate is said to have predecessors. And a custome, which is local, is alledged in no person, but layd within some manor or other place. As taking one example for many. *I. S.* seised of the mannor of *D.* in fee prescribeth thus: that *I. S.* his ancestors, and all those whose estate he hath in the sayd mannor, have time out of minde of man had and used to have common of pasture, &c. in such a place, &c. being the land of some other, &c. as pertaining to the sayd mannor. This properly we call a prescription. A custome is in this manner. A copyholder of the mannor of D. doth plead that within the same mannor, there is and hath beene such a custome time out of mind of man used, that all the copyholders of the said mannor have had and used to have common of pasture, &c. in such a wast of the lord, parcell of the said mannor, &c. where the person neither doth or can prescribe, but alledgeth the custome within the mannor. But both to customes and prescriptions, these two things are incidents inseparable, viz. possession or usage, and time. Possession must have three qualities: it must be long, continual, and peaceable; *longa, continua, et pacifica;* for it is said, *transferuntur dominia, sine titulo, et traditione, per usucaptionem, scil. per longam, continuam, et pacificam possessionem. Longa, i. e. per spatium temporis per legem definitum,* of which hereafter shall be spoken. *Continuam dico, ita quòd non sit legitimè interrupta.*

(6 Co. 60. a. 55. b. 66.) 12 E. 4. 1, 2. Mariæ, Br. Prescr. 100. 6 E. 6. Dy. 71. 14 E. 3. Bar. 277. 43 E. 3. 32. 7 H. 6. 26. 22 H. 6. 14. 16 E. 2. tit. Prescript. 53. 45 Ass. 8. 40 Ass. 27. 41. 21 E. 4. 53, 54. (9 Co. 57.)

Bract. fo. 51, 52.

[114. a.] ☞ *Pacificam dico, quia si contentiosa fuerit, idem erit quod priùs, si contentio fuerit justa. Ut si verus dominus, statim cùm intrusor vel disseisor ingressus fuerit seisinam, nitatur tales viribus repellere, et expellere, licet id quod inceperit perducere non possit ad effectum, dum tamen cùm defecerit diligens sit ad impetrandum et prosequendum. Longus usus nec per vim, nec clam, nec precariò, &c.*

Bract. fo. 222. b.

If a man prescribeth to have a rent, and likewise to take a distresse for the same, it cannot bee avoyded by pleading, that the rent hath beene always payd by cohersion, albeit it began by wrong.

13 E. 4. 6.

"*A title of prescription.*" Seeing that prescription maketh a title, it is to be seene; first, to what things a man may make a title by prescription without charter; and secondly, how it may be lost by interruption.

For the first, as to such franchises and liberties as cannot be seised as forfeited, before the cause of forfeiture appeare of record, no man can make a title by prescription, because that prescription being but an usage *in pais*, it cannot [*] extend to such things as cannot bee seised, nor had, without matter of record: as to the goods and chattels of traitors, felons, felons of themselves, fugitives, of those that be put in exigent, deodands, conusance of pleas, to make a corporation, to have a sanctuary, to make a ☞ coroner, &c. to make conservators of the peace, &c. (1).

(Dr. & Stud. 16. 5 Co. 72.) 21 H. 6. Prescript. 44. 21 E. 4. 6. 1 H. 7. 23. 9 H. 7. 11. 20. 7 H. 6. 45. 6 E. 3. 32. 42. 45 E. 3. 2. 2 E. 4. 26. (9 Co. 59. Doc. Plac. 103.

[114. b.]

2 Roll. Abr. 270.) [*] Fleta, lib. 1. cap. 25. Brit. f. 6, & 15. 44 Ass. p. 8. 49 E. 3. 3. Staunf. Pl. Cor. 21. 51. 5 Co. 109, 110. 9 Co. 29. (Post. 195. a. 2 Roll. Abr. 114. 265.) (2 Ro. Abr. 270. 9 Co. 29. Post. 195. a.)

[e] But

(1) See an observation on this doctrine against prescribing to make conservators of the peace, in 2 Hawk. Pl. C. b. 2. c. 8, s. 10. 27 H. 8, c. 4. s. 2.

[e] But to treasure trove, waifes, estraies, wrecke of sea, to hold pleas, courts of leets, hundreds, &c. infange thiefe, outfange thiefe, to have a parke, warren, royall fishes; as wales, sturgions, &c. fayres, markets, franke foldage, the keeping of a gaole, tolle, a corporation by prescription, and the like, a man may make a title by usage and prescription onely without any matter of record. [*] *Vide* Sect. 310, where a man shall make a title to lands by prescription.

[e] 22 E. 3. Coron. 241. 9 H. 7. 11. 20. 18 H. 6. Prescript. 45. 11 H. 4. 10. 21 H. 7. 33. 9 E. 4. 12. 39 E. 3. 35. 46 E. 3. 16. 11 H. 6. 25. F. N. B. 91. 1 H. 7. 24. Staunf. Pl. Cor. 38. 44 E. 3. 4. 22 E. 4. 43, 44. 3 E. 3. Brooke Prescrip. 57. 44 Ass. pl. [*] 8 H. 6. 16.

But it is to be observed, [f] that although a man cannot, as is aforesaid, prescribe in the said franchise to have *bona et catalla proditorum, felonum, &c.* yet may they and the like bee had obliquely, or by a meane by prescription; for a county palatine may be claimed by prescription, and by reason thereof to have *bona et catalla proditorum, felonum, &c.*

[f] 12 E. 4. 16. 32 H. 6. 25. 12 Eliz. Dier, 288, 289. 11 E. 3. tit. Issue, 40. (2 Ro. Abr. 271. 2 Inst. 19. Cro. Jam. 155, 156. 454. 15 E. 3. tit. Judgment, 133. 14 E. 3. ibid. 155.

As to the second, by what meanes a title by prescription, or custome, may be lost by interruption. It is to be knowne, that the title, being once gained by prescription or custome, cannot be lost by interruption of the possession for ten or twenty yeares, but by interruption in the right; as if man have had a rent or common by prescription, unity of possession of as high and perdurable estate is an interruption in the right.

In a writ of mesne the plaintife made his title by prescription, that the defendant and his ancestors had acquited the plaintife and his ancestors and the terre-tenant time out of minde, &c. the defendant took issue, that the defendant and his ancestors had not acquited the plaintife and his ancestors and the terre-tenant; and the jury gave a special verdict that the grandfather of the plaintife was enfeoffed by one *Agnes*, and that *Agnes* and her ancestors were acquitted by the ancestors of the defendant time out of minde before that time, since which time no acquitall had beene: and it was adjudged and affirmed in a writ of error, that the plaintife should recover his acquitall, for that there was once a title by prescription vested, which cannot be taken away by a wrongfull cesser to acquite of late time: and albeit the verdict had found against the letter of the issue, yet for that the substance of the issue was found, viz. a sufficient title by prescription, it was adjudged both by the court of common pleas, and in the writ of error by the court of king's bench for the plaintife; which is worthy of observation. So a *modus decimandi* was alleged [*] by prescription time out of mind for tithes of lambes; and thereupon issue joyned; and the jury found, that before twenty yeares then last past there was such a prescription, and that for these twenty yeares he had paid tithe lambe *in specie*. And it was objected, 1. That the issue was found against the plaintife, for that the prescription was generall for all the time of prescription, and twenty yeares fail thereof. 2. That the party by payment of tithes *in specie* had waived the prescription or custome. But it was adjudged for the plaintife in the prohibition; for albeit the *modus decimandi* had not bin paid by the space of twenty yeares, yet, the prescription being found, the substance of the issue is found for the plaintife. And if a man hath a common by prescription, and taketh a lease of the land for twenty yeares, whereby the common is suspended, after the yeares ended he may claime the common generally by prescription, for that the suspension

(2 Ro. Abr. 271. 278.)

[*] Mich. 43. & 44 Eliz. in a prohibition betweene Nowell pl. and Hicks vicar of Edmonton defendant in the King's Bench. (2 Co. Bishop of Winton's case. 6 Co. 69. 3 Co. 9. 2 Ro. Abr. 292.)

suspension was but to the possession and not to the right, and the inheritance of the common did alwayes remaine; and when a prescription or custome doth make a title of inheritance (as *Littleton* speaketh), the partie cannot alter or waive the same *in pais* (2).

"Time out of minde, &c. and of title of prescription, which is all one in law." So as the time prescribed or defined by law is, time whereof there is no memorie of man to the contrary. [e] *Omnis querela, et omnis actio injuriarum, limita infra certa tempora.*

(Dr. & Stud. 17. a.)

[e] Bracton, fol. 314.

"Time of limitation." Limitation, as it is taken in law, is a certaine time prescribed by statute, within the which the demandant in the action must prove himselfe or some of his ancestors to be seised.

(1 Ro. Abr. 685.)

"In a writ of right." In [f] ancient time the limitation in a writ of right was from the time of *H.* 1. whereof it was said *à tempore regis Henrici senioris.* After that by the statute of [g] *Merton* the limitation was from the time of *H.* 2. and by the statute [h] of *W.* 1. the limitation was from the time of *R.* 1. And this is that limitation, that *Littleton* here speaketh of. Whereof in the *Mirror* in reproofe of the law it is thus said: [i] *Abusion est de counter cy longe temps dount nul ne poet testmoigner de vieu et de oyer, que ne dure my generalment ouster* 40 *ans.*

[f] Regist. 158. Bract. fo. 373. 5 Ass. p. 2. 34 H. 8. 40.
[g] Stat. de Mert. 20 H. 3. ca. 8.
[h] West. 1. an. 3 E. 1. c. 8. Vide W. 2. 13 E. 1. ca. 46.
[i] Mirror, ca. 5. sect. 1.

[115. a.] ☞ Time of limitation is twofold: first, in writs; and that is by divers acts of parliament: secondly, to make a title to any inheritance; and that (as *Littleton* here saith) is by the common law.

Glanvil. li. 13. ca. 3. & 34. Mirror, ca. 5. sect. 4. Fleta, l. 2. c. 38. & l. 4. c. 5. Britton. fol. 78. 82. Bracton, l. 2. f. 52. and f. 179. 253. 373.

Limitation of times in writs is provided by the said statute of *Merton* (1), and after by the said statute of *W.* 1. which *Littleton* here citeth, and which was in force when he wrote, but is since altered by a profitable and necessary statute [k] made *anno* 32 *H.* 8. and by that act, the former limitation of time in a writ of right is changed and reduced to threescore yeares next before the *teste* of the writ; and so of other actions, as by the statute at large appeareth. But it is to be observed, that this act of 32 *H.* 8. extendeth [l] not to a *formedon* in the *discender* (2),

[k] 32 H. 8. cap. 2. See the second part of the Institutes. Merton, c. 8.
[l] Mich. 10 & 11 Eliz. Dyer, 278. Fitzwilliam's case.

nor

(2) It is observable, that Mr. serjeant Rolle has incorporated most of the preceding passages relative to prescription into his Abridgment. See Ro. Abr. tit. *Prescription*, and the additional matter in Vin. Abr. same title, R. S. T.

(1) See cap. 39, and lord Coke's Commentary upon it in 2 Inst. 238.

(2) The statute mentions formedons in *remainder* and *reverter*, and limits them to fifty years; but omits formedon in *descender*. Nor is the latter deemed to be comprehended within the clause of the statute relative to writs of *right;* for a formedon is not in the strict sense a writ of right; though it certainly is in the nature of one, the *mere right* being equally triable in both. Accordingly, in the case cited by lord Coke from Dyer, three judges held, that a formedon in *descender* was not within the statute. The other judge doubted. See also the additional case in the margin of Dy. ed. 1688, fol. 278. a. But as the 21 Jam. 1. c. 16,

nor to the services of escuage homage and fealty (3), for a man may live above the time limited by the act. Neither doth it extend to any other service, which by common possibility may not happen or become due within sixty yeares, as to cover the hall of the lord, or to attend on his lord when he goeth to warre, or the like; nor where the seisin is not traversable or issuable (4). Neither doth it extend to a rent created by deed (5), nor to a rent reserved upon any particular estate; for [*m*] in the one case the deed is the title, and in the other the reservation; nor to any writ of right of advowson, *quare impedit*, or assise of *darreine presentment* (for there was a parson of one of my churches that had been incumbent there above fifty yeares, and dyed but lately) or any writ of right of ward, or ravishment of ward, &c. but they are left as they were before the statute of 32 *H.* 8. (6). But hereof thus much for the better understanding of *Littleton* shall suffice (7).

4 Co. 10, & 11. Bevel's case.
[m] 8 Co. 65. sir William Foster's case.
1 Mar. Parliam. 2. cap. 5.
Vide 17 E. 3. 11.
Pl. Com. 371. b.

"*From*

---

c. 16, requires formedons of every kind to be brought within twenty years after the descent of the title, this defect of the former statute is now of no consequence.—[Note 148.]

(3) Acc. 3 Lev. 21.

(4) The reason is plainly this. The limitation in the 32d of Henry the eighth is wholly referrible to seisin; the statute requiring a seisin within a certain time, according to the nature of the writ; that is, sixty years for writs of *right*, fifty for *possessory* writs founded on an *ancestor's* possession, thirty for *possessory* writs founded on the party's own possession, and so on. Now the limitation being thus dated from a seisin, it would be absurd to extend the statute to actions, in which seisin, not being issuable, can never become the subject of evidence or trial.—[Note 149.]

(5) This was the point adjuged in sir William Foster's case, cited by lord Coke in the margin; and there is a much earlier adjudication to the same effect in Moore. See Mo. 31. The reason of this exemption of rents created by *deed* out of the statute is of the same kind as is explained in note 4; the statute pointing at rents, to which the title is by *seisin*. But according to sir William Jones, such exemption should be understood with this qualification; that the *certainty* of the rent should appear in the deed; because otherwise the *quantum* or *quality* of the rent is no more ascertained by the deed than if there was not one existing. Therefore if the rent is created by reference to something out of the deed, as by reserving such rent as the person reserving pays over, without expressing what that is, and the latter rent not having commenced by deed is one of which seisin is the proper proof; in such a case seisin, as sir William Jones thought, is equally requisite to both rents, and consequently both ought equally to be deemed within the limitation of the 32 of Hen. 8. See W. Jo. 238. 2 Vern. 235. 3 Lev. 21. 2 Atk. 71.—[Note 150.]

(6) It was doubtful whether the several writs here mentioned, in respect to advowsons and wardships, were not within the statute of Henry the eighth; and to remove this doubt a statute of Mary cited by lord Coke was make, declaring that the former statute should not extend to them. The reasons of that statute are fully explained in Plowden. See fol. 371. But so far as regards *advowsons*, this statute of Mary is no longer of any use; it being enacted by the 7th of Anne, c. 18, that no usurpation shall displace the estate of the patron, and that he may be present on the next avoidance, as if there had not been any usurpation; which provision in effect takes away all limitation of suits about the right of patronage. See 3 Blackst. Comm. 5th ed. 250.—[Note 151.]

(7) See further as to the statute of 32 Hen. 8. Brooke's reading upon it. Since the 32 of Hen. 8. there have been various statutes for limitation of the

time

"*From the time of king Richard the first.*" And that was intended from the first day of his raigne; for (*from the time*) being indefinitely, doth include the whole time of his raigne, which is to be observed. Vide 34 H. 6. 36.

"*A writ of right,*" *Breve de reto;* so called, for that the words in the writ of right are, *quòd sine dilatione plenum rectum teneas.*

"*Title of prescription at the common law, &c. for the time whereof mind of man runneth not to the contrary.*" *Docere oportet longum tempus, & longum usum illum, viz. qui excedit memoriam hominum; tale enim tempus sufficit pro jure.* Bract. lib. 4. fol. 230. Fleta, lib. 4. cap. 24. (5 Co. 72. Dr. & Stud. 16. b.)

"*Any proofe of the contrary.*" For if there be any sufficient proofe of record or writing to the contrary, albeit it exceed the memory, or proper knowledge of any man living, yet is it within the memory of man: for memory or knowledge is two-fold. First, by knowledge by proofe, as by record or sufficient matter of writing. Secondly, by his owne proper knowledge. A record or sufficient matter in writing are good memorialls; for *litera scripta manet.* And therefore it is said, when we will by any record or writing commit the memory of any thing to posterity, it is said, *tradere memoriæ.* And this is the reason, that regularly a man cannot prescribe or alledge a custome against a statute, because that is matter of record, and is the highest proofe and matter of record in law. But yet a man may prescribe against an act of parliament, when his prescription or custome is saved or preserved by another act of parliament. (8 Co. 121.) 28 Ass. 25. 38 Ass. 18. 45 E. 3. 26. 5 H. 7. 10. 8 H. 7. 7.. 11 H. 7. 21. Dyer, 23 Eliz. 273.

There is also a diversity betweene an act of parliament in the negative and in the affirmative; for the affirmative act doth not take away a custome (8); as the statutes of wills of 32 and 34 *A.* 8. doe not take away a custome to devise lands, as it hath beene often adjudged. Moreover, there is a diversity betweene statutes that be in the negative; for if a statute in the negative be declarative of the ancient law, that is in affirmance of the common law, there as well as a man may prescribe or alledge a custome against the common law, so a man may doe against such a statute; for, as our author saith, *consuetudo, &c. privat communem legem* (9). As the statute of *Magna Charta* provideth that no (2 Ro. Abr. 266. 4 Inst. 274. 298. 303. 2 Inst. 20. 11 Co. 63. 12 Co. 22. Plow. 207. Cro. Jam. 313 2 Rol. Abr. 266.) Magna Charta, cap. 35. (2 Leon. 28.)

---

time for bringing actions; of which the principal and general one is the 21 of Jam. c. 16. See tit. *Temps* in Com. Dig. and tit. *Limitation* in the other Abridgments.—[Note 152.]

(8) This rule about *affirmative* statutes is very common in the books. See the references in the margin of Plowd. Engl. ed. 112. In another place lord Coke lays down a like rule as to their not taking away the *common law*, but with more particularity; for his words are, that *a statute made in the affirmative without any negative expressed or implied, doth not take away the common law.* 2 Inst. 200. This seems to be the justest way of stating the rule both as to common law and customs. See further Plowd. 113, and the references in the margin of Engl. edit. Hatt. on Stat. 83. 4 Com. Dig. 339. 432. Elmee's case, 1 And. 71, and Dy. 373. pl. 13. and Jones and Jmith, 2 Bulstr. 36.—[Note 153.]

(9) This appears to be a good rule; for if a statute is merely declaratory of the common law, the latter should be construed as it was before the recognition by

no leet shall be holden but twice in the yeare (10), yet a man may prescribe to hold it oftener, and at other times (11); for that

by parliament; and consequently its operation should not be extended to the destruction of prescriptions and customs which were before allowable. As to the use of *negative* words in such a case, they may either arise from the subject, or be a *mode* of expressing what the common law is; in either of which cases, there cannot be any colour of reason for giving more effect to *negative* than belongs to *affirmative* words. In short, to say that a statute *merely declaratory* of the common law, being expressed in negative words, shall operate on subjects to which the common law is not applicable, seems to be a direct contradiction; for how can a statute be *merely declaratory*, if it is in *any* degree *introductory of a new law?* However, there are books in which lord Coke's distinction, in respect to negative statutes declaratory of the common law, is denied. See W. Jo. 270, 271. 289. If those who oppose his opinion had meant only to say, that in the instances by which he illustrates his rule, the negative words of the statutes not only import something more than a declaration of the common law, but were also intended to annihilate all particular customs clashing with it, or that on other accounts the instances were not apt, there might possibly be some colour for their dissenting from lord Coke. But what is professed to be controverted is the distinction itself, which, as we understand it, seems to be perfectly unexceptionable.—[Note 154.]

(10) It is observable, that *Magna Charta* distinguishes between *tourns* or the *leets* of *sheriffs* and the *view* of *frank-pledge;* limiting the *former* to *twice* a year and the *latter* to *once.* In the more ordinary sense *frank-pledge* and *leet* are synonymous; as appears from the style of tourns and other leets, which in court-rolls are usually denominated *curiæ*, or *visus frauci plegii.* But when *frank-pledge* is used, as in *Magna Charta*, it should be understood in a *strict* and *particular* sense; according to which it meant only that part of the business of a court-leet, which related to the taking of sureties or free pledges for every person within the jurisdiction; a practice which had fallen into disuse long before lord Coke's time. See 8 H. 7. 4. and 2 Inst. 72.—[Note 155.]

(11) Adjudged acc. 2 Leon. 28. But it may be doubted, whether the prescription for holding a leet oftener than twice a year, when examined into, will appear a fit example to prove the rule, that negative statutes in affirmance of the common law may be prescribed against. The only words of *Magna Charta* which relate to the holding of tourns or leets are these: *Nec aliquis vicecomes, vel ballivus, faciat turnum suum per hundredum, nisi bis in anno; et nonnisi in loco consueto, videlicet semel post Pascha et iterum post festum Santi Michaelis; et visus de franco plegio tunc fiat ad illum terminum Sancti Michaelis sine occasione.* See Blackst. ed. of Magn. Chart. But this provision or declaration seems wholly confined to the *tourns* or leets of *sheriffs*, and not to include the *leets of private persons;* though it must be owned there are some authorities to the contrary. Acc. Bro. Abr. *Lease*, 23, and the opinion of *Periam* in 2 Leon. 74. *Contra*, 2 Hal. Hist. Pl. C. 71, and the opinion of *Rhodes*, 2 Leon. 74. See also 2 Hawk. Pl. C. 56. Therefore should this provision in *Magna Charta* be only an affirmance of the common law, which, as we shall mention in the next note, is a point controverted, the instance would still be liable to exception. See 2 Hawk. Pl. 56. But the strongest objection is, that, in the same chapter of *Magna Charta*, there is a *general* and express reservation of ancient liberties; there being added this qualification, *ita scilicet quòd quilibet libertates suas, quas habuit et habere consuevit tempore regis Henrici avi nostri, vel quas postea perquisivit:* which words, even in the opinion of those who extend *Magna Charta* to *all* leets, suffice to save prescriptions. 2 Leon. 75. What renders lord Coke's thus applying the case of leets the more remarkable is, that he himself, in his Second Institute, when commenting on this part of *Magna Charta*, agrees, that *leets*

that the statute [n] was but in affirmance of the common law (12).

So the statute [o] of 34 *E.* 1. (13) provideth, that none shall cut downe any trees of his own within a forest without the view of the forester; but inasmuch as this act is in affirmance of the common law (14), a man may prescribe to cut down his woods within a forest without the view of the forester (15). And so

[n] 6 H. 7. 2. 8 H. 4. 34. 12 H. 7. 18. 31 H. 6. Leet, 11. 18 H. 6. 13.

[o] 34 E. 1. tit. Forest. Rast. 1 E. 3. cap. 2.

(Doc. Plac. 342. 2 Rol. Abr. 266. Ante 2. Post. 165. b. 233. a. Cro. Jam. 155. Dr. & Stud. 164.)

was

leets of private persons, so far as regards the *negative* words of *Magna Charta*, are not within it, and takes particular notice of the reservation of ancient liberties. 2 Inst. 72. See further 4 Com. Dig. 122. Perhaps lord Coke might intend to assert, that, notwithstanding *Magna Charta*, it is lawful to prescribe for holding a sheriff's tourn oftener than twice a year; which indeed seems to be admitted by judge Rhodes, who construed *all* leets to be within *Magna Charta*. But we do not observe that the authorities lord Coke cites mention any such prescription.—[Note 156.]

(12) Some think that *Magna Charta*, so far as regards the time for holding tourns and leets, was introductive of a new law. See 2 Hawk. Pl. C. 56. —[Note 157.]

(13) The 34 E. 1. is not printed in the modern editions of the statutes. Indeed it seems doubtful whether it is entitled to the denomination; for lord Coke in another of his works treats it as an *ordinance*, and to prove it such cites Fitzherbert's *Natura Brevium*. 4 Inst. 298. F. N. B. 167. A. See also 12 Co. 23. If it be true that the 34 E. 1. is only an ordinance, lord Coke's case should be put on the 1 E. 3. st. 2. c. 2, or the *Charta de Foresta* of the 9 H. 3. c. 4, both of which laws provide to the same effect as the 34 E. 1. and are certainly acts of parliament. See also a like negative provision in the *consuetudines et assisa de foresta*, printed as a statute of uncertain time in Ruffh. ed. Append. 25, and cited by Noy in W. Jo. 270. 291.—[Note 158.]

(14) Acc. Manw. Forr. L. 1st ed. 41. a. and Fitz. Abr. *Trespass*, 239. there cited.

(15) It having been denied by persons of considerable respect, that such a prescription is good, we shall give some account of the state of the arguments for and against it.—The *general* ground on which lord Coke asserts the prescription to be lawful, is, *first*, that a statute, though expressed in negative words, yet if it is a mere affirmance or declaration of the common law, may be prescribed against; and *secondly*, that the statutes against cutting down trees in a forest without view of the forester, are *negative* statutes of this sort. As to the *first* of these propositions, we have endeavoured to evince its reasonableness in a former note, in which also the reader is referred to the various authorities on the subject, for the purpose of showing that they greatly preponderate in favour of lord Coke. See note 13. In respect to the *second* proposition, the authorities not only support it, but are so uniform, that we do not find it any where controverted. See note 14. The *particular* argument for the prescription consists principally of various allowances of it at *eyres of the forest*, and of two express adjudications of the point on demurrers in *courts of common law*. The cited instances of *allowances* are not few; for, besides the three cases of *Henry de Percy*, *Thomas lord Wake of Liddel*, and *Gilbert de Acton*, here mentioned by lord Coke, he *in his fourth Institute* cites another, which was in the 8th of Edward the third on a claim by *Thomas Pickering* and *Margaret his wife*. See 4 Inst. 297. The cases at common law are *Sellinger's* and *lord Hatton's*. The *former* is stated by lord Coke to have been before the exchequer in the time of Elizabeth, and to have been adjudged upon *argument and long advisement;* and probably is the same case he here cites as one of the 16th

of

was it adjudged in 16 *Eliz.* in the exchequer by sir *Edward Sanders* chiefe baron, and other the barons of the exchequer, as sir

of Elizabeth. See 4 Inst. 297, and 12 Co. 22. The *latter* is taken notice of by judge Croke, who reports lord Coke to have cited it as a judgment on demurrer in the king's bench. Cro. Jam. 155. To these authorities we may add an *extra-judicial* opinion of all the judges on being consulted by James the first; the words of which seem to imply, that a custom for cutting wood in the king's forests without view of the forester may be good. See the third resolution of the judges in 4 Inst. 299. It is said too, that in a case of the 19 of E. 1. between the *prebend of Chichester* and the *earl of Arundel*, issue was joined on such a custom; from which it may be inferred, that in those ancient times the goodness of the custom was not doubted. W. Jo. 290.—On the other hand lord Lovelace's case, whose claim came before an eyre in the 8th of Charles the first, is a direct decision against the allowance of a prescription for cutting wood without view of the forester; and in that case lord chief justice Richardson, when this part of the Commentary upon Littleton was referred to, denied lord Coke's *general doctrine* about negative statutes declaratory of the common law. W. Jo. 270. Two other adjudications, to the like effect, appear to have been made at eyres in the same reign; one of which was on a claim by the tenants of the manor of Bray, who, in proof of the custom they alleged, offered in evidence an inquisition of the reign of Edward the second. W. Jo. 289, 290. 348. The principle on which Noy, attorney-general, argued in these cases, was a general one, that negative statutes, such as those which occur against cutting wood in the king's forest, without license, cannot be controlled by custom or prescription. To prove this he appealed to a case from a year-book of Henry the sixth; which he considered as directly in point, and as a judgment that tithe of timber cannot be prescribed for against the statute of *sylva cædua*, though only an *affirmance* of the old law, merely because the statute is *negative*. See W. Jo. 270. 290. and 25 E. 3. c. 3. The year-book reported to have been cited by Noy is the 20th of Hen. 6. but we do not meet with any case of that year relative to the statute of *sylva cædua*, and therefore the 9 of Hen. 6. 56, which is to the point, was probably meant; though if it was, it contains no *judgment*, but only a *query*, which Brooke, in abridging the case, by mistake calls the reporter's *opinion*. Bro. *Prescription*, 2. Noy also cited the earl of Arundel's case from a record of the 16 of Edward the second, as a decision, that a prescription to cut wood against the forest statutes was not good. W. Jo. 270. As to the cases urged against him, he observed, that the case between the *prebend of Chichester* and *the earl of Arundel* was of a *chace*, and the statutes only related to *forests;* that in *Percy's* case the forest was *not in the hands of the crown* when the statutes were made; and that the case of the reign of Elizabeth, which lord Coke reports from lord Popham, was of a *chace*, of which the king was seised *in right of his duchy of Lancaster*. W. Jo. 290, 291. It is observable, however, that Mr. Noy leaves the two cases of *lord Wake* and *Gilbert de Acton* wholly unanswered, though they were cited against him. As to the other authorities we have stated for a prescription against the *forest* statutes, or those against *negative* statutes in *general* being declaratory, they do not appear to have been urged against Mr. Noy. But besides the authorities relied on by Noy, there is one more; for judge Croke, after taking notice of the judgment for the prescription in *lord Hatton's* case, reports Popham to have said, that *it was adjudged otherwise about the same time in the exchequer*. Cro. Jam. 155. However, this is irreconcilable with lord Coke's representation of the judgment of the *exchequer* both here and elsewhere, unless we suppose him to mean a different case.—Having thus brought together, and digested, what we found scattered in the books on this much litigated subject, we shall dismiss it, leaving the reader to his own judgment, with this single remark.—If the

greater

sir *John Popham*, chiefe justice of the king's bench, reported to me.

In the eire of the forest of *Pickering*, before *Willoughby Hungerford* and *Hanbury*, justices itinerants there, *anno* 8 *E.* 3. I reade [*p*] a claime made by *Henry de Percy*, lord of the manor of *Semor* within the said forest. The forestors, verderours, and regarders found his claim to be true, viz. *quòd prædictus Henricus de Percy, & omnes antecessores sui tenentes* [115. b.] *manerium prædictum à tempore quo non extat memoria, & sine interruptione aliquali, tenuerunt prædictum manerium cum pertinentiis extra regardum forestæ, & habuerunt woodwardum portantem arcam & sagittas ad præsentandum præsentanda de ventatione tantùm, &c. & habuerunt in boscis suis de Semere forgeas & mineras, & amputârunt, dederunt & vendiderunt boscum suum infra manerium prædictum, sine visu forestariorum pro voluntate suâ, & fugârunt & ceperunt, vulpes lepores, capreolos, &c. sicut idem Henricus Percy superiùs clamat.* Which claime by prescription, and found as is aforesaid, the justices doubted onely of two points. The first, forasmuch as the said manor was within the limits of the forest, it should not onely be *contra assisam forestæ*, for his woodward to beare bow and arrowes, where by law he ought to beare but an hatchet, and no bow nor arrowes within the forest, but also *de facili cedere possit in destructionem ferarum, &c.* and they therefore doubted whether it might bee claimed by prescription. Their second doubt was concerning *fugationem & captionem capreolorum in boscis suis prædictis, eò quòd est bestia venationis forestæ, & transgressores inde convicti finem facerent ut pro transgressione venationis;* and for that difficulty, the claime was adjourned into the king's bench. But of the other parts of the prescription no doubt at all was made; and the like had been allowed in the same eire, as in the case of *Thomas* lord *Wake* of *Lydell*, and of *Gilbert* of *Acton*, in the same eyre, Rot. 37, and of others.

[*p*] Itin. Pickering, ann. 8 E. 3. Rot. 38.

(8 Co. 136. Cro. Jam. 155.)

"This is proved by the pleading." Note, one of the best arguments or proofes in law is drawne from the right entries or course of pleading; for the law it selfe speaketh by good pleading: and therefore *Littleton* here saith, it is proved by the pleading, &c. as if pleading were *ipsius legis viva vox.*

(Post. 126. a. 283. a. Ante 17. a. 10 Co. 88. 1 Sid. 336.)

"Insomuch that such title of prescription was at the common law, &c." Note, all the prescriptions that were limited from a certaine time were by act of parliament, as from the time of H. 1. which

---

greater number of authorities, which, unless the cases we have referred to are misstated or misunderstood, is in favour of the prescription, shall be thought to be of *equal* or *nearly of equal* weight with the *more modern* decisions on the other side; then probably, as the subject strikes us, the good sense of lord Coke's distinction as to negative statutes, together with a consideration of the multiplicity of bookes which favour his *general* doctrine, will so strongly turn the scale in this *particular* instance of forest-law, as scarce to leave any doubt. Indeed it was for the sake of explaining how far the *general* doctrine may be affected by the decision of this point of *forest*-law, that we have detained the reader so long upon it.—[Note 159.]

which was the first time of limitation set downe by any act of parliament, and so from the reigne of *R.* 1. &c. But this prescription of time out of memory of man was (as *Littleton* here saith) at the common law, and limited to no time. Also here is implyed a maxime of the law, viz. that whatsoever was at the common law, and is not ousted or taken away by any statute, remaineth still.

(Ante 110. b. Post. 344. a.)

"*Common law.*" The law of *England* is divided, as hath beene said before, into three parts; 1, the common law, which is the most generall and ancient law of the realme, of part whereof *Littleton* wrote; 2, statutes or acts of parliament; and 3, particular customes (whereof *Littleton* also maketh some mention.) I say particular, for if it be the generall custome of the realme, it is part of the common law.

(Pref. to 8th Co.)

The common law has no controler in any part of it, but the high court of parliament; and if it be not abrogated or altered by parliament, it remaines still, as *Littleton* here saith. The common law appeareth in the statute of *Magna Charta* and other ancient statutes (which for the most part are affirmations of the common law) in the originall writs, in judiciall records, and in our bookes of termes and yeares. Acts of parliament appeare in the rolls of parliament, and for the most part are in print. Particular customes are to be proved.

Sect. 171.

ALSO, every borough is a towne (chescun burgh est un ville), *but not* è converso. *More shall be sayd of custome in the Tenure of Villenage.*

(2 Inst. 669.) Vid. Linwood, verbo Vicus. Bract. lib. 5. fol. 434. & lib. 2. fol. 211. Fortescue, cap. 29. 7 E. 6. Fines levie de terre. Br. 91. 34 E. 1. Quare imp. 187. Fortescue, cap. 29.

"TOWNE (ville)," *villa, quasi vehilla, quòd in eam convehantur fructus.* And it is called *vicus*, because it is *propre viam. Villa est ex pluribus mansionibus vicinata & collata ex pluribus vicinis.* If a town be decayed so as no houses remaine, yet it is a towne in law. And so if a borough be decayed, yet shall it send burgesses to the parliament, as Old *Salisbury* and others doe. It cannot be a towne in law, unlesse it hath, or in time past hath had, a church, and celebration of divine service, sacraments and burials. What alteration hath beene made in townes, heare what a great lawyer saith. *In Angliâ villula tam parva inveniri non poterit, in quâ non est miles, armiger, vel paterfamilias, &c. magnis ditatus possessionibus, necnon liberi tenentes alii & valecti plurimi, suis patrimoniis sufficientes, &c.* And it appeareth by *Littleton*, that a towne is the *genus*, and a borough is the *species*; for hee saith that every borough is a towne, but every towne is not a borough. *Et sub appellatione villarumcontinentur burgi & civitates.*

Fortescue, cap. 24.

Domesday, Glouc.

☞ *Berewica*, or *berewit*, in *Domesday* signifieth a towne. *Hæ berewicæ pertinent ad Berchley.* (*Et sic recitat plus quàm viginti villas.*) [116. a.]

There be in *England* and *Wales* eight thousand eight hundred and three townes, or thereabouts.

See

See more *de villis, parochiis, et hamlettis* in the ancient authors of the law, and plentifully in our other bookes. But let us now heare what *Littleton* saith (1).

Bract. ubi sup. Flet. li. 4. c. 15. & lib. 6. ca. 49. Brit. fo. 124. & 274, &c.

Chap. 11. Of Villenage. Sect. 172.

TENURE in villenage is most properly, when a villeine holdeth of his lord, to whom he is a villeine, certaine lands or tenements according to the custome of the mannor, or otherwise at the will of his lord, and to doe to his lord villeine service; as to carry and recarry the dung of his lord out of the city, or out of his lord's mannor unto the land of his lord, and to spread the same upon the land, and such like (hors del city, ou del manor (2), son seignior, jesques a le terre son seignior, en gisant ceo (3) sur le terre, *et hujusmodi*). *And some free men hold their tenements according to the custome of certaine manors, by such services. And their tenure also is called tenure in villenage, and yet they are not villeines; for no land holden in villenage, or villein land, nor any custome arising out of the land, shall ever make a free man villeine. But a villeine may make free land to bee villeine land to his lord. As where a villeine purchaseth land in fee simple, or in fee taile, the lord of the villeine may enter into the land, and oust the villeine and his heires for ever; and after, the lord (if hee will) may let the same land to the villein, to hold in villenage.*

"*TENURE in villenage.*" Villeine is from the *French* word *villaine*, and that *à villa, quia villæ adscriptus est*; for they which are now called *villani*, of ancient times were called *adscriptitii*. And in the common law he is called *nativus; quia pro majore parte natus est servus*: and this is hee which the civilians call *servus*. [*a*] *Theyn* in the *Saxon* tongue is *liber*, and *then*, *servus*. *Theme* (sometimes written *theame* corruptly) is an old *Saxon* word, and signifieth *potestatem habendi in nativos sive villanos, cum eorum sequelis, terris, bonis et catallis*. But *teame* sometime corruptly written *theame*, is of another signification; for it is also an old *Saxon* word, [*b*] and signifieth, where a man can-

Lib. Rub. 76. & 77. Glanv. li. 5. ca. 1 & 2, &c. Vide Bract. li. 1. ca. 6, &c. Brit. fo. 77. & 67. 82. 97. 98. 125, 126. 147. Flet. li. 1. c. 3. Flet. l. 2. ca. 44. Idem. li. 4. cap. 11 & 12. Mir. ca. 2. sect. 18.

Ockham. (F. N. B. 77. a.) [*a*] Flet. li. 1. ca. 24. [*b*] Vide Lamb. inter leges Sanct. Edw. fo. 132. nu. 25.

not

---

(1) We do not observe that there is any thing in the statute of Charles the second for taking away military tenures, which in the least varies the tenure by burgage. For further information about *burgage* and *boroughs*, see Brad. on Bor. Mad. Firm. Burg. Squire's Anglo. Sax. Gov. 1st. ed. tit. *Boroughs* in the index, and Wright's Ten. 205.—[Note 160.]

(2) *In L. and M. and Roh. the words are* del cite (*which seems used in the same sense as* scite) del mannor.

(3) *Instead of* en gisant ceo, *the words in L. and M. and Roh. are* gisaunt warrette et de spreder le fyme le signour.

not produce his warrant of that which hee bought according to his voucher.

"*Villenage,*" *Villenagium* (as in like cases hath been sayd where the termination is in *age*) is the service of a bondman. And yet a free man may doe the service of him that is bond. (F. N. B. 12. 2 Rod. Abr. 73.) And therefore a tenure in villenage is two fold; one, where the person of the tenant is bond, and the tenure servile; the other, where the person is free and the tenure servile. [c] *Serva terra libros de sanguine existentes, villanos facere non potest.* And therefore it is said, [d] *est enim ratio et regula generalis in istis duobus casibus, quòd liber homo nihil libertatis propter* ☞ *personam suam liberam confert villenagio, nec liberum tenementum è contrario mutat statum aut conditionem villani.* And againe, [e] *Villenagium vel servitium nihil detrahit libertati; habita tamen distinctione utrùm tales sint villani, et tenuerunt in villano socagio de dominico domini regis.* And againe [f] *Tenementum non mutat statum liberi non magis quàm servi; poterit enim liber homo tenere purum villenagium, faciendo quicquid ad villanum pertinebit, et nihilominus liber erit, cùm hoc faciat ratione villenagii, et non ratione personæ suæ: et ideo poterit, quando voluerit, villenagium deferere, et liber discedere, nisi illaqueatus sit per uxorum nativam ad hoc faciendum, ad quam ingressus fuit in villenagium, et quæ præstare poterit impedimentum, &c.* And againe, [g] *Purum villenagium est, à quo præstatur servitium incertum et indeterminatum, ubi quis facere tenetur quicquid ei præceptum fuerit.* And another saith to the same intent, *Ceux ne scavoient le vespere, de quoy ils serverent en la matyn.* [h] *Fuerunt in Conquestu liberi homines, qui liberè tenuerunt tenementa sua per libera servitia, vel per liberas consuetudines; et cùm per potentiores ejecti essent, postmodum reversi receperunt eadem tenementa sua tenenda in villenagio, faciendo inde opera servilia, sed certa et nominata, &c. et nihilominus liberi, quia, licèt faciunt opera servilia, cùm non faciunt ea ratione personarum, sed ratione tenementorum, &c.*

[116. b.]

[c] Hil. 29. E. 1. Cor. reg. Ebor. in thesaur.

[d] Bract. li. 4. fo. 170.

[e] Idem. li. 1. ca. 6. Brit. c. 31. & 66. Flet. li. 1. ca. 8.

[f] Bract. fo. 26. 43 E. 3. 5. acc.

[g] Bract. li. 4. fo. 208. Brit. ca. 31.

[h] Bract. li. 1. fo. 7.

How villenage or servitude began, and for what cause, it is said, [i] *Ab homine et pro vitio introducta est servitus. Sed libertas à Deo hominis est indita naturæ. Quare ipsa ad homine sublata, semper redire gliscit, ut facit omne quod libertate naturali privatur.* And another saith, [k] that the condition of villeines from freedome unto bondage, of ancient time grew by constitutions of nations. [l] *Fiunt etiam servi liberi homines captivitate de jure gentium,* and not by the law of nature, as from the time of *Noah's* Flood forward, in which time all things were common to all, and free to all men alike, who lived under the law naturall; and by multiplication of people, and making proper and private those things that were common, arose battels. And then it was ordained by constitution of nations, that none should kill another; but that he that was taken in battell, should remain bond to his taker for ever, and he to doe with him, and all that should come of him, his will and pleasure, as with his beast, or any other chattell, to give, or to sell, or to kill: and after it was ordained, for the cruelty of some lords, that none should kill them, and that the life and members of them, as well as of freemen, were in the hands and protection of kings, and that he that killed his villeine, should have the same judgment as if he had killed a freeman.

[i] Fortesc. ca. 42.

[k] Brit. ca. 31.

[l] Bract. li. 1. ca. 6. Flet. li. 1. ca. 8. & ca. 5. Mir. cap. 2. sect. 18.

freeman. Thereupon they were called *servi, quia servabantur à dominis et non occidebantur, et non à serviendo.* He is called *nativus, à nascendo, quia plerumque natus est servus;* and he is called *villanus*, for that he doth his villeine service *in villis.*

Est autem libertas naturalis facultas ejus quod cuique facere libet, nisi quod de jure, aut vi prohibetur. Servitus est constitutio de jure gentium quâ quis domino alieno contra naturam subjicitur. (F. N. B. 77. F.) Bract. li. 1. ca. 6. Britton, ca. 31. & ubi supr. Fleta, lib. 1. ca. 2 & 3.

And againe, [*m*] *Et tout soyt que touts creatures duissont este frank solonque le ley de nature, per constitution nequidant, et fait de homes sont auters creatures enservies, sicome est dit beasts en parkes, pissons en servors, et oyseux en cages.*

[*m*] Mirror, cap. 2. sect. 18.

[*n*] This is assured, that bondage or servitude was first inflicted for dishonouring of parents; for *Cham* the father of *Canaan* (of whom issued the *Canaanites*) seeing the nakedness of his father *Noah*, and shewing it in derision to his brethren, was therefore punished in his sonne *Canaan* with bondage. And herewith agreeth the divine: *Ante vini inventionem inconcussa libertas. Non est hodie servitus, si ebrietus non fuisset.* Ambrose.

[*n*] Mirror, cap. 2. sect. 18. Genesis, ix. vers. 21, 22, &c.

"*Out of the city or out of his lord's mannor, &c.*" [117. a.] This is false printed, for the ☞ originall is, *hors del scite del mannor*, and so would it be amended in the impressions of the booke hereafter.

"*And some freemen hold, &c.*" This is apparent enough, especially upon that which hath beene said. Mirror, cap. 2. sect. 18. acc.

"*Where a villeine purchaseth land in fee simple.*" Yet the villeine may purchase some kinde of inheritances in fee simple, which the lord of the villeine cannot have. As if a villeine purchase a common *sauns nomber*, the lord shall not have it; for the lord may surcharge the same, which should be a prejudice to the terre-tenant; and the same law of a *corodie incertaine* granted to a villeine, and such like inheritances. And therefore *Littleton* materially said, *purchaseth land.* When the villeine hath an estate of any thing certaine, the lord shall have it; as a rent granted to the villeine, commons certaine, estovers certaine, and such like. [*o*] But that which lyeth in action, as a warranty made to the villeine his heires and assignes, the lord shall not take advantage of by voucher; because it is in lieu of an action. Neither shall the lord take advantage of any obligation or covenant, or other thing in action made to the villeine; because they lye in privity, and cannot be transferred to others.

Mirror, cap. 2. sect. 18.

22 Ass. p. 37.

[*o*] Doct. and Stud. ca. 43. (3 Co. 62, 63. 2 Ro. Abr. 740. Post. 120. a.)

[*p*] If a man be lessee of a villeine for life, for yeares, or at will, and the villeine purchaseth lands in fee; if the lessee entreth into the lands, he shall hold the lands as a perquisite to him and his heires for ever. But if a bishop hath a villeine in the right of his bishopricke, and he purchaseth lands, and the bishop entreth, the bishop shall have this perquisite to him and his successors, and not to him and his heires; for the law respecteth the quality, and not the quantity of his estate. So if executors have a villeine for yeares, and the villeine purchase lands in fee, and the executors enter, they shall have a fee simple, but it shall be assets.

[*p*] L. 5 E. 4. 61. 18 E. 3. 29. 21 H. 6. 37. Bro. tit. Vil. 70. (Plow. 235. a. Ante 90. a.) Post. 387. a. 124. a. S. 192. 21 Vin. 578. (G.) Ante 13. a.

"*Fee taile.*" By this it is apparent, that if lands be given to a villeine, and to the heires of his body, the lord may enter and put out the villeine and the heires of his body; for *quicquid acquiritur*

15 E. 4. 9. b. Pl. Com. 555, in Walsingham's case.

quiritur servo acquiritur domino (1). And in this case the lord gaines a fee simple determinable upon the dying of the villeine without heire of his body; and the absolute fee simple remaineth still in the donor. And if the lord enter, and after infranchise the donee, and after the donee hath issue, yet that issue shall never have remedy either by *formedon* or entry, to recover this land, by force of the statute of *donis conditionalibus;* for that statute giveth remedy to the issues of the donee, that have capacity

(1) This rule about *slaves* holds in *some degree* in respect to *apprentices* and *servants*, particularly the former; though with a great difference in point of extent and application. All acquisitions of property real and personal made by the villein, in whatever way arising, with no other exception than what is allowed of to prevent prejudice to third persons, belonged to his lord; because an incapacity to acquire any thing for his own benefit was one of the harsh characteristics of the villein's condition. But the relation of the apprentice and servant to his master is more mild and limited; for it only imports, that the master shall be entitled to their personal labour during the term stipulated, either in a particular way, or generally, according to the nature of the service or apprenticeship. Consequently the master cannot claim any other acquisitions, than such as are the result of that labour. What the apprentice or servant earns by his labour, whilst he remains with the master, or is actually working for him, falls so clearly within this principle, that there can be no room for doubt. Nor can there be any, where the apprentice or servant is employed by another person within the knowledge and consent of the master, without any circumstances indicating a waver of their earnings. The books contain several adjudications founded upon this latter idea. Most of them indeed relate to apprentices in the *seafaring* way; whose wages and prize-money as seamen, though earned whilst in another service, have been recovered, by those to whom they were bound. But the principle, which governs them, seems to apply to apprentices and servants in *general*. See 6 Mod. 69. 12 Mod. 415. Comberb. 450. 1 Stra. 582. 1 Barnard. Rep. 312. 1 Ves. 48. 83. See doctrine as to case between father and child, 1 Wooddes. 451. Some of the cases go so far, as to give the master a right to the wages or earnings, whether the service is performed by the apprentice *with or without the master's license*; and even though the earnings accrue in a *trade* or *service different* from that to which the apprentice is bound. 6 Mod. 69. 12 Mod. 83. 1 Ves. 83. But though the rule should be so large in respect to *apprentices*, it may be doubted, whether it is equally so in the case of *other* servants. There is a case of the reign of James the first, in which a judgment against the master appears to be principally founded on the want of his consent and privity to the retainer. Cro. Jam. 653. 2 Rol. Rep. 269. Independently too of authority, the master's proper remedy in all cases, except those in which the servant is intentionally employed on his master's account, seems to be an action either against the employer for loss of service, if he knew of the first retainer, or against the servant himself for breach of his contract; such a case rather importing the master's right to damages for injury sustained by the consequences of the second retainer, than a right to the profits accruing from it. We have already mentioned, that most of the cases, which occur in the books, relate to the apprentices of watermen and seafaring persons. It may therefore be proper to add, that in 31 Geo. 2. c. 10, one object of which is to regulate the pay of seamen in the royal navy, there is a provision, that in particular cases the master shall not be entitled to the wages of his apprentice. See Sect. 10. Note also the 17th Section in the 2 and 3 Anne, c. 6, from which it seems, as if the framers of that law doubted, whether the master of an apprentice who goes into the royal navy, would be entitled to his wages without an express provision.—[Note 161.]

capacity and power to take and retaine such a gift; and the title of the lord remaines, as it did at the common law, for the statute restraineth acts done only by the tenant in taile. And so it is, if lands be given to an alien, and to the heires of his body, upon office found, the land is seised for the king, afterwards (A) the king makes the alien a denizen, who hath issue and dyeth, the king shall detaine the land against the issue.

Sect. 173.

AND note, if a feoffement be made to a certaine person or persons in fee, to the use of a villeine; or if a villeine, with other persons, be infeoffed to the use of the villein; what estate soever that the villein hath in the use, in fee taile, for terme of life or years, the lord of the villein may enter into all those lands and tenements, as if the villein had been sole seised of the demesne. And this is given by the statute of anno 19 H. 7. ca. 15 (2).

THIS is an addition to *Littleton;* and the statute of 19 *H.* 7. ca. 15. therein mentioned, for the cause that hath beene aforesaid, hath lost his force (3).

[117. b.] ☛ Sect. 174.

BUT if a free man will take any lands or tenements, to hold of his lord by such villeine service, viz. to pay a fine to him (1) *for the marriage of his sonnes or daughters, then he shall pay such fine for the marriage; and notwithstanding though it be the folly of such free man to take in such forme lands or tenements to hold of the lord by such bondage, yet this maketh not the free man a villeine* (2).

"*TO pay a fine for the marriage, &c.* [q] And this villeine and servile tenure is called in old bookes *marchetum* or *merchet. Marchetum verò pro filiâ dare non competit libero homini, inter alia, propter liberi sanguinis privilegium, &c.* And this is true *de communi jure, sed modus et conventio vicunt legem.* And as *Littleton* here saith, it is the folly of such a freeman to take such mannors, lands or tenements, to hold of the lord by such bondage. And yet this doth not make such a freeman a villeine, [r] *Quia hujusmodi præstationes fiunt ratione tenementi, et non ratione personæ, in donatione comprehensæ et reservatæ; non enim*

[q] 15 E. 3. tit. Aid, 33. Bracton, lib. 2. fo. 26. Mirror, ca. 2. sect. 18. See more of this after in this Chapter, Sect. 194. (Dr. & Stud. 66. b.)

[r] Fleta, lib. 3. cap. 13. Mir. cap. 2. sect. 18.

(A) Note, and see for case of Denization before office, Gould. c. 29. See also ca. of Villein, 2 Leon. 139.

(2) This Section was first introduced in Redman's edition.

(3) The cause meant is, that the 27 of H. 8, transfers uses into possession. See lord Coke's note on Sect. 115. fol. 84. b.—[Note 162.]

(1) In Roh. the words *for his marriage or* come in here.

(2) This Section in L. and M. stands the last in the Chapter of Villenage.

enim unum et idem est, sed longè aliud, tenere liberè, et per liberum servitium, &c. For the signification of this word, *vide* Sect. 194. 74. 441.

Sect. 175.

ALSO, every villeine is either a villeine by title of prescription, to wit, that hee and his ancestors have been villeines time out of mind of man; or he is a villeine by his owne confession in a court of record.

(2 Ro. Abr. 732.) Lib. Rub. cap. 76, 77. Bracton, lib. 1. cap. 6. Bract. fol. 77. (Post. 120. a.) [s] Bract. lib. 1. cap. 6. Fleta, lib. 1. ca. 3. 8 Ass. p. 13. 11 Ass. 12. 24 Ass. 1. 73 Ass. 1. 17 E. 3. 78' 79. 27 E. 3. 89. 18 E. 4. 25. 27 H. 8. 7. b. Le statute de 17 E. 3. 17.

"*EVERY villeine is either a villeine by title of prescription, &c.*" Every villeine is, either by prescription, or confession. *Servi aut nascuntur, aut fiunt.* By prescription, either regardant to a mannor, &c. or in grosse. In gross, either by prescription, or by granting away a villeine that is regardant, or by confession. [s] *Fit etiam servus liber homo per confessionem in curiâ regis fact'* (3).

[t] 17 E. 3. 23. 11 H. 4. 26. 37 H. 6 21. Dier, Mich. 7 & 8 Eliz. 242. Pl. Com. 76, &c. [u] Glanvil. lib. 9. cap. 8. Bracton, lib. 3. fo. 156. Brit. fo. 121. [x] 6 Co. 11. & 12, in Gentleman's case. (3 Inst. 71. F. N. B. 138.

"*In a court of record.*" Record is derived of the *Latine* word *recordor*, that is, to keep in mind, as the poet saith, *Si rite audita recordor.* And therefore a record or inrolment is a memoriall or monument of so high a nature, [t] as it importeth in it selfe such an absolute verity, as if it be pleaded (4) that there is no such record, it shall not receive any triall by witnesse, jury, or otherwise, but only by itselfe. [u] And every court of record is the king's court, albeit another may have the profit, wherein if the judges do erre, a writ of error doth lye. [x] But the county court, the hundred court, the court baron, and such like, are no courts of record; and therefore the proceedings therein may be denyed, and tryed by jury, and upon their judgements a writ of error lyeth not, but a writ of false judgement, for that they are no courts of record, because they cannot hold plea of debt or trespasse, if the debt [118. a.]

Post. 128. 260. a. 4 Co. 71. a. 8 Co. 38. 1 Ro. Abr. 527. 2 Ro. Abr. 862, 863. Plow. 491. b. 1 Sid. 94. 2 Ro. Abr. 573. 576. 1 Sid. 314.) (14 H. 8. 15. 1 Rol. Ab. 543.

or

---

(3) From our law's thus permitting a person to be a villein by *acknowledgment* in a court of record, some have argued, that it is a legal mode of *creating* personal bondage; with a view to prove, that there is not any thing so repugnant in our law to domestic slavery, as is generally imagined, and thence to lay a foundation for more easily inferring the lawfulness of importing slavery from our colonies. But in another place we have had occasion to object to this way of considering the acknowledgment, and to explain, why it should be deemed merely a confession of that immemorial antiquity in the villein's slavery, which was otherwise necessary to be proved. See the editor's *Argument in the case of Somersett, a Negro*, 60 to 65, and Hob. 99.—[Note 163.]

(4) The words *if it be pleaded* are material; for *in evidence before a jury* the *copy* of a record will be a sufficient proof of its existence and contents. See Law of Nis. Pri. 226. ed. 1775. Com. Dig. tit. *Certiorari.*—[Note 164.]

or damages doe amount to forty shillings, or of any trespasse *vi et armis* (1).

Monumenta, quæ nos recorda vocamus, sunt veritatis et vetustatis vestigia.

Sect. 176.

BUT if a freeman hath divers issues, and afterwards he confesseth himselfe to be a villaine to another in a court of record; yet those issues which he hath before the confession are free, but the issues which he shall have after the confession shall be villaines.

This is so evident as it needeth no explication.

Sect. 177.

ALSO, if a villaine purchase land, and alien the land to another before that the lord enter, then the lord cannot enter; for it shall be adjudged his folly, that he did not enter, when the land was in the hands of the villaine. And so it is of goods. If the villaine buy goods, and sell or give them to another, before the lord seiseth them, then the lord may not seise the same. But if the lord, before any such sale or gift, commeth into the towne, where such goods be, and there, openly amongst the neighbours, claime the goods, and seise part of the goods, in the name of seisin of all the goods which the villaine has or may have (1)*, &c. this is a good seisin in law, and the occupation which the villaine hath after such clayme in the goods* (2)†, *shall be taken in the right of the lord.*

IN this case before the lord doth enter, hee hath neither *jus in re nec jus ad rem*, but onely a possibilitie of an estate, which estate he must gaine by his entry; and therefore if the villaine doth by way of prevention alien before the lord doth enter, the lord is barred of the possibility, which he had to the land, for ever. (Dr. & Stud. 140. 2 Rol. Abr. 735.)

[a] *Si autem servus vendiderit feodum, quod sibi et hæredibus perquisiverit, antequam dominus seisinam inde ceperit, valet donatio, et dominus sibi ipsi imputet, quod tantum expectavit.* But [b] if the villaine of the king purchaseth land, and alieneth before the king (upon an office found for him) doth enter, yet the king after office found shall have the land; *quia nullum tempus occurrit regi*, as *Littleton* himselfe saith in the next Section (2). And yet, [a] Fleta, lib. 3. ca. 13. Britton, fol. 98. a. 19 E. 2. Dower, 17. [b] 35 E. 3. tit. Villenage, 22. 9 H. 6. 21. per Babington. 12 H. 7. 12. (8 Co. 170. 7 Co. 28. 2 Ro. Abr. 734.)

* † *These are notes* 1, *and* 2, *to* 118. *b. in the* 13*th and* 14*th editions.*

---

(1) See post. 260. a. 2 Inst. 311.
(1) * The words *which the villaine has or may have* not in L. and M. nor Roh.
(2) † Instead of *the goods* it is *law* in L. and M. and R.
(2) See post. 119. a.

yet, after office found, the king shall not have the meane profits; because the title is by the seisure.

"*Purchase land.*" The like law is of seigniories, advowsons, reversions, remainders, rents, commons certaine, and such like certaine inheritances, wherein the villaine ☞ hath any estate or interest. If the villaine purchase land either in fee simple, fee taile, or for life, if the villaine doth alien before the lord doth enter, hee doth prevent the lord. But yet the issue of the villaine shall recover the land entailed in a formedon, and then the lord may enter. [118. b.]

"*Alien the land.*" Alien commeth of the verbe *alienare, id est, alienum facere, vel ex nostro dominio in alienum transferre, sive rem aliquam in dominium alterius transferre.* If a freeman hath issue, and afterward by confession becommeth bond, and purchaseth lands in fee, and, before the lord enter, he dieth seised, and the land descends to his issue which is free; in this case the lord shall not enter upon the heire, and yet this is a descent and no alienation. The like law it is, if the land so purchased by the villaine doth escheate to the lord of the fee before any entry made by the lord of the villaine: so as the act of the law, that is, the descent or escheat may as well prevent the lord of his entry, as the act of the party by alienation.

If a villaine be disseised before the lord doth enter, the lord may enter into the land in the name of the villaine, and thereby gaine the inheritance of the land; but if there be a descent cast, so as the entry of the villaine be taken away, then the villaine must recontinue the estate of the land by judgement and execution, before the lord of the villeine can enter. And this word [alien] doth not onely extend to alienations of land in deed, but also to alienations in law; as if the villeine purchase land and dyeth without heire, and the land escheate, or if there be a recovery against the villaine in a *cessavit*, or the like.

(2 Ro. Abr. 732. 5 Co. 109. 2 Ro. Abr. 58. Cro. Eliz. 386.)

"*And so it is of goods, &c.*" *Goods, biens, bona,* includes all chattels, as well reall as personall. *Chattels* is a *French* word, and signifies goods, which by a word of art we call *catalla.* Now goods, or chattels, are either personall or reall. Personall, as horse and other beasts, household stuffe, bowes, weapons and such like, called personall, because for the most part they belong to the person of a man, or else for that they are to be recovered by personall actions. Reall, because they concerne the reality, as tearmes for yeares of lands or tenements, wardships, the interest of tenant by statute staple, by statute merchant, by *elegit*, and such like.

Bona dividuntur in mobilia et immobilia. Mobilia rursum dividuntur in ea, quæ se movent et quæ ab aliis moventur. But, by the common law, no estate of inheritance or freehold is comprehended under these words *bona* or *catalla* (3). And it is to be observed, that as the title of the lord to his villeine's lands beginneth by his entry, so his title to the goods beginneth by the seizure of them. And

(3) See farther as to chattels, Bro. Abr. tit. *Chattels*, Com. Dig. tit, *Biens* and *Assets*, and Vin. tit. *Executors*, U. Y. Z.

And here againe it is to be observed, that where our author, in this branch concerning goods, useth these words (sell or give) that the same extendeth as well to gifts in law, as gifts in deed. And therefore if a niefe hath goods, and taketh baron, by this gift in law by force of the marriage, the lord is barred. And so it is if a villaine make his executors and dieth, by this gift in law the lord is barred, as shall be said hereafter.

"And claime the goods, and seise part of the goods." For a claim onely of the goods of the villaine is not sufficient in law, but he must seise some part in the name of all the residue, as here it appeareth; or that the goods be within the view of the lord; for the claime and his view amount to a seisure, as the clayme of a ward being present by word is a sufficient seisure, albeit the gardein layeth no hands on him. See hereafter Sect. 321. And so note a diversity between a claime of lands or tenements and goods. [c] In an action of trespasse or detinue brought by the villaine, a release made to the defendant by the lord is a good barre; for that amounts to a seisure and grant. If the villaine doth buy goods and make his executors, and dieth before the lord doth seise them, the executors shall detaine them against the lord of the villaine.

3 H. 4. 15. 46 E. 3. Barre, 217. Doct. and Stud. cap. 43. fol. 139. 22 E. 3. 6. Baldwin Freuil's case. (Ante 88. Post 145. b.) [c] 18 H. 6. 23. b. per Ascough. 3 H. 4. 16. 46 E. 3. Barre 217.

"Has or may have, &c." Here (*&c.*) doth imply an excellent point of learning, for that such a claime doth not only vest the goods, which the villaine then hath, but also which he after that shall acquire and get (4). But otherwise it is of lands of freehold or inheritance; for there such a generall entry or claime extends only to the lands the villaine hath at that ☞ time, and not to any other which he shall purchase after, as by our author in this Section may justly be collected.

[119. a.]

Sect. 178.

BUT if the king hath a villeine, who purchases land, and alien it before the king enter; yet the king may enter, into whose hands soever the land shall come. Or if the villeine buyeth goods, and sell them before that the king seiseth them; yet the king may seise these goods, in whose hands soever they be. Because nullum tempus occurrit regi (1).

"IF

(4) *Contra*, as to the goods *afterwards* acquired, Dr. and Stud. dial. 2. c. 4.

(1) See acc. 41. b. 57. b. 90. b. 118. a. 294. b. and for instances, Plowd. 243.—But the rule of *nullum tempus occurrit regi* is subject to various exceptions, both at *common law* and by *statute*.—1. There are many cases in which the subject may make title against the king by *prescription* as to treasure trove, waifs, estrays, and such other things as may be seised without matter of record. Ante, fol. 114. a. and b.—2. In some cases the king's right *necessarily* fails for want of exertion in due time, either because the *subject* of his right *determines* before

Vide Sect. 125. Vide Staunford, Prær. f. 32. e.

"*IF the king hath a villeine, &c.*" This is evident upon that which hath beene said before.

35 E. 3. tit. Villenage, 22.

"*Or if the villeine buyeth goods, &c.*" If the king's villeine acquire any goods or chattells, the propertie of them is in the king before any seisure or office; and it is well said of an ancient author, [d] *Al roy, quant al droit de la corone ou a franch estate, ne poet nul temps occurre;* and another, [e] speaking in the person of the king, saith, *Nul temps n'est limit quant a mes droits.*

[d] Mirror, cap. 3.

[e] Britton, fol. 88.

Bract. lib. 1. quæ res dari possint.

Sect.

---

before he claims it, or because it is *specially limited in point of time* by its creation. An instance of this is, where the land of tenant for life is found to be forfeited, and he dies before seisure by the king; for it is then too late to seize for the king, who, as Stanford expresses it, hath *surceased his time*, the estate forfeited being determined, and the right of entry being in him in reversion. Staunf. Prærog. 32. b. The law is the same, where the king is intitled to the *next* presentation; in which case, if another presents, and the incumbent dies, the king cannot have the second or any subsequent presentation. This was the opinion of Browne, justice, against Weston in Willion and Berkely, Plow. 243. 249, and was so adjudged in Baskerville's case, 7 Co. 28. a. Lord chancellor Egerton finds fault with the doctrine of this last case; but his objections do not appear in the least satisfactory. See his observations on lord Coke's Reports, 8.—3. Sometimes lapse of time drives the king *to a suit.* Thus by the statute of the 13th of Rich. the second, and according to lord Coke by the *common law*, if the king presents to a benefice already full with an incumbent, the king's presentee shall not be received by the ordinary, till the king has *recovered* his presentment by due process of law. 13 R. 2. st. 1. c. 1. Staunf. Prærog. 32. b. 2 Inst. 358. Post. 344. b. See also Cro. Jam. 385 4 H. 4. c. 22. Gibs. Cod. 1st ed. 802.—4. There are several statutes, which wholly extinguish the king's title, if not exerted within a limited number of years. By a statute of the 14th of Edward the third, the king lost his presentment, where he was entitled by having in his hand the temporalities of a bishopric, or the lands of a person within age, unless he presented within three years after the voidance. But this statute was soon repealed. See 14 E. 3. st. 3. c. 2. 25 E. 3. st. 3. c. 2. 2 Gibs. Cod. 1st ed. 800. The chief statutes, for limiting the king's title to a certaine time, now in force, are the 21 of Jam. 1. c. 2, and the 9 of Geo. 3. c. 16. By the *former* the king is disabled from claiming any manors, lands or hereditaments, except liberties and franchises, under a title accrued 60 years *before the beginning of the then session of parliament*, unless within that time there has been a possession under such title. But the efflux of time rendering this provision continually more ineffectual, the *latter* statute introduced one of a permanent kind, by limiting the king to sixty years *before the commencement of the suit or proceeding for recovery* of the estate claimed. See further a Commentary on the 21 Jam. in 3 Inst. 188. See also something relative to the rule of *nullum tempus occurrit regi*, in Hob. 152. 154. 347.—[Note 165.]

Sect. 179.

ALSO, if a man let certaine land to another for terme of life, saving to himself the reversion, and a villeine purchase of the lessor the reversion; in this case it seemeth, that the lord of the villeine may presently come to the land, and claime the reversion as the lord of the said villeine, and by his claime the reversion is forthwith in him. For in other forme or manner he cannot come to the reversion. For he cannot enter upon the tenant for life. And if he should stay untill after the death of the tenant for life, then perchance he should come too late. For peradventure the villeine will grant or alien the reversion to another in the life of the tenant for life, &c.

"MAY presently come to the land." For he cannot claime the reversion but upon the land, and he by his coming upon the land for that purpose is no trespassor; because the law giveth him power to claim the reversion, lest he should be prevented, and claime he cannot, unless he commeth to the land. So likewise if the villeine purchase a seigniory, rent, common, or any other freehold or inheritance, out of any lands or tenements of another, [119. b.] ☞ the lord may lawfully come to the land to make his claime to the seigniory, rent, or other profit out of the land. But if the villeine purchase a seigniorie, or a rent, common, or other inheritance issuing out of the land of the lord himselfe, it is said, that the seigniorie, rent, common, or such other inheritance, is extinguished in the lord's possession without any claime.

Vide 41 E. 3. tit. Audita querela, 18. 12 H. 4. tit. Execution, 28. F. N. B. 104. 1 H. 7. 15. b.

"Grant." Here must be intended an attornement; for after the grant and before attornement the lord may not (1) claime the reversion (2).

"In the life of the tenant for life, &c." Here by (*&c.*) is included tenant in taile, tenant *pur auter vie*, tenant by statute merchant, staple, *elegit*, and for yeares; for during all these estates the lord may claime the reversion, as well as in case of the tenant for life.

Sect. 180.

IN the same manner it is, where a villeine purchases an advowson of a church full of an incumbent, the lord of the villeine may come to the said church, and claime the said advowson, and by this claime the advowson is

---

(1) This is apparently an error of the press, the sense requiring the omission of *not*. Accordingly the first edition is without it. But the error appears in all the subsequent editions.

(2) But now by the 4 Ann. c. 16. s. 9. the grant of a reversion is perfect without attornment.—[Note 166.]

is in him. For if he will attend till after the death of the incumbent, and then to present his clarke (a presenter son clerke) *to the said church, then, in the mean time, the villein may alien the advowson* (3), *and so oust the lord of his presentment.*

"*ADVOWSON,*" *Advocatio,* so called, because the right of presenting to the church was first gained by such as were
13 H. 14. b. founders, benefactors, or maintainers of the church; viz. *ratione fundationis,* as where the ancestor was founder of the church; or *ratione donationis,* where he endowed the church; or *ratione fundi,* as where he gave the soile, whereupon the church was built. And therefore they were called *advocati.* They were also called *patroni,* and thereupon the advowson is called *jus patronatûs.* And in one word, advowson of a church is the right of presentation
Fleta, lib. 5. cap. 14. or collation to the church. *Advocatus est ad quem pertinet jus advocationis alicujus ecclesiæ, ut ad ecclesiam nomine proprio, non alieno, possit præsentare.* Every church is either presentative, collative, donative, or elective. *Vide* Section 645. 648.

24 E. 3. 30. 25 E. 3. 47. 38 E. 3. 9. 44 E. 3. 3. "*Full of an incumbent.*" If the church be presentative, the church is full by admission and institution against any common person; but against the king it is not full untill induction.
9 H. 6. 31. 22 H. 6. 27. 21 E. 4. 34. b. Vide Sect. 648. (Post. 344. a.)

"*Incumbent*" commeth from the verbe *incumbo,* that is, to be diligently resident, *id est, obnixè operam dare;* and when it is written *encumbent,* it is falsely written, for it ought to be *incum-*
10 H. 6. 7. *bent,* as *Littleton* doth here (4). And therefore the law doth intend him to be resident on his benefice.

"☞ *The lord of the villeine may come to the said church and claime the said advowson.*" Note, albeit the [120. a.] advowson is a thing incorporeall, and not visible, yet because the principall duty of the presentee of the patron is to be done in the church, the claime of the lord of the villeine must be made there; and by that claime the inheritance of the advowson shall be vested in the lord; for every claime or demand to devest any estate or interest must be made in that place which is most apt for that purpose.

Doct. & Stud. lib. 2. ca. 31. 5 E. 3. 180. 10 E. 3. 482. 25 E. 3. 49. 9 E. 3. 462. 11 H. 4. 37. 59. & 76. 41 E. 3. 5. F. N. B. 31, 32. "*After the death of the incumbent.*" *Nota,* a church presentative may become void five manner of wayes, viz. 1. By death, whereof *Littleton* here speaketh. 2. By creation. 3. By resignation. 4. By deprivation. 5. By cession, as by taking a benefice incompatible.

"*And then to present his clarke to the said church, &c.*" A presentation is derived *à præsentando; quia præsentare nihil aliud est quàm præsto dare, seu offerre.* And *Littleton* here briefly expresseth the effect of a presentation; for it is the act of the patron offering his clerke to the bishop of that diocesse, to be instituted to such a church, in these or the like words directed to the bishop, *Præsento vobis* A. B. *clericum meum ad ecclesiam de* Dale, *&c.* This

(3) *&c.* L. and M.
(4) However, in L. and M. and Roh. the word is *encombent.*

This may be done as well by word as by writing; and if it be by writing it is no deed, for the presentation is of the clerke, and the direction to the bishop, so as this writing is in nature of a letter to the bishop: and this is the reason that the king himself may present by word, as elsewhere is said. A villein at this day purchaseth an advowsen in fee, the church becomes voide, the lord for one hundred pound given by *A. B.* clerke presents him to the church, and his clerke is admitted, instituted, and induced; yet this gaineth not the advowson to the lord [*d*]. And so it is in that case, if any on the behalfe of *A. B.* had given or contracted with the lord in consideration of any valuable thing to present *A. B.* to the said church, albeit it had beene without the consent or knowledge of *A. B.* yet it should not have vested the advowson in the lord. But this was not law when *Littleton* wrote. [*e*] But now by the statute of 31 *Eliz.* the presentation, admission, institution, and induction in both the said cases, and in the like are made voide (1), where before the said statute they were but voidable by deprivation (2). And if a man present by usurpation to a benefice, by reason of any corrupt contract, agreement, &c. that presentation and the institution and induction thereupon are void; for that act extends to all patrons as well by wrong as by right. But where any presents by usurpation, the rightfull patron, and not the king, shall present; for otherwise every rightfull patron may lose his presentation. And such an incumbent, that commeth in by reason of any such corrupt agreement, is so absolutely disabled for ever after to be presented to that church, as the king himselfe, to whom the law giveth the title of presentation in that case, cannot present him againe to that church; for the act, being made for suppression of symony and such corrupt agreements, so bindes the king in that case, as he cannot present him that the law hath disabled (3); for the words of the act be, shall there-

(2 Ro. Abr. 353.)

[*d*] Adjudg. in comuni banco, Mich. 41 & 42 Eliz. inter Baker & Rogers.

[*e*] Adjudged in the King's Bench, Mich. 13 Ja. in a quar. imp. brought by the king against the bishop of Norwich, Thomas Cole, and Robert Secker, clerke, for the vicarage of Haverell in Suffolk. (Cro. Jam. 385. Hob. 75. Hob. 165. 12 Co. 100. 73. 3 Inst. 153. 1 Ro. Abr. 370. Cro. Jam. 385. 533. Cro. Cha. 477. 7 Co. 32. Post. 234. 11 Co. 68. Cro. Cha. 331.)

upon

---

(1) Though the person presented is not privy to the simony, yet the presentation is void, the statute making no distinction in this respect, but giving the turn to the king as a punishment of the patron. Adjudged 12 Co. 100. Agreed 12 Co. 73.—[Note 167.]

(2) The effect of the difference between *void* and *voidable*, in the instance of a simoniacal presentation, may be seen in Windsor's case, 5 Co. 102, and Winchcomb's case, Hob. 165, the judgment in both turning upon it.—[Note 168.]

(3) Adjudged accordingly in the king against the bishop of Norwich, Hob. 75. Cro. Jam. 385. In sir Arthur Ingram's case on the 5 & 6 E. 6. against the sale of offices, there was a like decision, that the king could not dispense with the disability created by statute. Post. 234. a. Hob. 75. Cro. Jam. 385. 3 Inst. 154. When the famous case of sir Edward Hales, in the reign of James the second, was argued, these two cases were urged to prove, that the king could not dispense with the disability for not taking the oaths and sacrament, according to the 25 Cha. 2. usually called the test act; and lord Coke himself in his Third Institute applies them to a like case on the 5 Eliz. in respect to the oath of supremacy. 3 Inst. 154. The principal judicial authority relied on for the dispensation was the case in the year-book of 2 H. 7. 6. b. in which, notwithstanding the statutes making void a grant of the office of sheriff for more than a year, the judges are represented to have held a grant for life with a *non obstante* to be good. But trusting to such an authority only exposed the weakness

upon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice. [f] And the party being disabled by the act of parliament (which being an absolute and direct law) cannot be dispensed withall by any grant, &c. with a *non obstante;* as it may be, when any thing is prohibited *sub modo,* as upon a penalty given to the king (4). And the said act doth not

[f] Pl. Com. 502. 27. H. 8. 2 H. 7. 6. 11 H. 7. 11. 13 H. 7. 8. b. 11 H. 4. 76. 5 E. 3. 29. F. N. B. 211.

E. Post. 234. a.

---

ness of the cause it was intended to sustain. The book cited, so far from containing any judgment of the point, ends with an adjournment of the case, accompanied with this remarkable declaration, that both judges and counsel agreed, what they had then said *should be taken for nothing.* As far too as appears, the grant in question might have been adjudged good on the ground of being within an exception of the statutes. The king also had been specially enabled by the 9 H. 5. cap. 5, to dispense with the statutes for four years on account of the wars and a pestilence. But, lastly, and principally, it was an insuperable objection to the authority of this case, that the 23 H. 6. to remove all doubts, provides, that the king's grant for more than a year should be *void,* notwithstanding any *non obstante.* What respect could be due to a *judicial* opinion, declaring a dispensation *good,* which the *legislature* itself had positively enacted should be *void?* Yet it is not to be concealed, that in the report of Calvin's case, lord Coke justifies the king's dispensation in this instance on the principle of its being beyond the power of parliament to take away his right to the service of his subjects. Calvin's case, 7 Co. 14. This strange language is the more unaccountable, as it is inconsistent with his own doctrine here, and in the case on the statute against the sale of offices.—[Note 169.]

(4) But by the bill of rights, 1 W. & M. it was declared, that *from the then session* of parliament, no dispensation with any statute should be valid, unless such statute allows it, and except in such cases as should be specially provided for the then session. 1 W. & M. sess. 2. c. 2. s. 12. The occasion of this excellent provision was the equally extravagant and unwarrantable exercise of the dispensing power by James the second, who, having procured the sanction of a judicial opinion to a dispensation with the test act in favour of sir Edward Hales, madly proceeded to a suspension of the principal laws for the support of the established religion; an excess, in which, monstrous as it was, several of the judges, to the great scandal of Westminster-hall, gave him countenance, the priests of the temple of justice treacherously aiding to pollute it, instead of manfully opposing the sacrilege. Till the time of this prince the doctrine of dispensation was received with very important qualifications, of which the principal were these:—1. It was said, that the king could not dispense with the common law; though lord chief justice Vaughan seems to deny this position. Dav. 75. 3 Inst. 154. Vaugh. 334.—2. It appears to have been generally agreed, that the king could not dispense with a statute, which prohibited what was *malum in se.*—3. *Malum prohibitum* was not deemed universally dispensable with; for some held, the king could not dispense with a statute, if the prohibition was *absolute,* and not *sub modo,* as under a penalty to the king, or, as others express it, where the statute was made for the *general* good, and not with a view merely to the king's profit or interest.—4. None contended, that the royal dispensation could diminish or prejudice the property or private right of the subject.—5. It was understood, that the king could dispense, *not generally,* but only in favour of *particular persons,* and, according to some, for these only in *particular instances.*—But some of these distinctions had great uncertainty and subtlety in them, and were so open to controversy, that they only tended to create embarrassment: and though the others greatly restricted the largeness of the claimed prerogative, yet they were far from obviating

not only extend to benefice with cure, but to dignities, prebends, and all other ecclesiastical livings.

" *Clarke* (clerke.)" *Clericus*, is twofold; *ecclesiasticus* (which *Littleton* here intendeth), and he is either secular or regular, so called 4. H. cap. 12.

---

obviating the chief objection to so formidable a pretension. Had the boundary of the dispensing power been ever so clearly marked, still it was wise and prudent to annihilate it. So far as it resembles the power of repealing laws, it was an intolerable corruption, wholly irreconcilable with the first principle of our constitution, by which the power of legislation cannot be exercised by the king, without the two houses of parliament. So far as it did not fall within this idea, it was unnecessary: for those acts which were the fruits of it, might have derived their force from other acknowledged powers of the crown, such as the right of waving penalties and forfeitures belonging to itself, and the prerogative of pardoning.—It is worthy notice, that the *declaration of rights*, which the lords and commons made on tendering the crown to William and Mary, distinguishes between *suspending* laws by regal authority, and *dispensing* with them. The former, being a *general* and *absolute* abrogation for a time, is condemned without any exception; but the latter being only a *special exemption* of certain individuals is merely declared illegal, *as it had been exercised of late*. Also the *bill of rights*, though it declares against the *future* exercise of a dispensing power in any case except where the king is specially authorized by act of parliament, yet contains a proviso saving from prejudice all prior charters, grants and pardons. 1 W. & M. sess. 2. ch. 2. sect. 12 & 13. If the condemnation of the dispensing power for the *time past* had been unqualified, it might have destroyed the titles under numberless subsisting grants from the crown, the validity of which it was deemed most equitable to leave to the decision of the courts of justice in the ordinary way.—Such as wish to go more deeply into the controversy about the dispensing power, may find the following references useful.—For the history of dispensations, see Dav. 69. b. Pryn. on 4 Inst. 128 to 133. Atkyns on Power of dispens. with Pen. Stat.—For the cases on the subject, see the case of the Merchants of Waterford, in 2. R. 3. 11. 1 H. 7. 2. the Sheriff's case in 2 H. 7. 6. b. the doctrine in 11 H. 7. 11. b. 12. a. Grendon and the bishop of Lincoln, Plowd. 502. Case of the Aulnager, Dy. 303. Calvin's case, 7. Co. 15. the Prince's case, 8 Co. 29. b. Case of the Taylors of Ipswich, 11 Co. 53. Case of Monopolies, ibid. 84. Irish case of Commendam Dav. 58. Case of Customs, 12 Co. 18. the cases cited ante note 3. Colt and Glover *v.* the bishop of Litchfield, or English case of Commendam. Mo. 898. 1 Rol. Rep. 151. Hob. 246. Evans and Kiffins *v.* Askwith, W. Jo. 158. Palm. 457. Latch. 31. 233. Noy, 93. 2 Rol. Rep. 450. Case of clerk of the court of wards, Hob. 214. Needler and the bishop of Winchester, Hob. 230. Lord Wentworth's case, Mo. 713. Case of dispensation with 3 Jam. 1. c. 5. against a recusant's holding an office, Hardr. 110. Case of dispensation with statute against retailing wine without license, namely Young and Wright, 1 Sid. 6. Thomas and Waters, Hardr. 443. 2 Keb. 425. Thomas and Boys, Hardr. 461. Thomas and Sorrell, Vaugh. 330. 1 Lev. 217. 1 Freem. 85. 115. 128. 137. 2 Keb. 245. 280. 822. 372. 416. 790. 3 Keb. 76. 119. 143. 155. 184. 223. 233. 264. sir Edward Hale's case on the test act of 25 Cha. 2, in 2. Show. 475. Comberb. 21. State Tri. v. 7. p. 612. 4 Bac. Abr. 179, and Case of the seven Bishops in the reign of Jam. 2. State Tri. 4th ed. v. 5. p. 303. Of these cases, Thomas and Sorrell and sir Edward Hale's are the principal. The former was argued with the greatest solemnity in the exchequer chamber, the delivery of the opinion of the judges, of whom the majority was for the dispensation, taking up a day in four several terms. The latter was treated with less form; but gave occasion to some considerable publications on the subject; particularly

called because he is *servus et hæreditas domini:* and *laicus*, and in this sense is signified a pen-man, who getteth his living in some court or otherwise by the use of his pen.

Note, if the church becommeth void, albeit the present avoidance be not by law grantable over, yet may the lord of the villeine present in his owne name, and thereby gaine the inheritance of the advowson to him and his heires; for albeit it be not grantable over, yet it is not merely a chose in action: [*g*] for if a feme covert be seised of an advowson, and the church becommeth void, and the wife dyeth the husband shall present to the advowson; [*h*] but otherwise it is of a bond made to the wife; because that is merely in action.

(Ante 117. a.)

[*g*] 14 H. 4. 12. 38 E. 3. 35. 13 E. 2. Quare imp. 57.

[*h*] 43 E. 3. 10. 39 E. 3. 5. 4 H. 6. 5.

(Post. 351. a. 1 Ro. Abr. 345.) Cont. Cr. El. 173. 600. 3 Lev. 403. Aston, 247. but see 1 P. Wms. 381. 4 Vin. 76.

Sect. 181.

ALSO, there is a villeine regardant, and a villeine in grosse. A villein regardant is, as if a man be seised of a mannor to which a villein is regardant, and he which is seised of the said mannor, or they whose estate he hath in the same mannor; have beene seised of the villein and of his ancestors as villeins and neifs (1) *regardant to the same mannor time out of memory of man. And villein in grosse is, where a man is seised of a mannor whereunto a villein is regardant, and granteth the same villein by his deed to another, then he is villein in grosse, and not regardant.*

"*VILLEINE regardant.*" He is called regardant to the mannour, because he hath the charge to do all base or villenous services within the same, and to gard and keep the same from all filthie or loathsome things that might annoy it: and his service is not certaine but he must have regard to that which is commanded unto him. And thereupon he is called regardant, *a quo præstandum servitium incertum et indeterminatum, ubi scire non poterit vespere quale servitium fieri debet mane, viz. ubi quis facere tenetur quicquid ei præceptum fuerit*, as before hath beene observed. And *Littleton* sayth, hereafter, that no other thing is said to be regardant, but onely a villeine: [*i*] yet in old bookes it was sometimes applied to services.

[120. b.]

8 H. 7. 5.

Bract. li. 2. fo. 26. Mir. ca. 2, sect. 18.

Vide Sect. 84.

[*i*] 20 E. 3. tit. Issue, 30.

"*In grosse*," is that which belongs to the person of the lord, and belongeth not to any mannor, lands, &c.

Sect.

---

lord chief justice Herbert's account of the authorities on which the judgment was given in sir Edward Hale's case, Mr. Atwood's answer to it and a tract by lord chief baron Atkyns, against the king's power of dispensing with penal statutes. In a manuscript report of sir Edward Hale's case, sir Bartholomew Shower is mentioned to have applied to lord chief baron Atkyns. But we have not yet met with any such piece. Mr. Hume's state of the arguments for and against the dispensing power, though written with an evident bias in favour of the crown's prerogative, is worth consulting. Hume's Hist. 8vo. ed. v. 8, p. 242. 254. See also Tyrr. Bibliothec. Politic. 589 to 597.—For the proceedings in parliament after the Revolution, in respect to sir Edward Hale's case and the dispensing power, see Gray's Deb. v. 9, p. 297 to 307, 314 to 332, 336 to 344. 396. Chandl. Deb. of the Lords, v. 1, p. 394.—[Note 170.]

(1) *and neifs* not in L. and M.

Sect. 182.

ALSO, if a man and his ancestors, whose heire he is, have been seised of a villeine and of his ancestors as of villeines in grosse time out of memorie of man, these are villeines in grosse.

THIS needeth no explanation, but to add the saying of an ancient author. *Servage de home est subjection, issuant de cy grand antiquitie, que nul franke cep poet estre trove per humane remembrance.* Mir. ca. 2, sect. 18.

Sect. 183.

AND here note, that such things, which cannot be granted, nor aliened, without deed or fine, a man which will have such things by prescription, cannot otherwise prescribe but in him and in his ancestors, whose heire he is, and not by these words, In him and them whose estate he hath; for that he cannot have their estate without deed or other writing, the which ought to be showed to the court, if he will take any advantage of it. And because the grant and alienation of a villeine in grosse (3)* *lyeth not without a deed, or other writing, a man cannot prescribe in a villein in grosse, without showing forth a writing, but in himselfe which claims the villeine, and in his auncestors whose heire he is. But of such things, which are regardant or appending to a mannor, or to other lands and tenements, a man may prescribe, that he and they whose estate he hath* (que il et ceux que estate il ad,) *who were seised of the mannor, or of such lands and tenements, &c. have been seised of those things, as regardant or appendant to the manor, or to such lands and tenements* (4)* *time out of mind of man* (de temps dont memorie, &c. (5)*] *And the reason is, for that such manor or lands and* (1)† *tenements may passe by alienation without deed, &c.*

"*OR fine,*" in *Latine, finis.* [*l*] *Ideo dicitur finalis concordia; quia imponit finem litibus, et est exceptio peremptoria.* [*m*] *Finis est amicabilis compositio et finalis concordia, ex consensu et licentiâ* ☞ *domini regis, vel ejus justiciariorum* (1). [*n*] *Talis concordia finalis dicitur eò quòd* Vide Sect. 441. 194. 174. 74. [*l*] Bract. li. 5. tract. 5. c. 28. (Fost. 262. a.) [*m*] Glanv. li. 8. ca. 1. Fleta. 281.

[121. a.]

Bracton, 256. 310. 435. [*n*] 9 Co. cap. 3. Statut. de modo levandi fines. Pl. Com. 357. (3 Co. 84. 8 Co. 51.) 5 Co. fol. 38. Teye's case.

finem

* *These are notes 3, 4, and 5, of* 121. *a.* in *the 13th and 14th editions.*
† *This is note* 1, *of* 121, *b. in the 13th and 14th editions.*

(3) * *in grosse* not in L. and M. nor Rob.
(4) * *&c.* and in L. and M. and Rob.
(5) * court *instead of &c. in L. and M. and Roh.*
(1) † *or* instead of *and* in L. and M.

(1) This, though a just description of fines, considered according to their original and still apparent import, yet gives a very inadequate idea of them in their modern application. In Glanville's time they were really amicable compositions of *actual* suits. But for several centuries past, fines have been only so in *name*, being in *fact fictitious* proceedings, in order to transfer or secure real property, by a mode more efficacious than ordinary conveyances.

What

finem imponit negotio, adeo ut neutra pars litigantium ab eo de cætero

What the superiority of a fine in this respect consists of will best appear by stating the chief uses to which it is applied.—One use of a fine is *extinguishing dormant titles*, by shortening the usual time of limitation. Fines, being agreements concerning lands or tenements solemnly made in the king's courts, were deemed to be of equal notoriety with judgments in writs of right; and therefore the common law allowed them to have the same quality of barring all who should not claim within a year and a day. See Plowd. 357. Hence we may probably date the origin and frequent use of fines as feigned proceedings. But this puissance of a fine was taken away by the 34 E. 3, and this statute continued in force till the 1 R. 3. and 4 H. 7, which revived the ancient law, though with some change, proclamation being required to make fines more notorious, and the time for claiming being enlarged from *a year and a day* to *five years*. See 34 E. 3. c. 16. 1 R. 3. c. 7. 4 H. 7. c. 24. The force of fines on the rights of strangers being thus regulated, it has been ever since a common practice to levy them merely for better guarding a title against claims, which, under the common statutes of limitation, might subsist, with a right of *entry* for twenty years, and with a right of *action* for a much longer time.—Another use or effect of fines is barring estates tail, where the more extensively operative mode by common recovery is either unnecessary or impracticable. The former may be the case when one is tenant in tail with an immediate reversion or remainder in fee; for then none can derive a title to the estate except as his *privies* or *heirs*, in which character his fine is an immediate bar to them*, the latter occurs when one has only a remainder in tail, and the person, having the freehold in possession, refuses to make a tenant to the præcipe for a common recovery, which would bar all remainders and reversions: for, under such circumstances, all which the party can do is to bar those *claiming under himself* by a fine. How this power of a fine over estates tail commenced has been *vexata questio*. The statute *de donis*, after converting fees conditional into estates tail, concludes with protecting them from fines, there being express words for that purpose. But the doubt is, when this protection was withdrawn, whether by the 4 H. 7. or the 32 H. 8. It is a common notion, into which some of our most respectable historians have fallen, that the 4 H. 7, was the statute which first loosened entails; and thus opening the door for a free alienation of landed property has been attributed to the deep policy of the prince then on the throne. See Hume's history, 8vo. ed. v. 3. p. 400. But this is is an error proceeding from a strange inattention to the real history of the subject. Common recoveries had been sanctified by a judicial opinion in Taltarum's case, as early as the twelfth of Edward the fourth: and from them it was that entails received their death wound; for, by this fiction of common recoveries, into the origin of which we mean to scrutinize in some other place, every tenant in tail in possession was enabled to bar entails in the most perfect and absolute manner; whereas fines, even now, being only a partial bar of the issue of the persons who levy them, must in general be an inefficacious mode. In respect to the 4 H. 7, it was scarce more than a repetition of the 1 R. 3, the only object of which indisputably was to repeal the statute made the 34 E. 3, in favour of non-claims, and against them to revive the ancient force of fines, but with some abatement of the rigour in point of time, and other improvements, as we have already hinted; a provision of the utmost consequence to the security of titles. Accordingly lord Bacon, whose discernment none will question, in his life of Henry the seventh, commends the statute of the 4th of his reign, merely as if aimed at non-claims. Bac. Hen. 7. in Ken. Comp. Hist. 2d ed. v. 1. p. 596. Nor indeed could there

* *But where the tenant in tail has the reversion or remainder in fee by descent, a recovery is preferable to a fine, for the reasons stated by Mr. Preston in his Treat. on Convey. vol. 1. 2d. ed. p. 9—12.*

there have been the least pretence to extend the meaning of the law farther, if it had not been for some ambiguous expressions in the latter end of it. Like the 1 R. 3, after declaring a fine with proclamation to be an universal bar, it saves to all, except *parties*, five years to claim after the proclamation of it. But this saving did not suit the case of the issue in tail, or of those in remainder or reversion: because during the life of the immediate tenant in tail these could have no right to the possession, and it was possible that he might live more than five years from the proclamation of the fine. The framers of the 4 H. 7, foresaw this; and therefore, like the 1 R. 3, it contains an additional saving of five years for all persons to whom any title should come *after* the proclamation of the fine, by force of any entail subsisting *before;* words, which as strongly apply to the issue of the tenant in tail levying a fine, as to those in remainder or reversion. Had therefore the 4 H. 7, stopped here, what the learned and instructive observer on our ancient statutes writes would be strictly just, that, instead of destroying estates tail, the statute expressly saves them. Barringt. on Ant. Stat. 2d ed. p. 337. But a subsequent part of the statute, in declaring how a fine shall operate on such as have five years allowed, if they do not claim within that time, expresses that they shall be concluded *in like form as parties and privies;* and another clause, in regulating who should be at liberty to aver against a fine *quod partes nihil habuerunt*, saves this plea for all persons, with an exception of *privies* as well as *parties*. From these two clauses, though the former of them was copied from the 1 R. 3, grew a doubt, whether the statute did not enable tenant in tail to bar his issue by a fine. The arguments for it were, that the issue were *privies* both in blood and estate; and that if the statute meant to bind them, when the tenant in tail had *not any* estate in the land at the time of the fine, it was highly improbable there should be a different intention, when he really had one. 2 Show. 114. On the other hand it might be said, that, as the word *privies* in the statute *de modo levandi fines*, and in the 1 R. 3, was not deemed sufficient to reach heirs in tail, and to control the statute *de donis*, why then should the same word in the 4 H. 7, include them; more especially when it was considered, that it was as much the professed scope of the 4 H. 7, as it was of the 1 R. 3, to revive the operation of fines against non-claims, and that both contained the same express saving for persons claiming under entails? 2 Inst. 517. Pollexf. 502. By such contrariety of reasoning, the judges in the 19 H. 8, became divided in opinion; three holding that the 4 H. 7, was not a bar to the issue, and four that it was. See 19 H. 8. 6. b. Dy. 2. b. pl. 1. Br. Abr. Fines, 1. 121. 123. Bro. N. C. 144. Pollexf. 502. To remove the doubt the legislature passed the 32 H. 8, by which the heirs in tail are expressly bound. 32 H. 8. c. 36. But the last-named statute, though intituled an exposition of the 4 H. 7, and though made to operate *retrospectively*, contained several exceptions, particularly one of fines of lands, of which the reversion is in the crown. Consequently room was still left for contesting the effect of the 4 H. 7, independently of the 32 H. 8, and in the reign of Charles the second a case arose, which made a discussion of the point almost unavoidable. It was the case of the earl of Derby against one claiming under a fine by the earl's father, who was tenant in tail with reversion in the crown, and so within an exception in the 32 H. 8. Two points were made, of which the first was, whether this fine, thus depending wholly on the 4 H. 7, was a bar to the issue in tail; and on adjournment of the case into the exchequer chamber, eight judges against three held that the fine of tenant in tail was a bar to the issue before the 32 H. 8, great stress however being laid by those of this opinion on the exposition of the former by the latter. See Murrey on the demise of the earl of Derby against Eyton and Price, Pasch. 31 Cha. 2, in Scacc. T. Raym. 260. 286. 319. 338. Pollexf. 491. Skinn. 95. 2 Show. 104. T. Jo. 237. It is observable, that both lord-keeper North and lord chief justice Saunders, the lateness of whose promotions prevented their publicly giving their opinions, concurred with the majority of the judges in the construction

of

of the 4 G. 7, and further, that Pollexfen, who as counsel argued most ably for the earl of Derby, the issue in tail, afterwards declared his private sentiments to be against the earl on that statute. But it should be adverted to, that though the majority of the judges were against lord Derby on this point, they gave judgment for him on a secondary one, which was, that the entail, being of the gift of the crown, fell within the protection of the 34 H. 8. Therefore their opinion on the 4 H. 7, finally proved to be wholly extra-judicial. But we do not know of any case in which the controversy has been again agitated (*a*).—A third effect of fines is passing the estates and interests of married women in the inheritance or freeholds of lands and tenements. Our common law bountifully invests the husband with a right over the whole of the wife's personalty, and entitles him to the rents and profits of her real estate during the coverture. It further gives him an estate for his own life in her inheritance, if the husband is actually in possession, and there is born any issue of the marriage capable of inheriting. But the same law which confers so much on the husband, will not allow her, whilst a feme-covert, to enlarge the provision for him out of her property, or to strip herself of any claims which the law gives her on his. On the contrary, jealous of his great authority over her, and fearful of his using compulsion, it creates a disability in her to give her consent to any thing which may affect her right or claims after the coverture, and makes all acts of such a tendency absolute nullities. By the rigour of the ancient law we take this rule to have been so universally applicable, that a married woman could in *no* case bind herself or her heirs by any *direct* mode of alienation. But accident gave birth to two *indirect* modes, namely, by fines and common recoveries. Though it might be proper to incapacitate the wife from being influenced by the husband to prejudice herself by any conveyances or agreements during the coverture, yet justice to others required, that such as might have any claim on the wife's freehold or inheritance should not be forced to postpone their suits till the marriage was determined; for if they should, then, to use the words of Bracton, in explaining why the husband's infancy would not warrant the parol to demur in a suit for the wife's land, *mulier implacitata de jure suo si propter minorem ætatem viri posset differre judicium, ita posset quælibet mulier in fraudem nubere.* Bract. lib. 5. tract. 5. c. 21. fo. 423. a. Probably it was on this principle the common law allowed a judgment against husband and wife, in a suit for her land, to be as conclusive as if given against a feme-sole; which was carried so far, that, till the statute of Westminster the second, even judgment against them, on default in a *possessory* action for the wife's freehold, drove the wife after the husband's death to a writ of right to recover her land. 2 Inst. 342. From enabling the husband and wife to defend her title, and making the judgment on such defence to be conclusive, permitting them to compound the suit by a final agreement of record, in the same manner as other suitors, was no great or difficult transition; more especially when it is considered, that in the case of femes-covert, fines are never allowed to pass without the court's secret examination of them apart from their husbands, to know whether their consent is the result of a free choice, or of the husband's compulsive influence. Such we conceive is the true source whence may be derived the present force of fines and common recoveries as against the wife, who joins in them; for whatever in point of bar and conclusion was their effect, when in suits really *adverse*, of course attended them when they were *feigned*, and in that form gradually rose into modes of alienation, or as the more usual phrase is, *common assurances*. The conjecture we have thus hazarded, to illustrate how it happens that a married woman may alien her real rights by fine, though not by any instrument or act strictly and nominally a conveyance, leads to proving, that the common notion of a fine's binding femes-covert merely by reason of the *secret examination* of them by the judges, is incorrect. If the secret examination of *itself* was so operative, the law would provide the means of effectually adding that form to ordinary conveyances, and so make them conclusive to femes-covert

cætero poterit recedere (2). Of the severall parts of a fine, and many incidents to the same, you shall reade in my Reports.

" *Whose estate* (que estate), &c." *quorum statum*, as much as to say, whose estate he hath. Here *Littleton* declareth one excellent rule, [*o*] that a man cannot prescribe in any thing by a *que estate*, that lyeth in grant, and cannot passe without deed or fine; but in him and his ancestors he may, because he comes in descent without any conveyance. Neither can a man plead a *que estate* in himselfe of any thing that cannot passe without deed, [*p*] but in another he may, as in barre of an avowry, the plaintife

[*o*] 22 Ass. 53. 23 Ass. 6. 12 H. 7. 16. 18. (Doct. Pla. 302. 303, 304.)

[*p*] 39 H. 6. 8. 18 E. 4. 23.

---

covert equally with a fine. But it is clearly otherwise; and, except in the case of conveyances by *custom*, there must be a *suit* depending for the freehold or inheritance, or the examination, being *extra-judicial*, is ineffectual. In the Second Institute lord Coke represents this to be the *general* law, and, amongst many other authorities cited to prove it, refers to a case of Hen. 7, reported by Kielwey, in which whether the examination of a feme-covert, on the enrolment of a bargain and sale to the *king*, sufficed to bind her, was largely debated. 2 Inst. 673. Kielw. 4. a. to 20. a. The just explanation therefore of the subject is, that the *pendancy of a real action* for the *freehold* of the land, in consequence of previously taking out an original writ, without which preliminary even at this day a fine is a nullity, should be deemed the *primary* cause of the fine's binding a feme covert; and that the *secret examination* of her, on taking the acknowledgment of the fine, is only a *secondary* cause of this operation. Such are the *three* chief effects, by reason of which, fines, no longer used, according to their original, as recorded agreements for conclusion of *actual suits*, have been changed into and are still retained as *feigned* proceedings; and being thus accommodated to answer purposes, to which ordinary conveyances cannot be applied, it is no wonder that they should not only be considered as a species of conveyance, but also be deemed a principal guard to the titles to real property, and as such be ranked amongst the most valuable of the common assurances of the realm. In this digression on the properties of a fine, we have purposely omitted to consider its operatien either as an *estoppel*, except so far as it may be said to be one to the issue in tail by force of the 4 H. 7, and 32 H. 8, or as a *discontinuance*, or lastly in respect of the conusor's *warranty*, which is always inserted in it. The virtues of a fine, in the three points of view we have examined it, namely, to extinguish dormant titles, to bar the issue in tail, and to pass the interests of femes-covert, these constitute the more *peculiar* qualities, on account of which it is most usually, if not always, resorted to. As to the three other effects, it may be enough to observe here, that they are equally incident to feoffments, or any other deeds having warranties annexed. The distinct consideration of them is reserved for another occasion.—[Note 171.]——(*a*) See the ca. in 1 Wils. 48, and the ca. 2 ib. 175, which I was not aware of when I wrote this note. See also the ca. of Johnson on dem. of E. of Anglesea & ux. and Ly. El. Huntley *v.* Earl of Derby & others, in Piggott on Recoveries, 201; and more fully in Supp. to 11 Mod. 2 ed. 304; and the case of Perkins *v.* Sewell, 4 Burr. 2223, and 1 Bl. Rep. 654.

As to devestment of remainders and reversions from the effect of a fine by tenant for life, see post. 251. b. 332. b.

(2) If binding the *parties*, or even *privies*, exclusive of heirs in tail, was the only effect of a fine, it would scarce be preferable to less solemn agreements; for without doubt, they are so far binding. The most distinguishable properties of a fine are barring *strangers* unless they claim within five years, barring the *issue in tail immediately*, and binding *femes covert*, as we have explained in the foregoing note.—[Note 172.]

plaintife may plead a *que estate* in the seigniory in the avowant. But *Littleton's* words are to be observed (*a man which will have such things by prescription*). Therefore [*q*] when a thing that lyeth in grant, is but a conveyance to the thing claimed by prescription, there a *que estate* may be alledged of a thing that lyeth in grant; as a man may prescribe, that he and his ancestors, and all those whose estate he hath in an hundred, have time out of minde, &c. had a leet, &c. this is good, &c.

[*q*] 11 H. 4. 89. 19 R. 2. Action sur le case, 51. 13 E. 3. Br. 674. (Cro. Jam. 673. 10 Co. 59. b.)

[*r*] Regularly the plaintife shall not intitle him by a *que estate* but he must shew how he came by it; but after avowry made, the plaintife shall plead a *que estate*, because he is now become as a defendant.

[*r*] 9 E. 4. 3. b. 29 Ass. 19. 2 H. 6. 10. 48 E. 3. tit. 33. 3 H. 6. 28. (Bro. Que estate, 3.)

[*s*] A man may plead a *que estate* of a tenancy in taile, or of an estate for life, so as he averreth the life of them; but he cannot plead a *que estate* of a lease for years (6), or at will.

[*s*] 41 Ass. 2. 40 Ass. 28. 2 H. 4. 20. 15 E. 4. 1. 5 H. 7. 39. 18 E. 4. 10. 7 E. 6. tit. Que estate, Br. 31. 27 H. 6. 3. 7 El. Dyer, 238. (1 Co. 46. 1 Sid. 298. Doc. Pla. 304.)

[*t*] A disseisor, abator, intruder, recoveror or any other that cometh in the *post* ☞ shall plead a *que estate*. [121. b.]

[*t*] 22 H. 6. 34. 6 E. 4. 12. 31 H. 8. Que estate Br. 48. 39 H. 6. 14. 9 H. 6. Estop. 25.

[*u*] A *que estate* must be alledged in the tenant or defendant himselfe, and not in one in the mean conveyance, from whom he claimeth; and yet some bookes be to the contrary.

[*u*] 11 H. 4. 81. 27 H. 6. 32. 9 E. 4. 3. 2 E. 6. tit. Que estate, 8. 1 E. 6. Que estate, Br. 49. (Cro. Cha. 54. 1 Lev. 190.)

§ "*The which ought to be shewed to the court.*" The reason wherefore a deed, that is pleaded, ought to be shewed to the court is, because every deed must prove itselfe to have sufficient words in law whereof the court must adjudge; and also to be proved by others, as by witnesses or other proofe, if the deed be denyed, which is matter of fact.

"*By alienation without deed, &c.*" Here by (*&c.*) is implyed, that whatsoever passeth by livery of seisin, either in deed or in law may passe without deed; and not only the rents and services parcell of the mannor shall with the demeanes, as the more principall and worthy, passe by livery without deed, but all things regardant, appendant, and appurtenant to the mannor, as incidents or adjuncts to the same, shall, together with the mannor, passe without deed; all which, as here it appeareth, and elsewhere is said, shall passe, without saying *cum pertinentiis* (2).

Sect.

---

(6) But see 1 Lev. 100, and 1 Sid. 298.

(2) But by the 17 E. 2, *de prærogativa regis*, the king's grant of a manor will not pass an avowson appendant without express mention of it. Yet there are some cases which have been deemed not within the reason of the statute; such as the crown's *restitution* of lands to wards, at their full age and to the heirs of idiots, or of temporalties to new bishops. Staunf. Prærog. 43. a. Doder. Advows. 36. Even words of *reference* have been held sufficient; as where the king granted a manor with all its appurtenances as fully as the same came to and were possessed by the crown, and an advowson was appendant to the manor. Adjudged in Whistler's case, 10 Co. 63. a.—It is agreed in our old books that before the statute *de prærogativa regis*, the king's grant of a manor would pass an advowson appendant, without naming it, or so much as

Sect. 184.

AND it is to be understood, that nothing is named regardant to a mannor, &c. but a villeine. But certaine other things, as an advowson and common of pasture, &c. are named appendant to the mannor, or to the lands and (3) *tenements, &c.*

"*REGARDANT:*" *Vide* Sect. 181.

"*Appendant.*" Appendant is any inheritance belonging to another, that is superior or more worthy. In law it is called *pertinens, quasi invicem tenens*, holding one another; a word indifferent both to things appendant and things appurtenant. The quality and nature of the things do make the difference. But regardant (as our author saith) is only applyed to a villeine. (*) Appendants are ever by prescription (4); but appurtenants may be created in some cases this day (5). As if a man at this day grant to a man and his heirce common in such a moore for his beasts levant or couchant upon his mannor; or if he grant to another common of estovers or turbary in fee simple, to be burnt or spent within his mannor; by these grants these commons are appurtenant to the mannor, and shall passe by the grant thereof. In the civill law it is called *adjunctum* (6).

Vide Sect. 1. (*) 5 Ass. 9. 8 H. 7. 4, 5. 28 H. 8. Dier, 30. b. Pl. Com. 381. F. N. B. fol. 181. (2 Ro. Abr. 60. 5 Co. 17. b.)

(*x*) If *A.* be seised of a mannor, whereunto the franchise of waife and stray and such like are appendant, and the king purchaseth the mannor with the appurtenances, now are the royall franchises re-united to the crowne, and not appendant to the mannor. But if he grant the mannor in as large and ample manner as *A.* had, &c. it is said, that the franchises shall be appendant (or rather appurtenant) to the mannor.

[*x*] 43 Ass. p. 10, 43 E. 3. 22. (10 Co. 64, 65.) 2 Ro. Ab. 185.)

Concerning things appendant and appurtenant, two things are implied [*y*].

First, that prescription, (which regularly is the mother thereof) doth not make any thing appendant or appurtenant, unless the thing

[*y*] Hill and Grange's case, Pl. Com. 168.

---

as using the word *appurtenances*. Staunf. Prærog. 42. a. 10 Co. 64. a. But in the history of Westmoreland, published by Mr. Nicholson and Dr. Burn, the record of a case of *darrein presentment* of the 15 E. 1, is cited, in which the court adjudged, that a grant of the manor of Burgh, with its *appurtenances*, being from the crown, would not pass the advowson of the chapel though appendant to the manor; and thence the 17 E. 2, is concluded to be only declaratory of the common law. See vol. 1. p. 564, 565. The case appealed to seems full in point. But then there is a strong current of authorities the other way; for the case of 43 E. 3. 23, is to the contrary, and so are the instances of things appendant not within the statute. Staunf. Prærog. 42. a. 10 Co. 64. a.—[Note 173.]

(3) *or* for *and* in L. and M.

(4) See note 2, to 122. a. 4 Vin. 589 (L). 2 Sid. 87.

(5) Acc. 1 Ventr. 407.

(6) *Adjunctum* is rather a term of the logicians. The *accessorium* of the civil law answers best to our terms of *regardant, appendant, appurtenant*, and *incident*. How these differ from that which is *part* or *parcel of* a thing, is explained in judge Doderidge's Treatise on Advowsons. See p. 38.—[N. 174.]

thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtent; as a thing corporeall cannot properly be appendant to a thing corporeall, nor a thing incorporeall to a thing incorporeall (7). But things incorporeall which lye in grant, as advowsons, villeins, commons, and the like, may be appendant to things corporeall, as a manor house or lands; or things corporeall to things incorporeall, as lands to an office. [z] But yet (as hath been said) they must agree in nature and quality; for [a] common of turbary or of estovers cannot be appendant or appurtenant to land, but to a house to be spent there. [b] Nor a leet, that is temporall, to a church or chappell, which is ecclesiasticall. Neither can a nobleman, esquire, &c. claime a seat in a church by prescription as appendant or belonging to land, but to a house, for that such seat belongeth to the house in respect of the inhabitancy thereof; and therefore, if the house be part of a mannor, yet in that case he may claime the seat as appendant to the house for the reason aforesaid. [122. a.]

(1 Rol. Abr. 230.)
[z] 1 H. 7. 24. Pl. Com. 169.
[a] 5 Ass. 9. (1 Sid. 354.)
[b] 10 E. 3. 5. 37 H. 6. 34. 26 H. 8. 4.
4 Co. 36, 37, in Tirringham's case.
Pop. 140.
2 Mod. 183.

(12 Co. 104.) 5 E. 6. Dier, 70. b. (1 Rol.. Abr. 230.)

Secondly, that nothing can be properly appendant or appurtenant to any thing, unless the principall or superior thing be of perpetuall subsistance and continuance. For example, an advowson that is said to be appendant to a mannor, is *in rei veritate* appendant to the demesnes of the mannor, which are of perpetuall subsistance and continuance, and not to rents or services, which are subject to extinguishment and destruction (1).

(1 Rol. Abr. 230.)

An advowson is appendant to the mannor of *Dale*, of which mannor the mannor of *Sale* is holden, the mannor of *Sale* is made parcel of the mannor of *Dale* by way of escheat, the advowson is only appendant to the mannor of *Dale*.

31 H. 6. 15. b.

And where it is said, that a chamber may be parcell of a corody, and passe by the name of the corody, which may be extinguished, there he that hath the corody hath but his habitation in the chamber; as a fellow of *Trinity* College in *Cambridge* hath in his chamber, or as one that had a corody and a chamber in an house of religion, he had but his habitation only. As for offices of fee whereunto land may appertaine, they are of perpetuall subsistence, either being *in esse*, or in that they are grantable over.

13 E. 3. Quar. imp. 170.

Note, that an advowson at one turne may be appendant, and at another

43 E. 3. 35. 13 E. 3. Quar. imp. 58. 17 E. 3. 38. 9 Eliz. Dier, 259. 7 E. 3. 20.

(7) This position is not universally true. It sometimes fails as to things appurtenant. *Return of writs* or a *leet* may be appurtenant to an *hundred;* so may *waif* and *stray* to a *leet;* and yet in these instances *both* subjects are *incorporeal.* Ante, 121. a. 8 H. 7. 1, 2, 3. Rast. Entr. 128. The true test seems to be the propriety of relation between the *principal* and the *adjunct;* which may be found out, by considering whether they so agree in nature and quality as to be capable of union without any incongruity. See 1 Ventr. 386.—[Note 175.]

(1) Acc. Dy. 70. b. and two adjudged cases in marg. of ed. 1688. Acc. also by Dyer in 2 Leon. 222. The same point was agitated in *Long* and *Heming*, 31 Eliz. of which case the reports differ so much, that it is difficult to say what was decided by the court. But it rather seems to have ended with an opinion consonant to lord Coke's. Sav. 103. Cro. Eliz. 209. 1 Leon. 207. 4 Leon. 216. Doder. Advows. 42.—[Note 176.]

another turne in grosse. As if the mannor be divided betweene coparceners, and every one hath a part of the manor without saying anything of the advowson appendant, the advowson remaines in coparcenary, and yet in every of their turnes, it is appendant to that part which they have; and so it is, if they make composition to present against common right, yet it remaines appendant. But if upon such a partition an expresse exception be made of the advowson, then the advowson remains in coparcenarie and in grosse, and so are the bookes reconciled.

19 E. 3. Quar. imp. 59. 35 H. 6. 32, 33. 38 H. 6. 9. 2 H. 7. 5. (6 Co. 64. a.)

"*Common of pasture.*" [c] *Communia*, it cometh of the *English* word common, because it is common to many; and thereupon and accordingly is here called by *Littleton* common of pasture, for that the feeding of beasts in the land wherein the common is to be had belongs to many.

[c] Glanvill. lib. 3. ca. 86. Bract. lib. 4. c. 19. & 42. Brit. cap. 55, 56. 57. Fleta, lib. 4. ca. 19. Mirror, ca. 5. sect. 3.

[d] There be foure dinds of common of pasture, viz. common appendant, which is of common right, and therefore a man need not prescribe for it) (2) for beasts commonable (that is) that serve for the maintenance of the plough, as horses and oxen to plough the land, and for kine and sheep to compester the land, and is appendant to arrable land (3).

[d] 20 E. 3. Admeasurement 8. Temps. E. 1. Common 24. 17 E. 2. ibid. 23. 4 H. 6. 22 H. 6. (1 Rol. Abr. 396.) (Cro. Cha. 542. 6 Co. 69.)

[e] The second is common appurtenant, that is, for beasts not commonable; as swine, goats, and the like. [f] If a man purchase part of the land, wherein common appendant is to be had, the common shall be apportioned, because it is of common right; but not so of a common appurtenant, or of any other common of what nature soever. But both common appendant and appurtenant shall be apportioned by alienation of part of the land to which common is appendant or appurtenant; and for common appurtenant one must prescribe (4).

[e] 37 H. 6. 34. 26 H. 8. 4. F. N. B. 181. (Dier, 70. b. [f] 4 Co. f. 37, 38, &c. Tirringham's case. (Hob. 235. 1 Roll. Abr. 399. Cro. Cha. 482. Cro. El. 531.)

[g] The third is *common per cause de vicinage*, which differeth from both the other commons, for that no man can put his beasts therein, but they must escape thither of themselves by reason of vicinity: in which case one may enclose against the other, though it hath beene so used time out of mind, for that it is but an excuse for trespasse.

[g] 8 Co. 78, 79. W. Wilde's case. (7 Co. 5. Corbet's case.)

The last is common in grosse, which is so called, for that it appertaineth to no land, and must be by writing or prescription. Of common appendant, appurtenant, and in grosse, some be certaine, that is, for a certaine number of beasts; some certaine by consequent, viz. for such as be levant and couchant upon the land; and some be more incertaine, as commons *sauns nomber* in grosse,

---

(2) This may at first seem to clash with the doctrine before, that *appendants are ever by prescription*. Ante 121. b. n. 4. But they may be reconciled; for as appendancy cannot be without prescription, the former always *implies* the latter: and therefore if one pleads common appendant, it is unnecessary to add the usual form of prescribing.—[Note 177.]

(3) See Fulb. Prepar. 68. b. and 1 Saund. 351.

(4) But not if there is a *grant* to show; common appurtenant being claimable by *grant*, as well as by *prescription*. Adj. Cro. Cha. 482.—[Note 178.]

(1 Saund. 345.) grosse, and yet the tenant of the land must common or feed there also (5).

[h] Fleta, ubi supra.

[i] 18 E. 3. fol. 43.

[k] 15 E. 2. Prescript. 51. 12 H. 8. fol. 2. (Cro. Jam. 208. 257. 1 Rol. Abr. 396. 2 Rol. Abr. 267. 7 Co. 5. 1 Vent. 391. 1 Saund. 351.)

[*] Pasch. 26 Eliz. in the King's Bench, inter White & Shirland in com. Oxon. Vide Sect. 1 & 2. (F. N. B. 180. C. 2 Saund. 326. 1 Rol. Abr. 405.)

[l] Vid. 3. E. 3. 29, 30. 4 E. 3. 7. 46 E. 3. 23. 15 E. 2. Prescript. 51.

[m] 20 H. 6. 4. 10 H. 7. 24.

There be also [h] divers other commons, as of estovers, of turbary, of pischary, of digging for coles, minerals, and the like. [i] If common appendant be claymed to a manor, yet *in rei veritate* it is appendant to the demesnes, and not to the services; and therefore if a tenancy escheate, the lord shall not encrease his common by reason of that. [k] If a man claime by prescription any manner of common in another man's land, and that the owner of the land shall be excluded to have pasture, estovers, or the like, this is a prescription or custome against the law, to exclude the owner of the soyle; for it is against the nature of this word common, and it was implyed in the first grant, that the owner of the soyle should take his reasonable profit there, as it hath beene adjudged. [*] [l] But a man may prescribe or alledge a custome to have and enjoy *solam vesturam terræ*, from such a day till such a day, and hereby the owner of the soyle shall be excluded to pasture or feed there (6); and so he may prescribe to have *separalem pasturam*, and exclude the owner of the soyle from feeding there. *Nota divesitatem.* [m] So a man may prescribe to have *separalem pischariam* in such a water, and the owner of the soil shall not fish there; but if he claim to have *communiam pischariæ*, or *liberam pischariam*, the owner of the soyle shall fish there (7). And all this hath ☞ beene resolved. [*] And therefore it is necesary for every man by learned advice to plead according to the truth of his case; for *parols font plea.*

[122. b.]

Temps E. 1. Assise, 422. (2 Rol. Abr. 258.) [*] Inter Chinery & Fishen in le Com. Banke in replevin, and Mich. 29 & 30 Eliz. inter Shirland & White in com. Oxon. et inter Foiston & Crachrode eodem termino in Essex. (2 Rol. Abr. 267.)

A man

(5) It has been denied that common in *gross* can be *sans nombre*. 1 Saund. 346. But see Fulb. Prepar. 70. a. and the books there cited.—[Note 179.]

(6) For the cases about *sola vestura* see ante 4. b. n. 1. As to *separalis pastura*, whether a prescription for it can be made against the owner of the soil, has been the subject of argument in three different cases since lord Coke's time. In the first the court of common pleas was equally divided. North and Cox, Mich. 20 Cha. 2. Vaugh. 251. 1 Lev. 253. In the second the court of king's bench inclined to think such a prescription good; but the demurrer, on which the point arose, being over-ruled by consent, in order to try the fact, and a verdict being found against it, a decision of the question of law became unnecessary. Potter and North, Easter, 21 Cha. 2. 1 Ventr. 383. 1 Saund. 347. 1 Lev. 268. But in the third case, which was on a motion to arrest judgment, the whole court of king's bench adjudged for the prescription. Hopkins and Robinson, East. 23 Cha. 2. Pollexf. 13. 1 Mod. 74. a. 2 Saund. 324. 2 Leon. 2. Since this last case lord Coke's doctrine seems to have been generally acquiesced in.—Vin. Prescrip. 269, 270.—[Note 180.]

(7) According to this passage, ownership of the soil is not necessarily included in a *several fishery;* and *common of fishery* and *free fishery* are the same thing. But one, whose works will be admired, as long as a good taste for literary compositions, or gratitude for the pleasure and instruction derived from them, shall have any influence, gives a very opposite explanation; for, according to him, ownership of soil is *essential* to a *several fishery:* and a *free fishery* differs both from *several fishery* and *common of fishery*; from the former, by being confined to a *public* river, and not *necessarily* comprehending the soil; from

[n]. A man seised of land whereunto common is appendant, and is disseised, the disseisee cannot use the common, untill he entreth into the land whereunto it is appendant. [o] But if a man

[n] 19 H. 6. 33.

[o] Vide Sect. 541. (4 Co. 31. a. Post. 307. 349. b. 368. b.)

---

from the latter, by being *exclusive*. 2 Blackst. Com. 8 ed. 39. But we doubt whether this distinction may not be in a great degree questionable.—1. In respect to a *several fishery*, where is the inconsistency in granting the *sole* right of fishing, with a reservation of the soil and its other profits? Bracton expressly takes notice of such a grant; for his words are, that one may *servitutem imponere fundo suo, quòd quis possit piscari cum eo, et ita in communi, vel quòd alius per se ex toto.* Bract. fo. 208. b. There are also numerous other authorities for it; the old books of entries agreeing that one may prescribe for a *several fishery* against the owner of the soil; to which should be added, the three cases of Elizabeth cited by lord Coke. See Lib. Intrat. 162. b. 163. a. Rast. Entr. 597. b. and the books cited under the letter *d* in fol. 4. b. and under *m* here, and the cases referred to under the * on the other side. Nor do we understand why a *several piscary* should not exist without the soil, as well as a *several pasture*, as to which latter we have already shown the doctrine to be settled. Supra, note 6. The chief reasons which occur against lord Coke seem to be these.—Several writs, never applicable except to the soil, lie for a piscary; such as a *præcipe quòd reddat, monstraverunt de rationabilibus devisis*, and *trespass*, which latter writ is particularly insisted upon by lord chief justice Holt. Dav. 55. b. Hugh. Comm. Orig. Wr. 11. W. Jo. 440. 1 Ventr. 122. 2 Salk. 637. Skinn. 677. *Suum liberum tenementum* is a good plea to trespass for fishing in a *several piscary*. 17 E. 4. 6. 18 E. 4. 4. 10 H. 7. 24. 26. 28. The soil will pass, as it is said, by the grant of a piscary. Plow. 154.—But all these objections may be repelled.—The writs relied on will not always lie for a piscary. Thus if a *præcipe quòd reddat* is brought of a piscary in the water of another person, the writ is bad, and a *quòd permittat*, is the proper remedy. Fitz. Abr. Briefe, 861. F. N. B. 23. I. and note b. of the 4to ed. Besides, in the cases of actions for trespass in a *several piscary*, or at least in some of them, the writ seems in effect to state a *several piscary* in the *plaintiff's own soil*, which therefore proves nothing as to the sense of *several piscary* without further explanation. Reg. Br. Orig. 95. b. Carth. 285. Skinn. 677. The plea *liberum tenementum* may be replied to by prescribing for a *several piscary*. See the books before cited as to such a prescription. Though the grant of a piscary *generally may*, perhaps, pass the soil, yet it will not, if there are any words to denote a different intention; as where one seised of a river grants a *several fishery* in it, which is the case put by lord Coke in another place; and much less will the soil pass when there is an express reservation of it. Ante 4. b. and n. 2, there.—Hence, as it should seem, the arguments are short for the purpose; for at the utmost they only prove, that a *several piscary* is *presumed* to comprehend the soil, till the contrary appears, which is perfectly consistent with lord Coke's position, that they may be in different persons, and indeed appears to us the true doctrine on the subject.—2. Both parts of the description of a *free* fishery seem disputable.—Though, for the sake of distinction, it might be more convenient to appropriate *free fishery* to the franchise of fishing in *public* rivers by derivation from the crown; and though in other countries it may be so considered, yet, from the language of our books, it seems as if our law practice had extended this kind of fishery to *all* streams whether *private* or *public*, neither the Register nor other books professing any discrimination. Reg. 95. b. Fitzh. N. B. 88. G. Fitz. Abr. Ass. 422. 4 E. 4. 28. 17 E. 4. 6. b. 7. a. 7 H. 7. 13. b. Cro. Cha. 554. 1 Ventr. 122. 3 Mod. 97. Carth. 285. Skinn. 677. Again, it is

man be disseised of a mannor whereunto an advowson is appendant, he may present unto the advowson, before he enters into the mannor; and the reason of this diversitie is, because in the case of the common it should be a prejudice to the tenant of the soile: for if the disseisee might do it, the disseisor also might put on his cattle, which should be a double charge to the tenant, but not so of the advowson.

Sect. 185.

ALSO, if a man will acknowledge himselfe in a court of record to be a villeine, who was not a villein before, such a one is a villeine in grosse (1).

Bract. lib. 1. cap. 6. Britton, fol. 78. Fleta, l. 1. c. 3. 43 E. 3. 4. b. 19 E. 2. tit. Vil. 34. 18 E. 4. 29. [p] 19 H. 6. 32. 26 Ass. 62. 37 Ass. 17. 11 H. 4. 16, in Appeale. (2 Ro. Abr. 732.) 41 E. 3. tit. Vill. 6.

THIS is intended in some action brought against him that made such confession (*p*) or where he is brought into court by course of law; for if he commeth into the court extrajudicially, and not by any due course of law, such confession is without warrant of law, and bindeth not the partie, because the court had no warrant to take it. But if a *precipe* be brought against one, he may confesse himselfe villeine to an estranger, and that he holds the land in villenage of him, and this is good and shall bind him. And if in that case the demandant reply, that he the day of his writ purchased was a freeman (2), and thereupon issue is taken, and he is tryed to be free, yet he shall remaine villeine to the stranger in respect of his confession.

19 H. 6. 32. b.

If a writ of *nativo habendo* be brought against one, and the plaintiffe, as he ought, offereth in his count to prove the villenage by the cousins and kindred of the defendant, and thereupon produceth the uncles of the defendant, who upon examination confesse themselves to be villeines to the demandant; this confession,

---

is true, that in one case the court held *free fishery* to import an *exclusive* right equally with *several piscary*, chiefly relying on the writs in the Reg. 95. b. and the 43 E. 3. 24. But then this was only the opinion of two judges against one, who strenuously insisted that the word *libera ex vi termini* implied *common*, and that many judgments and precedents were founded on lord Coke's so construing it. 2 Salk. 637. Carth. 285. That the dissenting judge was not wholly unwarranted in the latter part of his assertion, appears from two determinations a little before the case in question. See *Upton* and *Dawkins*, 3 Mod. 97, and *Peake* and *Tucker* cited in Carth. 286, in marg. We may add to this the three cases cited by lord Coke as of his own time; and that there are passages in other books which favour this distinction. See Cro. Cha. 544. 17 E. 4. 6. b. 7. a. 7 H. 7. 13. b.—These remarks on *several* and *free fishery* may serve the student as a notice of the doubts on the subject, and also assist in any future discussion for removing them; which, in truth, is the whole scope of the annotation.—Vin. Trespass, 442. H. 11.—[Note 181.]

(1) See ante 117. b. n. 3.

(2) This replication was given by the 37 E. 3. c. 17, before which statute the plea of being a villein to a stranger to the writ could not be denied.—[Note 182.]

confession being entred of record, doth so bind, that, albeit they were so free before, they and the heires of their bodies are by this confession bond and villeines for ever, for the uncles came in by the due course of law in an action depending in court.

Sect. 186.

ALSO, a man which is villeine is called a villeine (3) *and a woman which is villeine is called a niefe; as a man which is outlawed is called outlawed, and a woman which is outlawed is called waived.*

"*NIEFE,*" or *Naife*, is in *Latine naturalis, seu nativa*, because for the most part neifes are bond by nativitie.

"*A woman which is outlawed is called waived.*"

F. N. B. 161. A. Regist. 132, & 277. Britton, fol. 20. Bract. l. 3. tract. 2. ca. 12. 13 Fleta, lib. 1. cap. 28. 3 H. 5. tit. Utlawry. Statham. Regist. orig. 132. (2 Rol. Abr. 804.)

Waived, waiviata, and not *utlegata* or *exlex*, for that woman are not sworne in leets, or tornes, as men which be of the age of twelve yeares or more be; and therefore men may be called *utlegati, id est, extra legem positi*, but women are *waiviatæ, id est, derelictæ*, left out or not regarded, because they were not sworne to the law; wherein it is to be noted, that of ancient time a man was not said to be within the law, that was not sworn to the law, which is intended of the oath of allegiance in the leet (4).

And the outlawrie of a woman is legally called *waiviaria mulieris.*

[123. a.] ☞ Sect. 187.

ALSO, if a villeine taketh a free woman to wife and have issue between them, the issues shall be villeines. But if a niefe taketh a freeman to her husband, their issue shall be free.

**This is contrarie to the civill law; for there it is said,* partus sequitur ventrem* (1).

SURCULUS totum alimentum à stipite capit, poma tamen edit sua. The siens (2) takes all his nourishment from the stocke, and yet it produceth his own fruit.

Fortescue, cap. 42. Glanv. lib. 5. cap. 6. Hill. 29 E. 1, coram rege Eborum in thesaur.

[q] *Si quis de servo patre matus sit et matre liberâ pro servo reddatur*

[q] Lib. Rub. cap. 77.

---

(3) *and neif* in L. & M. & Roh.

(4) See ante 68. b. n. 1, 2, to which add post. 172. b. Spelm. Gloss. voc. *Fidelitas*, 2 Inst. 73. Britt. cap. 29. Cow. Inst. l. 2. t. 3. s. 14. Flet. l. 2. c. 52. l. 3. c. 16. Mirr. c. 3. sect. 35. 7 Co. 6. b. 7. a. Calvin's case. Tyrr. Biblioth. Polit. 4th ed. 907. Ellesmere's argument in Calvin's case, 76.

(1) The sentence between the stars is not in L. and M. Roh. nor. P.

(2) *Siens*, or, according to the modern spelling, *cion*, signifies the *shoot* of a tree, and is derived from the French word, *scion*, which is the same as *surculus* in Latin.—[Note 183.]

reddatur occisus in eâ parte; quia semper à patre non à matre generationis ordo texitur. Si pater sit liber et mater ancilla, pro libero reddatur occisus. [r] *Lex Angliæ nunquam matris, sed semper patris* (A), *conditionem imitari partum judicat.*

[r] Fortescue, ubi supra.

[s] The husband and wife are all one person in law, and the neife marrying a freeman is infranchised during the coverture (3); and therefore by the common law of *England*, the issue is free (4).

[s] Herewith agreeth Britton, fol. 78. b.

[t] *Si mulier serva copulata sit lebero, &c. quòd partus habebit hæreditatem, et mater nullam dotem, quia mortuo viro suo libero redit in pristinum statum servitutis, nisi hæres ei dotem fecerit de gratiâ* (5). And when a bondman marrieth a free woman, they are all one person in law, and *duæ animæ. in carne unâ*, and *uxor subjecta est viro, et sub potestate viri* (6).

[t] Bract. lib. 4. fol. 298. b. Idem, lib. 1. cap. 6. Mirror. cap. 2. sect. 28.

[u] *Observatur in com' Cornubiæ de tali consuetudine, quæ talis est, quòd si liber homo ducat nativam aliquam in uxorem ad liberum tenementum et liberum thorum, si ex eâ duæ procreantur filiæ, una erit libera et altera villana, quia ibi partiti sunt pueri inter liberum patrem et dominum uxoris villanæ.*

[u] Bract. lib. 4. fo. 271.

[x] *Qui verò procreantur ex nativâ unius et nativo alterius, proportionabiliter inter dominos sunt dividendi.*

[x] Glanvill. lib. 5. cap. 6.

"*This is contrary to the civill law.*" (7) For true it is, that by that

Fortescue, cap. 42.

(A) See an instance on the question of alienage in Cro. Ch. 601.

(3) According to Fitzherbert, the marriage enfranchises the woman *for ever*; and he cites as an authority Britton, who considers it as a negligence in the lord not to have prevented the marriage. F. N. B. 78. G. Brit. 79. B. But Bracton, in the passage cited by lord Coke two or three lines farther, confines the enfranchisement to the coverture, and there are several authorities which concur with him. Bro. *Villenage*, 23. Pasch. 33 E. 3. Statham, tit. *Villenage*. Fitz. Abr. *Villenage*, 21. 30. 46. Lord Coke was aware of this contrariety in the books; for in a subsequent part he takes notice of it, but calls the opinion, that the enfranchisement ceases with the coverture, the better one. Post. 136. b. 137. b. However he inclines to except the case of the nief's marrying with her own lord. But even this is denied by Perkins. Perk. sect. 314. It is a strong argument against this latter writer, that, in other cases of *constructive* manumissions, though in some the ground of inference was not so strong as the lord's marriage with his nief, the enfranchisement was *perpetual*. It is a still more forcible reason, that reviving the slavery on the lord's death, if he left an heir by his nief, would have necessarily induced the *unnatural* consequence of making the mother the slave of her own issue.—[Note 184.]

(4) It was unnecessary to resort to this reason to prove the issue of such a marriage free; the rule of our law being, that the child shall follow the father's condition; consequently, whether the nief was *free* or *bond* during the coverture, made no difference to her issue.—[Note 185.]

(5) In the chapter of dower lord Coke represents a nief marrying a free man to be dowable. Ante, 31. a. But this passage from Bracton is direct to the contrary. Perkins distinguishes, allowing dower to the nief from a *stranger*, but not from her *lord*. Perk. sect. 314.—[Note 186.]

(6) Here lord Coke omits explaining what effect the marriage of a villein with a free woman has on his condition. As Britton writes, if the villein marries his own *lady*, it enfranchises him for ever. Brit. 78. b. If the marriage is with any other woman, it is clear, from Littleton's declaring the issue villeins, that the father remained a slave as before.—[Note 187.]

(7) This difference between our and the civil law is the subject of the chapter in

that law *partus sequitur ventrem*, as well where a free man takes a bondwoman to wife, as where a bondman takes a free woman to wife. In the first case the issue is by the civill law bond, and in the other free; both which cases are contrarie to the law of *England*. But this is no part of *Littleton;* and therefore we in this manner pass it over.

Cro. C. 601. Litt. R. 28. Mar. 91.

Sect. 188.

ALSO, no bastard may be a villeine, unless he will acknowledge himselfe to be a villeine in a court of record; for he is in law quasi nullius filius, *because he cannot be heire to any.*

"*NULLIUS* [a] *filius.*" *Cui pater est populus, pater est sibi nullus et omnis.*

[a] Vide Sect. 399. 13 E. 1. tit. Villein, 36. (Ante 3. b. Post. 244. b.)

Cui pater est populus, non habet ille patrem.

[b] Some hold that the bastard of a niefe shall be a villeine. [c] And others hold, that if a villeine hath a bastard by a woman, and after marrieth the woman, that this bastard is a villeine. But the law is contrary in both cases; for in both cases, the issue by the common law is a bastard, and consequently, *quasi nullius filius*, as *Littleton* here saith. [d] Though a bastard be a reputed sonne, yet is he not such a sonne, in consideration whereof an use can be raysed, for the reason that *Littleton* here yields; because in judgment of law he is *nullius filius*. [e] (8) And,

[b] Bract. lib. 1. fo. 5. a. Fleta, lib. 1. cap. 3. Britton, fol. 78. [c] 39 E. 3. 34. 43 E. 3. 4. Britton, ubi supra. [d] 23 Eliz. Dier, 374. [e] 13 Eliz. Dier, 296. 14 Eliz. Dier, 313. 18 Eliz. Dier, 345.

for

---

in Fortesc. de Laud. Leg. Angl. cited in the margin. See also Mr. Selden's and Mr. Gregor's notes in the 8vo. ed. of 1775.—[Note 188.]

(8) This point was so held in Worseley's case of 23 Eliz. in Dyer, which lord Coke refers to in the margin. According to Dyer, judge Periam was of a contrary opinion. But Anderson, who reports the same case, informs us that the judges were agreed. 1 And. 75. In the queen against an illegitimate son of sir John Perrot, and in Frampton against Gerrard, two subsequent cases of the same reign, the judges recognized the doctrine. 2 Rol. Abr. 785. 791, and Mo. 735. However, it should be observed, that though a bastard is not a *son* for whom the consideration of blood will *raise* an use, yet, on an estate otherwise effectually passed, an use may be as well *declared* to a bastard being *in esse* and sufficiently described as to another person: and so Rolle in his Abridgment states the law to be, but at the same time cites the case of Frampton and Gerrard as determined to the contrary. 1 Ro. Abr. 791. Gilb. on Uses, 207. The reason why the use to the bastard is bad in the first instance, and good in the second, depends on the common, but perhaps obscure, distinction between uses raised by transmutation of the possession, as on a feoffment, grant, fine, or common recovery, and those raised without, as a covenant to stand seised, or bargain and sale; or, to express it in more intelligible terms, between declaring uses on a possession or estate actually *transferred* to a *third person*, and declaring them on a possession or estate *retained* in the *party himself*. In the former case the estate is passed completely from the grantor or donor, without

☞ for the same reason, where the statute of 32 *H.* 8. of wills, speaketh of children, bastard children are not within that statute, and the bastard of a woman is no child within that statute, where the mother conveys lands unto him. [123. b.]

[*f*] Trin. 18 E. 1. rot. 61. Bedf. coram rege. (Cro. Jam. 541. 1 Roll. Abr. 536. Godb. 281. Palm. 9.)

[*f*] It was found by verdict, that *Henry* the sonne of *Beatrice*, which was the wife of *Robert Radwell* deceased, was born *per undecim dies post ultimum tempus legitimum mulieribus constitutum*. And thereupon it was adjudged, *quòd dictus Henricus dici non debet filius prædicti Roberti secundum legem et consuetudinem Angliæ constitut'* (1). Now *legitimum tempus* in that case appointed

---

without the aid of a court of equity; and therefore it is immaterial, whether the use declared on the estate is gratuitous or not, it being sufficient that the grantee or donee receives it coupled with a trust or use. But in the latter case the transaction rests in covenant or agreement between the covenantor or bargainor and the *cestui que use;* and if the covenant or agreement was not founded on the consideration of *blood* or a *valuable* consideration, such as marriage or money, our courts of equity, which till the 27 of H. 8. had the sole cognizance of uses, would not interpose to compel the performance. In fewer words, chancery would enforce uses annexed to a *perfect gift*, however gratuitous they might be, but not those resting only on a *naked contract*, without even so much as the consideration of *blood* to maintain them. The authorities in proof of this distinction are abundant; nor do we know of any seeming to impeach it, except the single case of Frampton and Gerrard already cited from Rolle, which, if it did turn on such a point, is sufficiently controlled by other cases to make the doctrine indisputable. Mo. 102. Ow. 40. 1 Leon. 197. 1 Co. 176. b. W. Jo. 346. Cart. 143. 12 Mod. 161. Gilb. on Uses, 113. 207. Add to this the disfavour of our law to bastardy, in not recognizing any but *legitimate* blood to be a good consideration, and the whole secret of the rule as to uses to bastards will be disclosed. On a covenant to stand seised, an use will not rise to a bastard; because, the use depending on *contract*, some consideration is requisite, and *lawful blood* and *marriage* are the two considerations *peculiar* to such a covenant, which necessarily excludes *bastardy*. But on bargains and sales of land, in which the essential consideration to raising an use is *money* or a *price*, or on any conveyances, on which the estate being passed out of the grantor, and therefore not depending on his contract, uses may be declared without any consideration, bastards stand precisely on the same footing with other persons, and are equally capable of having uses limited to them. To give the sum of this elucidation in one sentence, where the use will not rise without the consideration of *blood*, if derived through any but the pure channel of marriage, however near the blood may be, it will not avail.—[Note 189.]

(1) Lord Hale, in a manuscript note on a passage about legitimacy in Co. Lit. fol. 8. a. gives a fuller extract of this case from the record than is here expressed. His words are these: "Trin. 18. E. 1. Coram rege, rot. 13. Bedford, "et M. 22, 23 E. 1. rot. 2. *In assise by John Radwell against Henry son of "Beatrice, who was wife of Robert Radwell*, quia compertum est quòd dictus "Henricus fuit natus per 11 dies post 40 septimanas, quod tempus est usitatum "mulieribus pariendi, ex quo prædictus Robertus non habuit accessum ad præ-"dictam Beatricem per unum mensem ante mortem suam, præsumiter dictum "Henricum esse bastardum, ideo *judgment for the plaintiff*."

If this state of the case is correct, lord Coke's is erroneous in several particulars of consequence. 1. He is short in not expressing that the record mentions *forty weeks*, and so leaving it to be deemed an *inference* of his own, as which it hath been accordingly treated. 2. He exceeds the record, by representing it to style *that*

appointed by law at the furthest is nine moneths, or forty weeks;

that time the *latest* for a woman's going with child, when the record only calls it the *usual* period. 3. He wholly omits the husband's having had *no access to the wife for one month before his death;* a fact very material, it being very easy to allow *eleven days* after the *usual* time, but requiring a strong case to warrant extending such liberality to nearly *six weeks.* 4. The word *præsumitur*, which lord Coke passes over, is of importance; for it indicates, that, notwithstanding the great excess of time, it was conceived to create only a *presumption* for the bastardy, and consequently, if very cogent circumstances to account for the protraction of the birth, and in favour of the wife's chastity had occurred, the judgment might have been for the legitimacy. So far we had advanced, when on looking into Rolle's Abridgment, 356, we found the same ancient case of Radwell more at large than either in lord Coke or lord Hale. But Rolle agrees with the former, as well in respect to the record's not mentioning the *forty weeks*, as to its stating the birth to be eleven days after the *latest time in law for a woman's going with child;* and as from Rolle's particularity he seems to have most minutely attended to the record, his authority, till the whole record appears, seems most decisive. However the two last particulars, in which lord Coke differs from lord Hale, still remain, to which Rolle adds these further circumstances; namely, that the *husband languished of a fever a long time before his death;* that on the taking of an inquisition afterwards in the court of a lord, of whom he held lands by knight's service, *the wife swore she was not pregnant,* and to prove it uncovered herself in open court; and that, in consequence of all this, the lord received a *collateral* relation as heir. The words describing the wife's exposure of her person are remarkable; for the record states, that she, being interrogated, *juramento asserebat se non esse prægnantem; et, ut hoc omnibus manifestè liqueret, vestes suas usque ad tunicam exuebat, et in plenâ curiâ sic se videri permisit.* 1 Ro. Abr. 356. pl. 3, and 18 E. 1. rot. 18, in B. R. there cited. It reflects great discredit on the lord's court which permitted such a gross indecency; and still more on the king's judges, who suffered it to be recorded as one of the grounds for a verdict before them. How laudably contrariant is the proceeding on the writ *de ventre inspiciendo.* This remedy for the heir against the pretence of pregnancy, so well known to be of earlier date than the reign of Edward the first, as it was framed in the times of Bracton, Britton, and Fleta, delicately requires the widow to be inspected by a jury *of her own sex;* and though in subsequent times the sheriff was ordered to summon a jury composed both of men and women, yet still the *search* was to be made by the latter only. Bract. 69. a. Brit. 165. b. Flet. lib. 1, c. 15. Reg. Br. Orig. 227. a. What harsh ideas of the times might we be led to adopt, if the early introduction of the writ *de ventre inspiciendo* did not demonstrate, that the unseemly record we are observing upon was a *singularity*, and so many other testimonies of a more advanced refinement in judicial proceedings did not concur to rescue the age of our English Justinian from the suspicion of a *general practice* of such barbarism. Let us then suppose the record to be as it is in Rolle; which is the more probable to be the truth, because a contemporary judge, who reports its having been *produced* on a trial of legitimacy, represents it much in the same way. Cro. Jam. 541. But still it will not warrant lord Coke's inferring from it, that *forty weeks* constitute the latest time our law allows for a woman's going with child. On the contrary, no particular time being mentioned, what period was meant must be found out through some other *medium;* and as the record states *other* unfavourable circumstances besides the excess of time, and that the *jury presumed* against the child's being the issue of the deceased husband, it seems fair to suppose that the law was understood not to be so strict in the time alluded to, whatever that time might be, as indiscriminately to condemn as illegitimate all children not born within

it

weeks (2); but she may be delivered before that time, which judgement I thought good to mention. And this agreeth with that

it, but rather to consider every excess, unless very extraordinary indeed, as only raising a presumption against them. This construction is clearly most consistent with the terms of the record in question. In the next note we shall attempt to satisfy the reader, that the rule resulting from it is most conformable to other precedents and authorities, as well as to the reason of the thing. After the case of Radwell, from the record of E. 1. lord Hale thus gives the four following cases:—"Rot. Parl. 9 E. 2. m. 4. Gilbert de Clare comes "Glouc. obitt 30 Junii, 7 E. 2. in parliamento tent. quindena Hil. 9 E. 2. *the "sisters and coheirs pray livery. Matilda*, quæ fuit uxor comitis, *pretends to "be big by the earl, which was accordingly found* per inquisitionem. *The coheirs "reply, that*, si comitissa prægnans esset, tantum tempus elapsum est, ut secun- "dum cursum pariendi non potest dici imprægnari a comite. *Yet they could "not obtain livery till* Pasch. 10 E. 2. *But the question hung in deliberation.*"

Note 18 R. 2. *where a woman in such a case immediately after the death of the first husband took a second husband, and had issue born forty weeks and eleven days after the death of the first husband, it was held to be the issue of the second husband.*—M. 17 Jac. B. R. *Alsop and Stacey. Andrews dies of the plague. His wife, who was a lewd woman, is delivered of a child forty weeks and ten days after the death of the husband. Yet the child was adjudged legitimate and heir to Andrews; for* partus potest protrahi *ten days* ex accidente.—M. 4 Car. in Cur. Ward, *and afterwards* P. 5 Car. B. R. *Thecar marries a lewd woman but she doth not cohabit with him and is suspected of incontinency with Duncomb; Thecar dies: Duncomb within three weeks after the derth of Thecar marries her; two hundred and eighty-one days and sixteen hours after his death, she is delivered of a son. Here it was agreed*, 1. *If she had not married Duncomb, without question the issue should not be a bastard, but should be adjudged the son of Thecar.* 2. *No averment shall be received that Thecar did not cohabit with the wife.* 3. *Though it is possible that the son might be begotten after the husband's death, yet, being a question of fact, it was tried by a jury, and the son was found to be the issue of Thecar.* Hal. MSS.—Lord Hale's case of E. 2. appears very extraordinary, the time from 30 June, 7 E. 2, when the Earl of Gloucester died, to the *quindene* of Hilary, or 29 Jan. 9 E. 2, when the livery to his sister was further postponed in parliament, being *within one day of a year and seven months;* which is a much later date for the delivery of a live child than the most liberal in their calculations have hitherto assigned. However, on reading the printed copy of the original record, in the rolls of parliament lately published, we find lord Hale's note quite accurate. See Rot. Parl. v. 1, p. 353. As to the case of R. 2, it confirms the doubt we have elsewhere stated of the opinion, that, if a widow marries again, and has a child within nine months after the death of the first husband, the child may choose his father; and is an authority for deciding according to the proof of the woman's condition when her first husband died. Ante fo. 8. note 7. Terms of the Law, first edit. tit. *Bastard*, and Cowel. Inst. lib. 1. t. 9. Lord Hale's two other cases are reported in several books, Alsop and Stacey being in Cro. Jam. 541. Godb. 281. Palm. 9. 1 Ro. Abr. 356, and Thecar's in Cro. Jam. 681. Winch. 71. Litt. Rep. 177.—[Note 190.]

(2) If our law was really as strict in point of time as is here represented, it would not sufficiently conform to the course of nature. The physicians, it is true, generally call *nine* months, each being of thirty days, the *usual* period for a woman's going with child. But then they allow, that as a delivery may be accelerated by accidental causes, so it is frequently protracted, not only for *ten days* beyond the nine months, but to the end of the *tenth* month, and sometimes for a considerably longer time. See Zacch. Quæst. Medico-legal. lib. 1. tit. 2.

that in *Esdras: Vade et interroga pregnantum, si quando impleverit novem menses suos, adhuc, poterit matrix ejus retinere partum in semetipsâ? Et dixi, Non potest, domine.*

4 Esdras, 4. 41. Vide Paniceroll. Nova Reporta, page 485, &c.

Sect.

---

tit. 2. Justice therefore requires, that in the case of posthumous children an excess of the usual time should not operate further than by raising a proportional *presumption* against the legitimacy. The Roman law was very liberal in this respect: for the *decemviri* allowed that a child may be born in the tenth month; and though a law of the Digest excludes the eleventh, yet the emperor Adrian, after consulting with the philosophers and physicians, decreed even for this, where the mother was of good and chaste manners. See Dig. 1. 4. 12. Paul. Sentent. lib. 4. t. 9. s. 5. Nov. 39. c. 2. t. 17, with Gothofred's learned notes on those two texts of the Roman law. Cod. lib. 6. t. 29. leg. 2. Aul. Gell. lib. 3. cap. 16. Huber. Prælect. in Dig. lib. 1. tit. 6. A like liberal discretion probably prevails in most countries in Europe; for an instance of which, we appeal to a writer of great authority, who reports a decision by a majority of judges in the supreme court of Friesland, by which a child was admitted to the succession, though not born till three hundred and thirty-three days from the day of the husband's death, which period wants only three days of *twelve lunar* months. Sand. Decis. lib. 4. tit. 8. Definit. 10. Nor will our own law, nothwithstanding what lord Coke advances, if the authorities are duly collected and considered, be found deficient on this interesting subject. Indeed there is a passage in Britton which gives countenance to lord Coke's limitation of forty weeks; for this writer excludes from the inheritance posthumous children not born within forty weeks from the husband's death. Brit. 166. a. However, even this writer seems to extend in some degree beyond the forty weeks; unless he meant to make the wife's conception exactly of equal date with the husband's death, which surely is not a very reasonable construction. But without dwelling on such a nicety, it is sufficient, that the principal of the few other authorities in our books are against so rigid a rule. Bracton is very cautious, illegitimatizing only the issue born so long after the husband's death as to create an improbability of its being his child, without naming any fixed period. Bract. lib. 5 fo. 417. b. As to the determined cases, the only authorities of this sort we meet with, are enumerated in the preceding annotation; and these duly weighed will not be found, it is apprehended, to warrant lord Coke's conclusion. In Radwell's case, the finding against the issue is expressed to have been grounded merely on *presumption;* and besides, if we construe the record properly, the presumption arose from proof of the husband's non-access to the wife for a month before his death. The case of 9 E. 2. is an instance of allowing so much time beyond forty weeks, that it seems too strong to have much weight; but so far as it can claim any, it counts against lord Coke. The case of 18 Rich. 2, at first seems full for lord Coke's rule, the child, though born only *eleven* days beyond the *forty weeks*, having been declared not the issue of the deceased husband. But when it is further considered, there will be found nothing to prove a *positive general* rule; for it was very special, the widow having married a second husband the day after the death of the first, so that the question was not of legitimacy, but merely to which husband the issue belonged. One of the two only remaining cases considerably extends the time beyond the forty weeks; for in *Alsop* and *Stacey*, the first of them, the issue was found legitimate, notwithstanding the lapse of forty weeks and *ten days*, and the lewd character of the wife; and even as to *Thecar's* case, which is the other of them, the issue having been born two hundred and eighty-two days, there was an excess of the forty weeks, though but a trifling one. The precedents therefore, so far from corroborating lord Coke's limitation of the

ultimum

Sect. 189.

ALSO, every villein is able and free to sue all manner of actions against everie person, except against his lord, to whom he is villeine, And yet in certaine things he may have against his lord an action. For he may have against his lord an action of appeale for the death of his father, or of his other ancestors, whose heire he is.

[g] Bract. lib. 4. fol. 196. Britton, cap. 49. fo. 125. [h] 14 E. 4. 6. b. 15 E. 4. 32. 20 E. 3. tit. Villein, 10. 38 E. 3. 21. [i] Fleta, lib. 2. cap. 4. (3 Inst. 131.)

"*EVERY villein is able and free to sue, &c.*" [g] In an action brought by a villeine *versus non dominum, non valebit ei exceptio, quia est servus alienus, ex quo nihil ad ipsum utrùm liber sit an servus.* [h] And it is to be observed, that he that hath but a particular estate in a villeine, as tenant for life or for yeares, shall disable the villeine, if he brings an action against him; but the lessor shall not (as it is said) disable him. [i] *Examinatio villenagii non tenet, nisi ex ore veri domini fuerit pronunciata.*

[k] Brit. cap. 22. fo. 38. Bracton, lib. 1. fo. 6.

"*Appeale.*" *Appellum*, commeth of the *French* word *appeller*, that signifieth to accuse or to appeach. An appeach, [k] an appeal, is an accusation of one upon another, with a purpose to attaint him of felonie by words ordained for it.

[l] 18 E. 3. 32. 11 H. 4. 93. 1 H. 4. 6. 29 H. 6. tit. Corone, 17. [m] Fleta, li. 1. c. 5. 1 H. 4. 6.

"*For the death.*" [l] For a villeine shall not have an appeale of robberie against his lord, for that he may lawfully take the goods of the villein as his own. [m] And if in an appeale of death it be found for the plaintife, he is infranchised for ever. *Hinc enim est, quòd eo ipso sunt hujusmodi domini servos suos amissuri, cum de injuriis fuerint convicti.* And there is no diversitie herein, whether he be a villein regardant or in grosse, although some have said the contrary.

Sect.

---

ultimum tempus pariendi, do, upon the whole, rather tend to show, that it hath been the practice in our courts to consider forty weeks merely as the more *usual* time, and consequently not to decline exercising a discretion of allowing a longer space, where the opinion of physicians, or the circumstances of the case, have so required.—In the course of our inquiries into the subject of this note, we were curious to know the general sentiments of that eminent anatomist Dr. Hunter, on three interesting questions. These were, what is the *usual* period for a woman's going with child, what is the *earliest* time for a child's being born alive, and what the *latest*. The answer, which he obligingly returned through a friend, we have liberty to publish, and it was expressed in the words following: 1. *The usual period is nine calendar months; but there is very commonly a difference of one, two, or three weeks.* 2. *A child may be born alive at any time from three months; but we see none born with powers of coming to manhood, or of being reared, before seven calendar months, or near that time. At six months it cannot be.* 3. *I have* known *a woman bear a living child, in a perfectly natural way, fourteen days later than nine calendar months, and* believe *two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception.*—[Note 190*.]

Sect. 190.

ALSO, a niefe that is ravished by her lord, may have an appeale of rape against him.

"RAPE." [n] *Raptus* is, when a man hath carnall knowledge of a woman by force and against her will.

[n] Mirr. ca. 1, sect. 12, c. 3. de Rape, & cap. 4, de Homicide, (3 Inst. 60.)

"*Appeale of rape.*" By the generall purview of the statutes [*] that give the appeale of rape, the niefe shall have an appeale of rape against the lord. [o] And it seemeth by the ancient authors of the law, that this so hainous an offence was severely punished by losse of eyes, and privy members; but of old time it was felony, which you may reade at large in the Second Part of the Institutes, *W.* 1. ca. 13.

[*] W. 1. ca. 13. W. 2. ca. 35. 6 R. 2. ca. 6. 11 H. 4. cap. 13. 1 E. 4. cap. 1.

[o] 29 H. 6. 11. tit. Coron. 17. Bract. lib. 3. fol. 147.

[124. a.] [p] ☞ And this word *rape*, which our author here useth, is so appropriated by law to this case, as without this word (*rapuit*) it cannot be expressed by any periphrasis or circumlocution; for *carnaliter cognovit eam*, or the like, will not serve.

[p] 9 E. 4. 26. Mirror, ca. 1. sect. 13.

Sect. 191.

ALSO, if a villeine be made executor to another, and the lord of the villeine was indebted to the testator in a certaine sum of money, which is not paid; in this case, the villeine, as executor of the testator, shall have an action of debt against his lord; because he shall not recover the debt to his owne use, but to the use of the testator.

OF this matter sufficient hath beene spoken in this Chapter before. The villein shall have an action as executor against his lord; and it is no plea for the lord to say, that the plaintife in his villeine; for he shall not be enfranchised by the user of this action; because he hath it by a gift in law to the use of the testator, and not to his owne use.

(Doc. Plac. 388. 21 E. 4. 50. a.)

Sect. 192.

ALSO, the lord may not take out of the possession of such villeine, who is executor, the goods of the deceased; and if he doth, the villeine as executor shall have an action for the same goods so taken against his lord, and shall recover damages to the use of the testator. But in all such cases it behoveth, that the lord, which is defendant in such actions, maketh protestation, that the plaintife is his villein; or otherwise the villeine shall be infranchised, although the matter be found for the lord, and against the villein, as it is said.

"THE *lord may not take out of the possession, &c.*" Of this also sufficient hath been said before.

"*And*

[q] 21 E. 4. 4. b. 11 H. 6. 35. b. 3 H. 6. 2. 2 H. 4. 21. 1 H. 4. 6.

"And shall recover damages to the use of the testator." [q] Note, damages recovered by the executor in an action of trespasse shall be assets; and yet they were never in the testator. And so it is in other like cases, as by our bookes it appeareth.

[r] Doct. & Stud. Brooke, tit. Villenage, 70.

[r] If an executor hath a villeine for yeares, and the villein purchases lands in fee, the executor entreth, he shall have the whole fee simple; but because he had the villein *in auter droit*, viz. as executor to the use of the dead, it shall be assets in his hands. Note a diversity between the quantity of the estate, and the quality of it; for the law respecteth not the quantity

(Ante 117. a.)

[s] L. 5. E. 4. 61.

of the estate; for not onely [s] ☞ tenant in taile and tenant for life of a villeine shall have the perquisite of

[124. b.]

[t] 21 H. 3. 6. 37. (Ante 117. a.)

the villeine in fee, but [t] tenant for yeares and tenant at will also shall have it in fee.

But the law respecteth the quality, for in what right he hath the villeine, in the same right he shall have the perquisite; as in the case of the executor abovesaid, and in the case of the bishop

[u] 41 E. 3. 21.

[u] that hath the villeine in right of his church, he shall have the perquisite in the same right.

[x] 18 E. 3. 29.

[x] So if a man hath a villeine in the right of his wife, he shall have the perquisite also in her right. But if the purchase be after issue had, then the baron shall have the perquisite to him and his heires; because by the issue he is intituled to be tenant by the curtesie in his owne right.

Vide Sect. 193. [y] Pl. Com. 276. b. in Greisbrook's case.

"Protestation," [y] *Protestatio*, is an exclusion of a conclusion that a party to an action may by pleading incurre; or it is a safeguard to the party, which keepeth him from being concluded by the plea he is to make, if the issue be found for him. But in this case without a protestation, albeit the issue be found for the lord, the villeine shall be enfranchised, as it appeareth hereafter in this Section.

Sect. 193.

ALSO, if a villeine sueth an action of trespasse, or any other action, against his lord in one county; and the lord saith, that he shall not be answered, because he is his villeine regardant to his mannour in another county (1); *and the plaintife saith, that he is free, and of a free estate, and not a villein; this shall be tryed in the county where the plaintife hath conceived his action, and not in the county where the mannor is: and this is in favour of liberty. And for this cause a statute was made* anno 9 R. 2. ca. 2, *the tenor whereof followeth in this forme. Also, for that where many villeins and neifs, as well of great lords as of other men, as well of spirituall as temporall, flye and goe into cities, townes, and places franchised, as into the city of* London, *and other like places, and feine divers suits against their lords, because they would make themselves free by the answer of their lords: it is accorded and assented, that lords nor others shall not be forebarred of their villeins by reason of their answer in law. By force of which statute, if any villeine will sue any manner of action to his own use in any countie, where it is hard to try against his lord* (ou il est

(1) *&c.* in L. and M. and Roh.

est fort a trier envers son seignior*), *the lord may chuse whether he will plead, that the plaintife is his villeine, or make protestation that he is his villeine, and plead his other matter in bar. And if they be at issue, and the issue be found for the lord, then the villeine is a villeine, as he was before by force of the same statute. But if the issue be found for the villeine, then the villeine is free; because that the lord tooke not at the beginning for his plee, that the villeine was his villeine, but tooke this by protestation, &c.*

"*THIS shall be tryed in the county, &c.*" Be tryed, that is, as it is intended, by the verdict of twelve men, that is called in law a triall, *triatio.* Brit. fol. 79. 125. b. 126. a.

[*a*] In this case the law doth favour the villein in the issue; for otherwise by the rule of law in like cases he ought to answer to the speciall matter, viz. to the regardancy; but in favour of liberty he may reply, that he is free and of free estate, and consequently this issue concerning the person shall be tryed where the writ is brought. [*b*] The like law it is, if issue be joyned upon the ideocy of the plaintife or defendant, it shall be tryed where the writ is brought, because it concerneth the person. [a] 7 E. 3. 50. 26 E. 3. 73. 38 E. 3. 34. 40 E. 3. 36. 43 E. 3. 4. 31. 44 E. 3. 36. 47 E. 3. 26. 22 H. 6. 52. 35 H. 6. 12. 39 H. 6. 24. s Vide Sect. 534.

[*b*] 2 Mar. Dier, 112. (Post. 125. 7 Co. 1.)

"*In favour of liberty.*" It is commonly said, that three things be favoured in law; life, liberty, and dower.

[*c*] *Impius et crudelis judicandus est, qui libertati non favet. Angliæ jura in omni casu libertati dant favorem.* (F. N. B. 77. F.) [c] Fortescue, cap. 42.

Tryall is to finde out by due examination the truth of the point in issue or question betweene the parties, whereupon judgement may be given. And as the question betweene the parties is twofold, so is the triall thereof; for either it is *quæstio juris*, (and that shall be tried by the judges either upon a demurrer, special verdict or exception, for *cuilibet in suâ arte perito est credendum; et quod quisque nôrit in hoc se exerceat;* and it is commonly and truly said, *ad questionem juris non respondent juratores*) or it is *quæstio facti* (1). And the triall of the fact is in divers sorts, whereof a light touch is given before, Sect. 102. Of these a triall by xii. men (here intended by *Littleton*) is the most frequent and common. And some few rules of law are necessary here to be remembered (for the better understanding of the bookes of law hereafter) where and from what place, viz. *de quo vicineto*, out of what neighbourhood the jury shall come, a necessarie poynt to be knowne; for if there be a mistryall, (that is) if the jury commeth out of a wrong place, or returned by a wrong officer, and give a verdict, judgement ought not to be given upon such a verdict. [*d*] Wherein the most general rule is, that every tryall shall be out of that towne, parish, or hamlet, or place known out of the towne, &c. within the record, within which the matter of fact issuable is alledged, which is most certaine and nearest there-

[125. a.]

Vide Sect. 234. Vide Sect. 102. Vide Sect. 234. more of this matter. (6 Co. 47. 5 Co. 36, b. Cro. Cha. 480.) [d] 3 E. 3. 73. 20 H. 6. 30. 7 H. 4. 27. 9 H. 5. 8. 8 H. 6. 34.

7 H. 6. 27. 17 E. 3. 56. 43 E. 3. 5. 47 E. 3. 6. 34 H. 6. 1. (2 Roll. Abr. 618. Cro. Jam. 150. 326. 513. 676. Hob. 76. 9 Co. 66. b. 11 Co. 25. b. 6 Co. 14.) (7 Co. 1. 1 Sid. 9. 88. Hob. 89. 1 Sid. 10. 2 Ro. Abr. 609. 1 Roll. Rep. 369. Cro. Eliz. 818.)

* *The literal meaning of these words appears to be,* where he (the villein) is powerful or strong in trial against his lord, *and not, "where it is hard to try against his lord," as they are translated by lord Coke. See Mr Ritso's Intr. p.* 106.

unto,

(1) See post. 155. b. 228. a.

unto, the inhabitants whereof may have the better and more certaine knowledge of the fact (2). As if the fact be alledged in *quâdam*

(2) Both in civil and criminal suits the common law is very nice in requiring every issuable fact to be alleged, not only within a *county*, but also within a *parish*, *town*, or *hamlet*, or for want of either of these, some other *known place* of the same county, not being a *hundred*, which probably was excluded as *too large* a division; and if this rule was not observed, it might be pleaded in abatement, or otherwise taken advantage of, by either party, according to the stage of the suit. Cro. Eliz. 260. Thel. Dig. Br. lib. 2. c. 15 to 18. Com. Dig. *Abatement*, H. 13. *Pleader*, C. 20. The necessity of having the county named is very obvious; as otherwise it could not be known whether the court had jurisdiction, who was the proper officer to direct the process of the court to, or whence the jury was to come, and consequently the cause could not go on. Nor is it difficult to account for stating a *particular place* in the *county*. One reason might be, that, if there was no other explanation of the case where the cause of action or ground of defence arose, than by reference to the extensive limits of a county, the allegation might fail in that certainty so essential to its being either well understood or properly controverted; and the rule, so far as it may have this foundation, still continues unchanged. But the other and principal reason was, that, if issue was taken on the fact alleged, it might be tried by a jury of the *vine* or neighbourhood, which our ancestors conceived to be more likely to be qualified to investigate and discover the truth, than persons living at a distance from the scene of the transaction. For this purpose the *venire facias* always directed the sheriff to summon a jury from the neighbourhood of the *parish* or *place* within which the fact to be tried was alleged; and this was not mere form; for it was the sheriff's duty to attend to the direction; and if *at least four* of the hundred, in which the place was situate, were not included in the panel returned by him, it was a good cause of challenge to the *array* or *whole panel;* or if four such persons did not attend to be sworn, the *polls*, or particular jurors, might be challenged for the same default. Post. 157. a. 48 E. 3. 30. 48 Ass. 5. 7 H. 4. 46. 21 E. 4. 59. b. Nay, so very essential did the common law deem the having some of the neighbours on the jury, that, if the visne appeared on the record to be from a wrong place, whether in consequence of the party's alleging the fact in a place not proper for a *visne*, or of the court's mis-awarding it, in both cases it was equally a mis-trial, and a good ground for a motion to arrest the judgment, or for reversing it by error. Cro. Eliz. 260. Hob. 5. But thus restricting every *visne* to a particular part of the county, though well intended, was followed with great inconveniences. It encouraged the losing party after a trial to make trivial objections to the *visne*, in order to disappoint his adversary of the fruits of a just verdict; and either because the rules for laying the *visne* were in themselves vague, or because they were perverted by an over curious interpretation, such objections not only became very common, but often succeeded, as appears from the profusion of cases and learning to be met with on the subject in our Reports. See Roll. Abr. and Vin. Abr. tit. *Trial*. At length the grievance became so intolerable to suitors, that parliament interposed to relieve them; for which purpose several statutes were made. The 21 Jam. c. 13, gives aid after verdict, where the *visne* is *partly* wrong, that is, where it is awarded out of too many or too few places in the county named. The 16 & 17 Cha. 2. c. 8, goes farther; and cures the defect of the *visne* wholly, so that the cause was tried by a jury of the proper county, without any regard to the part of the county from which the jury came. Still, however, either party was at liberty to object to the default of hundredors at the trial, which was found to be very troublesome on account of the difficulty of always having four jurors so qualified. The 4 & 5 Ann. c. 16, therefore directs, that every *venire facias* shall be awarded from *the body*

quâdam plateâ vocat' King-street in civitate Westm, in com' Midd. in this case the visne cannot come out of the *platea;* because it is neither town, parish, hamlet, nor place out of the neighbourhood whereof a jury may come by law. But in this case it shall not come out of *Westminster*, but out of the parish of *St. Margaret*, because that is the most certaine. But

[125. b.] ☞ therein also it is to be noted, that if it had been alledged in *King-street* in the parish of *St. Margaret* in the county of *Middlesex*, then should it have come out of *King-street*, for then should *King-street* have been esteemed in law a towne [*e*]; for whensoever a place is alledged generally in pleading (without some addition to declare the contrary, as in this case it is) it shall be taken for a towne. [*f*] And albeit *parochia* generally alledged is a place incertaine, and may (as we see by experience (include divers townes; yet if a matter be alledged *in parochia*, it shall be intended in law, that it containeth no more townes than one, unless the party doth shew the contrary. [*g*] But when a parish is alledged within a city, there without question the visne shall come out of the parish, for that is more certaine than the city.

[*e*] 4 E. 3. 30. 8 E. 3. 68. 39 H. 6. 13. Brooke, Pleading, 61.
[*f*] 4 E. 4. 41. 5 E. 4. 20. 22 E. 4. 2. 35 H. 6. 30. 22 H. 6. 47. 1 Co. 162. Digges' case. 11 Co. 25.

6 Co. 14. (Hob. 190. 2 Roll. Abr. 616.) [*g*] 1 E. 3. 8. 7 H. 6. 38.

[*h*] If a trespasse be alledged in *D.* and *nul tiel ville* is pleaded, the jury shall come out *de corpore comitatûs;* but if it be alledged in *S.* and *D.* and *nul tielle ville de D.* is pleaded, the jury shall come out *de vicineto de S.* for that is the more certaine. So if a matter be alledged within a mannor, the jury shall come *de vicineto manerii;* but if the mannor be alledged within a towne, it shall come out of the towne, because that is most certaine, for the mannor may extend into divers townes. And all these points were resolved by all the judges of *England* upon conference betweene them in the case of *John Arundel* esquire indited for the death of *William Parker* [*]

[*i*] In a reall action, where the demandant demands land in one county, as heire to his father, and alledges his birth in another county, if it be denyed that he is heire, it shall not be tryed where the birth was alledged, but where the land lyeth, for there the law presumes it shall be best knowne who is heire. But if the defendant make himselfe heire to a woman, for that is

[*h*] 22 E. 4. tit. Visne, f. 27. 6 H. 7. 3. b. 11 H. 7. 22 b. 9 E. 4. 3. a. 3 E. 4. 26. 39 H. 6. Tresp. 93. 4 E. 3. 30. (Hob. 89. 266. 6 Co. 65 b. 1 Leon. 109. Cro. Car. 17. Cro. Jac. 302, 303. 308.)
[*] 6 Co. 14. Arundel's case.
[*i*] 45 E. 3. 5. a. 46 E. 3. 6. & 7. Gernon's case. 18 E. 3. 58. 11 H. 4. 56. b. 57. 17 E. 3. 36. b. (Cro. Jac. 239.

39 Ass. 10. 38 Ass. 30. 35 Ass. 7.

the

---

body of the county in which the action is triable. But these statutes do not extend to *indictments* or other *criminal* suits; nor has any act been yet made to include any such, except the 24 G. 2. c. 18, which only applies to actions on penal statutes. Why a regulation so convenient should be thus confined principally to civil cases, seems unaccountable. However, though the ancient law continues in force as to trials for crimes, yet it hath been long deviated from in practice; lord Hale taking notice, that even during his time he never knew an instance of a challenge for want of hundredors in treason or felony; and the sheriffs, as we are well informed, now always summoning juries from the county at large, without the least regard to the visne of each indictment. 2 Hal. Hist. Pl. C. 272. Under such circumstances, retaining the form of a *visne* from the particular place of the county in which the crime is alledged, merely serves to create delay and embarrassment in the distribution of criminal justice, whenever an accused person may choose captiously to exert his right of challenging for default of hundredors.—[Note 191.]

the surer and more certaine side, and the mother is certaine when perhaps the father is incertaine, and therefore there it shall by tryed where the birth is alledged, because they have more certaine conusance than where the land lyeth. And so it is where generally bastardy is alledged, the tryall shall be in like case *mutatis mutandis*. [*k*] If a man plead the king's letters patents, and the other party plead *non concessit*, it shall not be tryed where the letters patents beare date, for they cannot be denyed, but where the land lyeth.

[*k*] Mich. 31 & 32 Eliz. Rot. 365, in the King's Bench, inter Edan & Frankline, adjudge 3 Mar. Dier, 129. 18 Eliz. Dier, 353. 17 Eliz. Dier, 342. (1 Roll. Abr. 604. Plowd. 232. Cro. Jam. 239. 9 Co. 47. a.)

Every tryall must come out of the neighbourhood of a castle, mannor, town, or hamlet, or place known out of a castle, mannor, towne or hamlet, as some forrests and the like, as before and by the authorities thereupon quoted appeareth.

Every plea concerning the person of the plaintife, &c. shall be tryed where the writ is brought, as it appeareth before.

When the matter alledged extendeth into a place at the common law, and a place within a franchise, it shall be tryed at the common law.

[*l*] 8 E. 4. 24. 9 H. 6. 46, 47. 21 H. 6. 4. 18 Ass. 7. 30 E. 3. 16, 17. 7 E. 4. 31. 27 H. 8. 30. 11 H. 4. 68.

[*l*] In an action against two, the one pleads to the writ, the other to the action, the plea to the writ shall be first tryed; for, if that be found, all the whole writ shall abate, and make an end of the businesse.

[*m*] 15 E. 4. 25. b. 9 H. 6. 46. 26 E. 3. 7 E. 4. 31. 39 E. 3. 16, 17. (Cro. Jac. 134. 1 Sid. 76. Hob. 54. 66. Noy, 144. 1 Roll. Abr. 103.)

[*m*] In a plea personall against divers defendants, the one defendant pleads in barre to parcell, or which extendeth only to him that pleadeth it, and the other pleads a plea which goeth to the whole, the plea that goeth to the whole, (that is) to both defendants, shall be first tryed; and of this opinion was *Littleton* in our bookes, for the tryall of that goeth to the whole; and the other defendant shall have advantage thereof, for in a personall action the discharge of one is the discharge of both. As for example, if one of the defendants in trespasse plead a release to himselfe (which in law extends to both) and the other pleads not guilty (which extends but to himselfe); or if one plead a plea which excuses himself onely, and the other pleads another plea which goeth to the whole, the plea which goeth to the whole, shall be first tryed; for, if that be found, it maketh an end of all, and the other defendant shall take advantage hereof, because the discharge of one is the discharge of both. But in a plea reall it is otherwise; for every tenant may lose his part of the lands. [*n*] As if a *præcipe* be brought as heire to his father against two, and one plead a plea which extendeth but to himselfe, and the other pleads a plea which extends to both, as bastardy in the demandant, and it is found for him, yet the other issue shall be tryed, for he shall not take advantage of the plea of the other, because one joyntenant may lose his part by his misplea. [*o*] But where an issue is joyned for part, and a demurrer for the residue, the court may direct the triall of the issue, or judge the demurrer first at their pleasure.

[*n*] 9 H. 6. 46. 39 E. 3. 16, 17.

[*o*] 10 Co. 54, and the bookes there cited.

[*p*] Mich. 21 & 22 Eliz. Dier, 367. 5 Co. 36. b. Bainham's case. 39 E. 3. 2. b. 44 E. 3. 6. 11 H. 6. 13.

[*p*] If a *venire fac.* be awarded to the coroners where it ought to be to the sherife, or the visne commeth out of a wrong place, yet if it be *per assensum partium*, and so entred of record, ☞ it shall stand; for *omnis consensus tollit errorem*(1). And thus much of these excellent points of learning: and if you desire to know the institution and right use

[126. a.]

5 Co. 40. Dormer's case. (5 Co. 36. b. Hob. 5. 1 Sid. 193. 2 Roll. 635. 1 Sid. 339.) (5 Co. 40. b. Cro. Eliz. 664. 1 Sid. 269.) Vid. Sect. 234.

of

(1) The cases to this point disagree; but the most modern are with lord Coke. See Vin. Abr. *Trial*, S. a. 2.—[Note 192.]

of this triall by twelve men, and of the antiquitie thereof, and more of this matter, read the 284 Section hereafter, which is worthy of your observation.

"*Statute.*" This commeth of the *Latine* word *statutum*, which is taken for an act of parliament made by the king, the lords and commons, and is divided into two branches, generall and speciall. This statute here mentioned is a generall statute, and is darkely and obscurely penned.

Vid. 25 E. 3. ca. 18. F. N. B. 77. C. 26 E. 3. 73.

"*And if they be at issue.*" [q] Issue, *exitus*, a single, certaine, and materiall point issuing out of the allegations or pleas of the plaintife and defendant, consisting regularly upon an affirmative and negative to be tried by twelve men. And it is twofold; a speciall issue, as here in the case of *Littleton;* or generall, as in trespasse, not guilty, in assise, *nul tort nul disseisin, &c.* And as an issue natural commeth of two severall persons, so an issue legal issueth out of two severall allegations of adverse parties.

[q] Vid. Sect. 414. 7 H. 6. 43. 9 E. 4. 36. 36 H. 6. 15. 5 E. 4. 26. 11 H. 4. 79. (Mo. 80. 1 Ro. Rep. 86. 1 Leon. 78. 9 Co. 110. Cro. Cha. 164. 80. Doct. Plac. 256, 257. Cro. Jam. 87. 560. Doct. Plac. 187. Cro. Jam. 580. 586. 589. Hob. 233.) 7 E. 3. 34. (Cro. El. 372.)

And to make our bookes more easie to be understood concerning this point, it is good to set downe some necessary rules (among many other) concerning joyning of issues. An issue being taken generally referreth to the count, and not to the writ. As in an account the writ chargeth him generally to be his receiver, the count chargeth him specially to be his receiver by the hands of *T.:* the defendant pleadeth, that he was never his receiver in manner and forme, &c. this shall referre to the count, so as he cannot be charged but by the receipt by the hands of *T.*

[r] A special issue must be taken in one certain materiall point, which may be best understood, and best tryed.

[r] 20 E. 3. Issue, 31. 22 E. 4. 28. 8 E. 3. 8. 9 H. 6. 18. 38 H. 3. 33.

[s] An issue shall not be taken upon a negative pregnant, which implyeth another sufficient matter: but upon that which is single and simple. As *ne dona pas per le fait* imply a gift by parol; therefore the issue must be *ne dona pas modo et formâ.*

[s] 21 H. 6. 9. b. 16 E. 4, 5. 24 E. 3. 32, 33. 75. 31 E. 3. Issue, 17. 13 E. 3. ib. 27. 21 E. 3. 49. 30 E. 3. 8. 10 E. 3. 32. 22 E. 3. 13. 18 E. 3. Issue, 35. 5 H. 7, 8. 31 Ass. 25. 12 E. 4. 4. 8, 2 H. 4. 23. 38 H. 6. 22. 40 E. 3. 5. 5 E. 3. 24.

[t] An issue joyned upon an *absque hoc, &c.* ought to have an affirmative after it. Two affirmatives shall not make an issue, unlesse it be lest the issue should not be tried.

[t] 12 El. Dy. 253. 22 H. 6. 19. 32 H. 6. 28. 2 R. 3.

[u] Some issues be good upon matter affirmative and negative, albeit the affirmative and negative be not in precise words. As in debt for rent upon a lease for yeares, the defendant pleades, that the plaintife had nothing at the time of the lease made; the plaintife replyeth that he was seized in fee, &c. this is a good issue.

6 H. 7. 5. 11 H. 4. 79. [u] 2 H. 7. 4. 5 H. 7. 12. 26. 11 H. 4. 83. 6 E. 4. 6. b. 26 H. 8. Dyer, 6. in Formedon. 28 H. Dyer, 31. 18 H. 6. 8, 9. 15 E. 4. 32. 32 H. 6. 23. 7 H. 6. 27. 43 Ass. 4. 9 E. 4. 36. Pl. Com. 172. a. 36 H. 6. 15. (2 Co. 24.)

[w] Where the issue is joyned of the part of the defendant, the entry is *et de hoc ponit se super patriam;* but if it be of the part of the plaintife, the entry is, *et hoc petit quòd inquiratur per patriam.*

[w] 26 H. 8. 3. 18 El. Dy. 353. (1 Sid. 215.) 290. 310. 341. Cro. Cha. 164.

[x] There be some negative pleas that the issues of themselves,

[x] 22 H. 6. 57. 59. 33 H. 6. 21. 3 H. 7. 9. 12 E. 4. 13. 17 E. 3. 53. 77, 78. 22 E. 3. 16, 17. 24 E. 3. 50. 40 E. 3. 19.

whereunto

whereunto the demandant, or plaintife, cannot reply, no more than to a general issue, which is, *et prædictus A. similiter.* As if the tenant do vouch, and the demandant counterplead that the vouchee or any of his ancestors had any thing, &c. whereof he might make a feoffment, he shall conclude, *et hoc petit quòd inquiratur per patriam, et prædictus tenens similiter.* So in a fine pleaded by the tenant, &c. the demandant may say, *quòd partes finis nihil habuerunt, et hoc petit quòd inquiratur per patriam, et præd' tenens similiter.* And so in a writ of dower the tenant pleades *unques seisie que dower*, he shall conclude, *et de hoc ponit se super patriam, et præd' pretens similiter;* and so in many other cases; and of this opinion was *Littleton* in our bookes. [y] A man leaves his wife ensient with a child, issue shall not be taken that she was not enseint by her husband on the day of his death, for *filiatio non potest probari;* but the issue must be, whether she was enseint the day of his death (2).

[y] 42 E. 3. 11 b.

A protestation

---

(2) The cases cited from the Year-Book of 41 E. 3. is a direct authority to this purpose. However, it may be doubted whether the doctrine continues to be law. At least it fails in principle, if it is founded on the notion that the presumption of the husband's being the father of every child the wife bears or conceives during the marriage, cannot be repelled by evidence to the contrary. Such a position indeed is asserted more than once by lord Coke in the present work, and may be met with in other books. Post. 244. a. and in 373. a. Vin. Abr. *Bastard*, A. 2. & B. But it never was an universal rule, lord Coke and all the authorities agreeing, that if the husband is beyond sea during the whole time of the wife's going with child, the issue is a bastard. Nor is the position in any degree true at present; for ever since Pendrel's case in the 5 Geo. 2. it has been settled, that not only proof of being out of the kingdom, but also every other kind of evidence tending to prove the impossibility or even improbability of the husband's being the father, is admissible. 1 Blackst. Comment. 5th edit. 457. 2 Strs. 925. 3 P. Wms. 365. Bott's Poor Laws, 2d ed. 105. 10 East, 132. 13 Ves. 56. 8 East, 193. Our books do not state on what grounds Pendrel's case was determined. But very ancient authorities are not wanting to justify over-ruling the doctrine which prevailed in lord Coke's time. Bracton taking notice of the presumption, that marriage proves legitimacy, adds, *et semper stabitur huic præsumptioni, donec probetur contrarium, ut, ecce, maritus probatur non concubuisse aliquamdiu cum uxore, infirmitate vel aliâ causâ impeditus, vel erat in eâ invalitudine ut generare non possit.* Bract. fo. 6. a. In another place the same author is still more explicit, for he states it to be a violent presumption against the child's legitimacy if the husband is proved, *propter aliquam infirmitatem, vel frigiditatem, vel aliam impotentiam coeundi, permultum tempus non concubuisse cum uxore;* or, *si probetur, quòd extra regnum vel provinciam per biennium et ultra longè extiterit, quod vehementer præsumi possit, quòd ad uxorem accessum habere non potuit.* Bract. fo. 63. b. There are also other passages to a like effect both in Bracton and Fleta. Bract. fo. 70. b. 278. a. Flet. lib. 1. c. 15. It is worthy remark too, that not only these limitations of the rule of *pater est quem nuptiæ demonstrant*, but even the words of them are in a great degree borrowed from the text of Justinian. See Dig. lib. 1. tit. 6. l. 6. But this by no means ought to lessen their value with our common lawyers. On the contrary, it should be deemed an additional reason for referring to them; because the trial of *general* bastardy belongs to the ecclesiastical courts, and these, in this instance, as well as in others, are much swayed by the authority of the Roman law. See further on this subject Godolph. Reperter. Canon. 477. Bryd. Law of Bastard. 83. Voet. ad Pandect. lib. 1. tit. 6. sect. 6. Ayl. Parerg. tit. *Bastardy*, and the same title in the abridgments.—[Note 193.]

[z] A protestation availeth not the partie that taketh it, if the issue be found against him; and therefore if the issue be found for the villeine, he is infranchised for ever. And yet in some special case, albeit the issue be found against him, that maketh the protestation, yet he shall take benefit of his protestation. [*] As if a man entreth into warrantie, and taketh by protestation the value of the land, albeit the plea is found against him, yet the protestation shall serve him for the value.

[z] 10 E. 4. Protest 5. 10 E. 4. 12. 32 Ass. 9. 30 E. 3. 14. 9 H. 6. 59. Vid. Sect. 192. (Plowd. 276. Cro. Cha. 365. Doc. Plac. 295.)
[*] 30 E. 3. 14.

Sect. 194.

ALSO, the lord may not mayme (the poet mayhemer) *his villeine; for if he mayme his villeine, he shall of that be indicted* (il serra de ceo indite) *at the king's suit, and if he be of that attainted, he shall for that make grevious fine and ransome to the king. But it seemeth that the villeine shall not have by the law any appeale of mayhem against his lord; for in appeale of mayhem a man shall recover but his damages; and if the velleine in that case recover dammages against his lord, and hath thereof execution; the lord may take that the velleine hath in execution from the velleine, and so the recovery is void, &c.*

"*MAYME.*" *Mayhemer,* [a] or *mehaigner* a *French* word, of which cometh *mayhem, mahemium,* (*id est*) *membri* [126. b.] *mutilatio,* ☞ and *membrum est pars corporis habens destinatam operationem in corpore. Mayhemium verò dici poterit, ubi aliquis in aliquâ parte sui corporis effectus sit inutilis ad pugnandum.* And the law hath so appropriated this word *mayhem*, which our author here useth, to this offence, as *mayhemavit* cannot be expressed by any other word, as *mutilavit, truncavit,* or *detruncavit,* or the like.

[a] Staunf. l. 1. ca. 41. Glanvil. lib. 14. ca. 7. Bract. lib. 3. fol. 144, 145. Brit. cap. 25. fol. 48, 49. Flet. lib. 1. ca. 38. (Post. 288. 1 Sid. 215.) Mirror, cap. 1. sect. 9. Vide Sect. 1. (4 Co. 39. b.)

"*He shall be indicted,*" *il serra indite,* or rather *endite*, and so is the original; for it cometh of the *French* word *enditer*, and signifieth in law an accusation found by an enquest of 12 or more upon their oath; and the accusation is called *indictmentum.* And as the appeale is ever the suit of the partie, so the inditement is alwaies the suite of the king, and as it were his declaration. [b] Some derive it from the *Greeke* word *ἐνδίκνυμι* to accuse.

[b] Lamb. Just. of Peace.

"*Shall not have, &c. any appeale of mayhem.*" [c] Because in that appeale he shall recover but damages, which the lord after execution might take againe, and so the judgment be *inutile* and illusory, and *sapiens incipit à fine.* And the law never giveth an action, where the end of it can bring no profit or benefit to the plaintife. But here it is to be observed, that albeit the party grieved can have no action for the mayhem, yet at the king's suite he shall be punished therefore, for the reason hereafter expressed in this Section. [d] And in ancient time there were, appeales *de plagis et de imprisonamento;* but they are out of use, and turned to actions of trespasse.

[c] Vid. 1. H. 4. 6 b. (4 Co. 43.)

Ante, 38. a.

[d] Fleta, lib. 1. cap. 40. Britt. cap. 25. Bract. 145. Mirr. cap. 3.

"*Fine,*" *finis.* Here fine signifieth a pecuniarie punishment for

for an offence or a contempt committed against the king, and regularly to it imprisonment appertaineth. And it is called *finis* because it is an end for that offence. [e] And in this case a man is said *facere finem de transgressione, &c. cum rege*, to make an end or fine with the king for such a transgression. It is also taken for a summe given by the tenant to the lord for concord, and an end to be made. [f] It is also taken for the highest and best assurance of lands, &c.

[e] Regist. Judic. 25. 8 Co. 59. Beecher's case. (8 Co. 38.)

[f] Vide Sect. 74. 174. 441. (11 Co. 42.)

Here it is good to see, what a fine differeth from an amerciament. [g] Amerciament in *Latine* is called *misericordia*, for that it ought to be assessed mercifully. And this ought to be moderated by affeerement of his equals, or else a writ *de moderatâ misericordiâ* doth lie. And thereof *Glanville* saith thus. [h] *Est autem misericordia domini regis, quâ quis per juramentum, legalium hominum de vicineto catenus amerciandus est, ne aliquid de suo honorabili contenemento amittat.*

[g] 8 Co. 59. Beecher's case. F. N. B. 76. (1 Ro. Abr. 238.)

[h] Glanvil. lib. 9. cap. 11. Magna Charta, cap. 14. Flet. lib. 2. c. 43. & 60. & lib. 1. cap. 43. Bract. lib. 3. fol. 116.

[i] The cause of an amerciament in plea reall, personall, or mixt (where the king is to have no fine) is for that the tenant or defendant ought to render the demand (as he is commanded by the king's writ) the first day; which if he do, he shall not be amerced. So as for the delay that the tenant or defendant doth use he shall be amerced. [k] And albeit the amerciament cannot be imposed, nor the king fully intitled thereunto, untill judgment be given, because by the judgment the wrong is discerned; yet a pardon before judgement, after judgement given, shall discharge the party, because the originall cause, viz. the delay, &c. is pardoned. [l] What then if a *præcipe* be brought against an infant, and, hanging the plea, he commeth of full age? ☞ He shall be amerced for the delay after his full age. So likewise if the demandant or plaintife be nonsuit, or judgement given against him he shall be likewise amerced *pro falso clamore*.

[i] 22 E. 3. 1 & 2. 14 E. 3. Amerciam. 16. 8 R. 2. ibid. 26, &c. 1 Ro. Abr. 212.

[k] Pl. Com. 401. Cole's case. 37 H. 6. 21. 5 Co. 49. Vaughan's case.

[l] Vaughan's case, ubi supra. Beecher's case, ubi supra. (1 Roll. Rep. 11.) 5 Co. 49. a. Cro. Cha. 410. (8 Co. 6. 2. b.)

[127. a.]

[m] And for the payment of this amerciament the demandant or plaintife, &c. shall finde pledges; and those demandants or plaintifes that shall finde no pledges, (as the king, the queene, an infant &c.) shall not be amerced. And therefore when such are demandant or plaintife, the writ shall not say, *Si rex, &c. fecerit te securum de clamore suo prosequendo.*

[m] F. N. B. 31. I. 47. c. & 101. a. Bract. lib. 4. fol. 254. 17 E. 3. 75. 18 E. 3. 2. Br. tit. Amerc. 53. 43 Ass. 45, &c.

[n] If a writ doe abate by the act of the demandant or plaintife, or for matter of forme, the demandant or plaintife shall be amerced; but if it abate by the act of God, as by the death of one, where there is two or the like, there shall be no amerciament. And to an amerciament imprisonment belongeth not, as it doth to a fine or ransome. If you desire to read more of fines and amerciaments, vide 8 Co. 38, 39, &c. *Gresley's* case; and 11 Co. 43, 44. *Godfreye's* case (1).

[n] Beecher's case. 8 Co. 60. b. (1 Ro. Abr. 213.)

It

(1) In very ancient times amercements were a considerable object in our law, as appears by the *Great Charter's* prohibiting their exorbitancy, and the writ of *moderata misericordia* for relieving against excessive amercements in courts not being of record. F. N. B. 75. a. But so far as regards amercements

[o] It is to be knowne that *wite, wita,* is an old *Saxon* word, and signifieth an amerciament; as *fledwite,* an amerciament for fleeing or being a fugitive; and so is *flemiswite, blodwite* an amerciament for drawing of blood, *ferdwite* concerning warfare; and so *letherwiti, childwite, wardwite,* and the like. Sometimes it signifieth forfeiture, sometimes freedom, or acquittall.

[o] Fleta, lib. 1. cap. 47. Stat. de Exposit. Verborum.

[p] And *bote* is also an ancient *Saxon* word, and sometimes signifieth amerciament, or compensation, as *thefbote, manbote:* or freedom from the same, as *brigbote, castlebote, burghbote.*

[p] Lamb. explication of Saxon words Leges Inæ, cap. 19.

Wera or *were* [q] sometimes signifieth amerciament or compensation, but properly *Wera Anglicè idem est in Saxonius linguâ, vel pretium vitæ hominis appretiatum;* which and the like words you shall often reade in ancient charters.

[q] Lamb. ubi supra. & Fleta, lib. 1. cap. 47.

"*Ransome.*" [r] *Redemptio* is here taken for a grand summe of money for redeeming of a great delinquent from some heynous crime, who is to be captivate in prison until he payeth it. Some hold it to amount to his whole estate, and others hold that ransome is a treble fine. [s] But in legall understanding a fine and ransome are all one; for, upon the statute of *Merlebridge,* cap. 8, upon these words, *Non ideo puniatur dominus per redemptionem,* [t] the tenant shall not have (where the lord distraineth within his fee where nothing is behind) an action of trespass *quare vi et armis* against his lord; for therein the lord should be punished by redemption, that is, by fine, and in that action the fine is very small. And this is manifest by many authorities in all succession of ages; and this appeareth by our author in this place; for he saith, *He shall for that make grievous fine and ransome;* where fine and ransome must of necessitie, in his opinion, be taken for all one; for if the fine and ransome were divers, then should the party that mayhemed the villeine, pay two summes, one for a fine, and another for a ransome, which never was done. And aptly a redemption and a fine is taken to be all one; for, by the payment of the fine, he redeemeth himself from imprisonment, that attendeth the fine, and then there is an end of the businesse.

[r] Dier, 6 Eliz. 232.

[s] See the Second Part of the Institutes. Merlebr. cap. 3. (2 Inst. 106. Plowd. 66. b. F. N. B. 90. c. 4 Co. 11. b. Post. 281. b.)

[t] 5 H. 7. 10. 48 E. 3. 5, 6. 41 E. 3. 26. 44 E. 3. 13. 2 H. 4. 4. 11 H. 4. 78. 1 H. 6. 6. 9 H. 7. 14. 8 E. 4. 15. 10 E. 4. 7. 20 E. 4. 3. 21 E. 4. 3. Mich. 17 & 18 Eliz. Bevel's case. 4 Co. 11 & 9 Co. 76. Combe's case.

It signifieth properly a summe of money paid for the redemption of a captive, and is compounded of *re* and *emo,* that is, to redeeme or buy again. And it is to be knowne, that [u] by the ancient law of *England,* if the defendant in an appeale of mayhem had been found guilty, the judgment against the defendant had beene, that he should lose the like member that the plaintife lost by his means; as if the plaintife had lost an hand, the defendant also should lose one, *et sic de cæteris;* in respect whereof the writ said, [w] *felonicè mahemavit,* for that the defendant should lose a member.

[u] 40 Ass. 9. Mirror, cap. 4. & ca. 5. sect. 18. Britt. cap. 25. fol. 48. Bract. lib. 3. fol. 144, 145. Fleta, l. 1. cap. 38.

[w] Bract. ubi supra. Brit. cap. 3. fol. 77. b. (4 Co. 43. Post. 288. a.)

Alwaies at the common law, when the defendant should lose life or member, the writ said *felonice, &c.* And now albeit the law

---

ments on judgments in civil suits in the king's courts of record, they have *long* been *mere form.* Yet in lord Coke's time it was error to omit the entry of them. 5 Co. 49. a. Now indeed by the 16 & 17 Cha. 2. c. 8, such an error is amendable.—[Note 194.]

law be changed (for at this day the plaintife shall, as our author saith, recover but damages) yet the writ of appeale saith still *felonicè*.

Note, the life and members of every subject are under the safeguard and protection of the king; for, as *Bracton* [x] saith, *Vita et membra sunt in potestate regis.* And therewith agreeth a notable record. *Pasch.* 19 *E.* 1, *coram rege*, Rot. 36, *Northt. Vita et membra sunt in manu regis*, to the end that they may serve the king and their countrie, when occasion shall be offered. Nay, the lord of the villeine, for the cause aforesaid, cannot mayheme the villeine, but the king shall punish him for mayheming of his subject (for that hereby he hath disabled him to do the king service) by fine, ransome, and imprisonment, until the fine and ransome be paid. So as there is a manifest diversity betweene a ransome and an amerciament; for ransome is ever when the law inflicteth a corporal punishment by imprisonment (and so is also a fine); but otherwise it is of an amerciament, as hath been said. And [y] ancients have said, that *ransome n'est forsque redemption de paine corporel per fine deis deniers.* This offence of mayhem is under all felonies deserving death, and above all other inferior offences; so as it may be truly said of it that it is, *Inter crimina majora minimum, et inter minora maximum* (2). And in my circuit in *anno* 1 *Jacobi regis*, in the county of *Leicester*, one *Wright*, a young strong and lustie ☞ rogue, to make himselfe impotent, thereby to have the more colour to begge or to be relieved without putting himselfe to any labour, caused his companion to strike off his left hand; and both of them were indited, fined and ransomed therefore, and that by the opinion of the rest of the justices for the cause aforesaid. [127. b.]

[x] Bract. lib. 1. fol. 6. Pasch. 19 E. 1. coram Rege, Rot. 36. Northt.

[y] Mirror, cap. 5. sect. 1 & 3.

"*Void, &c.*" Here by (*&c.*) is implyed a maxime in law, *Quod inutilis labor et sine fructu non est effectus legis.* And againe, *Non licet, quod dispendio licet.* And, *Sapiens incipit à fine;* and *Lex non præcipit inutilia.* [z] Therefore the law forbiddeth such recoveries, whose ends are vaine, chargeable, and unprofitable.

[z] Vide Sect. 273 and 578.

Sect. 195.

ALSO, if a villeine be demandant in an action real, or plaintiffe in an action personall against his lord, if the lord will plead in disabilitie of his person, he may not make plaine (1) *defence* (il ne poit faire pleine defence); *but he shall defend but the wrong and the force, and demand the judgement, if he shall be answered, and shew his matter by and by* (et monstra son matter maintenant*), *how he is villeine, and demand judgment if he shall be answered.*

* *The translation of* maintenant, *it should seem, is* presently, *or* forthwith, *or* without delay, *and not,* "*by and by,*" *as it is here interpreted. See Mr. Ritso's Intr. p.* 111.

"*DEMANDANT,*"

---

(2) Since lord Coke's time, *premeditated* maiming, accompanied with *lying in wait*, has been made a *capital* felony. See 22 and 23 Cha. 2. c. 1, commonly styled the *Coventry* act.—[Note 195.]

(1) It should be *full.*

"*DEMANDANT,*" *Petens*, is hee which is actor in a reall action, because he demandeth lands, &c. and *plaintife*, *quærens*, in actions personal and mixt, *quia queritur de injuriâ*, &c. *Tenant*, *tenens*, in reall actions; and *defendant*, *defendens*, in actions personal and mixt.

"*Defence*" (2) commeth of the word *defendo*, so called of the manner of the pleading, viz. *prædict. A. B. defendit vim et injuriam*, &c.

For example, in a personal action brought by *A. B.* against *C. D.* the defence is, *Et prædictus, C. D. defendit vim et injuriam quando*, &c. *et damna, et quicquid quod ipse defendere debet*, &c.

In this defence there be three parts to be considered. First, when he defendeth the wrong and the force, this hath a double effect, viz. to make himselfe partie to the matter; and this is the reason, that the defendant in this and the like actions can plead no plea at all, before he makes himselfe partie by this part of the defence; as it appeareth here by *Littleton*, that [*a*] if the defendant will plead in disabilitie of the person of the plaintiffe, he must first make himselfe partie by this first part of the defence. Neither can he plead to the jurisdiction of the court, without this part of the defence (3). Secondly [*b*], by the defence of the damages, he affirmeth that the plaintiffe is able to sue, and (upon just cause) to recover damages (4). Thirdly, and by the last part, viz. and all that which he ought to defend, when and where he ought, he affirmeth the jurisdiction of the court. *Et sic de similibus.* And of such necessitie it is for the tenant or defendant to make a lawfull defence, as [*c*] albeit he appeareth and pleads a sufficient barre without making defence, yet judgment shall be given against him.

[*a*] 40 E. 3. 36. 14 H. 6. 18. 35 H. 6. 12. 1 E. 4. 15.

[*b*] 29 E. 3. 22. 8 H. 6. 3.

[*c*] 36 H. 6. Judgment, 58.

[*d*] If a villenage be pleaded by the lord in an action reall, mixt or personal, and it is found that he is no villaine, the bringing of a writ of error is no enfranchisement; because thereby he is to defeate the former judgment; and if, in the meantime, the plaintiffe or demandant bring an action against the lord, he need make no protestation, so long as the record remains in force, for at that time he is free, but the lord shall be restored to all by a writ of error.

[*d*] 18 E. 4. 6, & 7.

Sect.

---

(2) It has been well observed, that *defence*, is applied in our law pleadings, means, not a *justification*, which is the ordinary signification, but a *denial*. 3 Blackst. Comm. 8th ed. 296. Had this occurred to the author of the book on *real* actions, he would not have been at a loss for the reason of the *tenant's defending the demandant's right* in a writ of right. Booth on Real Actions, 112.—[Note 196.]

(3) Held *contra* by three judges against Holt chiefe justice. Carth. 220.

(4) Adjudged acc. on demurrer, Carth. 229.

Sect. 196.

ALSO, there are sixe manner of men, (5) *who, if they sue, judgement may be demanded, if they shall be answered, &c. One is, where a villeine sueth an action against his lord, as in the case aforesaid.*

Bract. lib. 5. fol. 421. Britton, cap. 49. fol. 125. Mirror, cap. 2. sect. 18. 13 H. 4. Surety, 12. A Gardian shall disable.

"*ONE is where a villeine sueth an action, &c.*" *Littleton* here ☞ rehearseth six kinds of disabilities of the person, disabling him to sue any action reall, personall, or mixt. [128. a.]

(Post. 352. b.)

"*If they shall be answered.*" This is the legall conclusion of the plea, when the plea is in disabilitie of the person. And of the verbe *respondere* came *responsalis*, often used in the ancient authors of the law. [*f*] *Responsalis* was he that was appointed by the tenant or defendant, in case of extremity and necessitie, to alledge the cause of the parties absence, and to certifie the court upon what tryall he will put himselfe, viz. the combate or the country. So as his power was more than the essoinor, which casteth an essoigne only to excuse the absence of the party, as an estranger, which casteth a protection, doth. For by the common law, the plaintife or defendant, demandant or tenant, could not appeare by attornie without the king's special warrant by writ or letters patents, but ought to follow his suite in his owne proper person (by reason whereof there were but few suits). [*g*] *Abusion est a reteiner attorney sans breve de la chancerie.* And therefore *Bracton* saith truly, [*h*] *Attornatus hæc omnia facere potest* (that is, plead all manner of pleas). *Est igitur magna differentia inter attornatum et responsalem.* So as the statutes that give the making of attorneys, have worne out *responsales*. Now what manner of men attorneys ought to be, or rather what they ought not to be, heare what antiquity hath said: [*i*] *Attorneyes poient estre touts ceux, aux queux ley voile suffer. Femes ne poient estre attorneyes, ne enfans, ne serfs, ne nul que est en garde ou auterment faut de foy, ne nul criminous, ne nul essoigne, ne nul que n'est a le foy le roy, ne nul que ne poit este counter, &c.*

[*f*] Bract. lib. 4. fol. 212. b. & lib. 5. fol. 349. Fleta, l. 6. c. 11. Glanvil. lib. 11. cap. 1. Brit. ca. 126. Vid. W. 1. c. 43. F. N. B. 25. C. Regist. 9. (F. N. B. 156. E.)

[*g*] Mirr. ca. 5. sect. 1.

[*h*] Bracton, ubi supra.

(5 Co. 89. 7 Co. 74.)

[*i*] Mirror, c. 2. sect. 21.

Sect. 197.

THE second is, where a man is outlawed upon an action of debt or trespasse, or upon any other action or indictment, the tenant, or the defendant, may shew all the matter of record, and the outlawry, and demand judgment, if he shall be answered; because he is out of the law to sue an action during the time that he is outlawed.

"*THE*

(5) In L. and M. Roh. P. and Red. the reading is *against whom.*

"THE *second is* [*k*] *where a man is outlawed, &c.*" But these generall words receive a distinction, viz. [*l*] if an executor or an administrator sueth any action, utlary in the plaintife shall not disable him: because the suit is *in auter droit*, that is, in the right of the testator, and not in his owne right. And for the same reason, [*m*] a maior and commonalty shall have an action, though the maior be outlawed. [*n*] In a writ of error to reverse an utlary, utlary in that suit, or at any stranger's suit, shall not disable the plaintife, because if he in that action should be disabled if he were outlawed at several mens suits, he should never reverse any of them. [*o*] In an attaint outlary in the plaintife cannot be pleaded in disability of the person (1). [*p*] Outlary in *Chester* or *Durham* shall not disable the plaintife in any court at *Westminster, &c.* [*q*] *Minor verò, et qui infra ætatem* 12 *annorum fuerit, utlagari non potest, nec extra legem poni; quia ante talem ætatem non est sub lege aliquâ nec in decennâ.* [*r*] He that is abjured the realme may be disabled, for that he is *extra legem*, and yet he is not properly outlawed.

[*k*] Bracton, l. 5. fol. 421. Britton, ca. 22. fol. 39. Mirr. ca. 3, de exceptions a provors. ca. 4, defaults punishable.
[*l*] 21 E. 4. 49. b. 21 H. 6. 30. b. 14 H. 6. 15.
[*m*] 12 E. 4. fol. 12. 23 H. 8. c. 3. s. 5.
[*n*] 7 H. 4. 40.
[*o*] 23 H. 8. c. 3. 2 H. 7. 7. (1 Sid. 43. Cro. Jam. 425. 616.)
[*p*] Mirr. ca. 3. acc. 12 E. 4. 16. 33 H. 6. ca. 2.
[*q*] Bract. lib. 3. fo. 125.
[*r*] Britton, fo. 39.

3 H. 5. Utlagary, 11. 38 E. 3. 5.

"*Shew all the matter of record.*" Here note two things: first, by this word (*shew*), that [*s*] when any man pleads an utlary is disability of the person he must ☞ shew forth the record of the outlawrie *maintenant sub pede sigilli*, (because the plea is but dilatorie) unlesse the record be in the same court. But if he plead an outlawrie in barre, if it be denyed, he shall have a day to bring it in.

[128. b.]

[*s*] 20 H. 2. Coron. 232. 19 Ass. p. 10. 3 H. 6. 15. b. 37 H. 6. 28. 5 H. 7. 6 Eliz. Dyer, 228. F. N. B. 244.

Staunf. Pl. Coron. 105. (Noy, 74. 143.) (8 Co. 142. b.)

Secondly, [*t*] before the defendant can disable the plaintife, the outlawrie must appear of record; and the judgement after the *quinto exactus* given by the coroners in the county court is not sufficient, until the writ of *exigent* be returned, and the outlawrie appeare of record; which is manifest by *Littleton's* owne words, (viz.) *matter of record;* whereof see more hereafter, Sect. 503.

[*t*] 28 Ass. 49. 12 E. 3. Utlagarie, 3. M. 4 & 5 El. Dyer, 222. 38 E. 3. 13. (Post. 228. b. 5 Co. 111.)

It is to be observed, that there be two kinds of appearances before the *quinto exactus*, to avoid the outlawry, viz. an appearance in deed, that is, to render himselfe, &c. and the other is by an appearance in law, [*u*] that is, by purchasing a *supersedeas* out of the court where the record is, which is an appearance of record: and therefore, though it be not delivered to the sherife before the *quinto exactus*, yet it shall avoid the outlawrie: and so are the bookes, that speake hereof, to be intended.

[*u*] Tr. 44. El. in Com. Banc. inter Mere & Dolburie. 33 H. 6. 1. 11 H. 4. 34. Dyer, 3 El. 192. 33 E. 3. Err. 77.

5 El. 223. 4 H. 4. le l. case. 8 H. 4. f. 7. 37 H. 6. 17. 21 H. 6. 20. (Mo. 73.)

[*w*] If a man be outlawed at the suit of one man, all men shall take advantage of this personal disability. And so it is in case of *alien née* and of *excommengement*. But otherwise it is in case of villenage, for that disability is onely given to the lord.

[*w*] 33 H. 6. 19 b. &c. 3 East, 145.

"*During the time that he is outlawed.*" [*x*] If the defendant plead an outlawrie in the plaintife, in disability of his person, and the

[*x*] 44 E. 3. 27. (Doct. Plac. 162. 396.)

(1) Rot. Parl. 20 H. 6. n. 18. c. 2. Hal. MSS.

the plaintife after that plea pleaded purchase a charter of pardon; because the charter hath restored him to the law, the defendant shall answer. So note, the disability abateth not the writ, but disinableth the plaintife, untill he obtaineth a charter of pardon; and so it appeareth here by *Littleton*.

"*Judgement if he shall be answered.*" [y] If the ground or cause of the action be forfeited by the outlawry, then may the outlawry be pleaded in barre of the action; as in an action of debt, detinue, &c. But in reall actions, or in personall, where dammages be incertaine, (as in trespasse of batterie, of goods, of breaking his close, and the like) and are not forfeited by the outlawrie, there outlawry must be pleaded in disability of the person.

[y] 9 El. Dyer, 262. 7 H. 4. 4. b. Staunf. Pl. Coron. 188. 5 Co. 109, in Foxleye's case. 28 E. 3. 92. 29 Ass. p. 47. 68. 30 H. 6. 5. (Doct. Plac. 395.)

[z] And it is to be observed, that, in the reign of king *Ælfred*, and untill a good while after the Conquest, no man could have been outlawed but for felonie, the punishment whereof was death. But now the law is changed, as it appeareth by that which hath beene sayd. And hereby you shall understand old bookes and records, which say, that an outlawed man had *caput lupinum*, because he might be put to death by any man, as a wolfe that hateful beast might. [*] *Utlagatus et waiviata capita gerunt lupina, quæ ab omnibus impune poterunt amputari; meritò enim sine lege perire debent, qui secundum legem vivere recusant.* And another saith, [a] *Utlage pur felonie teigne leu pur loup, et est criable woolfeshered, pur ceo que loup est beast haye de touts gents, et de ceo en avant list al ascun de le occider al foer del loup, dont custome soloit estre de porter les testes al chiefe lieu del county, ou de la franchise, et soloit la avoire demy mark del countie pur chescun teste de utlage et de loupe.* And this agreeth with the law before the Conquest, [b] *Utlagatus lupinum gerit caput, quod Anglicè woolfeshead dicitur; et hæc est lex communis et generalis de omnibus utlagatis.* [c] But in the beginning of the raigne of king *Edward* the third, it was resolved by the judges, for avoyding of inhumanity, and of effusion of Christian blood, that it should not be lawfull for any man, but the sherife onely, (having lawfull warrant therefore) to put to death any man outlawed, though it were for felonie; and if he did, he should undergoe, such punishments and paines of death as if he had killed any other man: and so from thenceforth the law continued until this day, (*Nota, woolfeshead* and *wulferfod* is all one.) [*] And after in *Bracton's* time, and somewhat before, processe of outlawry was ordained to lie in all actions that were *quare vi et armis*, which *Bracton* calleth *delicta*; for there the king shall have a fine (1). But since, by divers statutes, processe of outlawry

[z] Mir. c. 1. sect. 3, &c. 3. & 4. sæpe. cap. 5. sect. 1.

[*] Fleta, lib. 1. ca. 27. Bract. li. 5. f. 421. Brit. f. 20. b.

[a] Mir. ca. 4. sect. 4. defaults punishable.

[b] Lamb. fol. 128.

[c] 2 Ass. p. 3. 2 E. 3. tit. Coron. 148.

[*] Bract. lib. 5. fol. 421. 8 H. 6. 9. b. 40 E. 3. 5. 35 H. 6. 6. 40 E. 3. 2.

(1) Whether the common law gives process of outlawry against crimes, being merely *constructive* breaches of the peace, was questioned in a late case before the king's bench on a *libel*. But the chief justice, in delivering the court's judgment, spoke at large to prove, that such process lies against crimes *universally*. Mr. Wilkie's case, 4 Burr. page 2537. However, the reasoning, on which this opinion is grounded, stands opposed by a former judgment of the common pleas on a prior case relative to the same gentleman. 2 Wils. 151. But it was adopted by both houses of parliament, when, in this case, they resolved, that privilege of parliament doth not extend to *libels*. See Annual Reg. for 1764. The arguments for the contrary opinion are forcibly expressed in

outlawry doth lie in account, debt, detinue, annuity, covenant, *action sur le statute de* 5 Rich. 2. *action sur le case*, and in divers other common or civill actions. But now let us heare what *Littleton* will say unto us.

Sect. 198.

THE third is an alien, which is born out of the ligeance (2) *of our soveraigne lord the king, if such alien will sue an action reall or personal, the tenant or defendant may say, that he was borne in such a country, which is out of the king's allegeance, and aske judgment if he shall be answered.*

[129. a.] "ALIEN." [a] *Alienigena* is derived from the *Latine* word *alienus*, and according ☞ to the etymologie of the word, it signifieth one borne in a strange country, under the obedience of a strange prince or country, (and therefore *Bracton* saith, that this exception, *propter defectum nationis*, should rather be *propter defectum subjectionis*) or as *Littleton* saith, (which is the surest) out of the liegeance of the king. Note, here *Littleton* saith not *out of the realme*, but *out of the ligeance;* for he may be borne out of the realme of *England*, yet within the liegeance. And he that is borne within the king's liegeance is called sometime a *denizen, quasi deins née*, borne within, and thereupon in *Latine* called *indigena*, the king's liegeman; for *ligeus* is ever taken for a naturall borne subject.

[a] Bract. lib. 5. fol. 415. 427. Mir. c. 1. sect. 3. c. 5. sect. 1. & ca. 3. except approvers. Flet. li. 6. c. 47. Brit. fo. 29. 13 E. 3. Bre. 677. 25 E. 3. de Natis ultra mare. 31 E. 3. Cosinage, 5. 42 E. 3. 2. 9 E. 4. 7. 11 H. 4. 26. 14 H. 4. 19, 20.

3 H. 6. 55. 22 H. 6. 38. Staunf. Pl. Cor. 197. a. 7 Co. 1. Calvin's case. Pl. Com. 268, per Sanders. Vid. Sect. 1. 439, 440, 441.

But many times in acts of parliament, *denizen* is taken for an alien borne, that is infranchised or denizated by letters patent, whereby the king doth grant unto him [b] *quòd ille in omnibus tractetur, reputetur, habeatur, teneatur, et gubernetur, tanquam ligeus noster infra dictum regnum nostrum Angliæ oriundus, et non aliter, nec alio modo.* But the king may make a particular denization: [c] as he may grant to an alien, *quòd in quibusdam curiis suis Angliæ audiatur ut Anglus, et quòd non repellatur per illam exceptionem, quòd sit alienigena et natus in partibus transmarinis*, to enable him to sue onely. The severall senses of which word must be gathered *ex antecedentibus, adjunctis, et consequentibus;* and they that take him in that sense, derive the word from *donaison*, (i. e.) *donatio*, because his freedome is given unto him by the king.

(2 Inst. 741.)

[b] 9 E. 4. f. 8. Pl. Com. 130. b.

[c] Rot. Parl. 22 E. 1. Elias de Daubenie.

There is another kind, and that is an alien naturalized, and that must be by act of parliament. And this alien naturalized to all intents and purposes is as a naturall borne subject (1), and differeth

Ante 8. a. 33. a.

---

in a protest by some of the lords, who were against making such a resolution. Jour. Dom. Proc. 29 Nov. 1763.—[Note 197.]

(2) Ubi natus in partibus transmarinis *shall not be an alien. See Hil.* 13 *E.* 1. rot. 1. Hal. MSS.—[Note 198.]

(1) But now by the 12 & 13 W. 3. c. 2, naturalized persons are incapacitated

fereth much from denization by letters patent; for if he had issue in *England* before his denization, that issue is not inheritable to his father; but if his father be naturalised by parliament, (Cro. Cha. 601.) such issue shall inherite. So if an issue of an *Englishman* be borne beyond sea, if the issue be naturalised by act of parliament(2), he shall inherit his father's lands; but if he be made denizen by letters patent, he shall not; and many other differences there be betweene them.

Vide Calvin's case, ubi supra. "*Ligeance,*" *à ligando,* being the highest and greatest obligation of dutie and obedience that can be. Ligeance is the true and faithful obedience of a liegeman or subject to his liege lord, or soveraigne. *Ligeantia est vinculum fidei: ligeantio est legis essentia.*

Ligeantia domino regi debita est duplex.

- *Perpetua,*
  1. *Originaria, sive naturalis, sive nata* [d]; and this is alwayes absolute and incident inseparable. *Nemo patriam, in quâ natus est, exuere, nec ligeantiæ debitum ejurare possit.*
  2. *Data, aut per denizationem, aut per naturalizationem (ut supradictum est) et ista ligeantia per denizationem potest esse sub conditione.*
- *Temporanea, aut,*
  - *Localis, quia quilibet alienigena, qui in hoc regno sub protectione regis degit domino regi ligeantiam debet.* And if he be indicted of high treason, the indictment shall say, [e] *contra ligeantiæ suæ debitum; et ideo dicitur temporanea et localis, quia non durat, nisi quousque infra regnum moratur.*
  - *Limitata,* as when one is made denizen for life, or in taile. [f] But one cannot be naturalized, either with limitation for life, or in taile, or upon condition: for that is against the absoluteness, puritie, and indebility of naturall allegiance.

[d] 13 El. Dier, fo. 300. Doctor Storie's case.

(Hob. 271.)

[e] 3 & 4 P. & M. Di. 144. 7 Co. 6, &c. Calvin's case.

[f] 9 E. 4. 7. Calvin's case, ubi supra. (Cro. Jam. 539. 2 Ro. Rep. 96.)

An

---

pacitated from being of the privy council, members of either house of parliament, or enjoying any office or place of trust, civil or military, or from having any grant of lands or other hereditaments from the crown. The 1 Geo. 1, goes still farther; for it enacts, that no bill of naturalisation shall be received without a clause to this effect. 1 Geo. 1. st. 2. c. 4. s. 2. But when any foreigner, distinguished by eminence of rank or services, is naturalized, it is usual, first to pass an act for the repeal of these statutes in his favour, and then to pass an act of naturalization without any exception.—[Note 199.]

(2) This imports a special act of parliament to be necessary. But whatever the law might be in lord Coke's time, now, by several modern statutes, persons born beyond sea, if their fathers, or paternal grandfathers, were natural-born subjects, are likewise made so, though with an exclusion of some unfavoured persons. 7 Ann. c. 5. s. 3. 4 G. 2. c. 21. 13 G. 3. c. 21. See ante fo. 8. a. note 1.—[Note 200.]

[*] An abbot, prior, or prioresse alien, shall have actions reall, personal, or mixt, for any thing concerning the possessions or goods of his monastery here in *England*, though he be an alien borne out of the king's ligeance; because he bringeth it not in his owne right, ☞ but in the right of his monastery, and not in his naturall but in his politique capacity (1).

[129. b.]

[*] 13 H. 3. Br. 264. 20 E. 3. Annuity, 24. 17 E. 3. 21. 40 E. 3. 10. 27 Ass. 48. 14 H. 4. 7. 22 E. 4. 44. 22 H. 7. 7.

Staunf. Prær. 54. L'estat. de Carliale, 35 E. 1.

"Reall or personal." [h] In this case the law doth distinguish betweene an alien, that is a subject to one that is an enemy to the king, and one that is subject to one that is in league with the king (2); and true it is that an alien enemie shall maintaine neither reall nor personall action, *donec terræ fuerint communes*, that is until both nations be in peace (3); but an alien that is in league, shall maintaine personal actions; for an alien may trade and traffique, buy and sell, and therefore of necessity he must be of ability to have personall actions; but he cannot maintaine either reall or mixt actions. An alien that is condemned in an information, shall have a writ of error to relieve himselfe. *Et sic de similibus.*

(Doct. Plac. 8. Dy. 2. b.) [h] Bracton, 426, 427. 430. 8 E. 3. 51. 5 E. 2. Aiel, 8. 13 E. 3. Bre. 677. 22 E. 3. 14. 20. 21 E. 3. Cosinage, 5. 42 E. 3. 2. 13 E. 4. 9. 11 H. 4. 26. 9 H. 4. 7. 19 E. 4. 7. 20 E. 4. 6.

13 E. 4. 9, 10. 32 H. 6. 23. 38 H. 8. Br. Denizen, 10. 1 E. 6. Nonhab. Br. 13 & 62. Vide 4 H. 3. Dower, 179. 6 E. 3. 263. 31 H. 6. ca. 4, Livre d'Entries in Eject. 7. 6 H. 8. Dier, 2. 6 H. 7. 15. 1 Bos. 166. 4 East, 505. 6 T. R. 24.

[*] If an alien be made a prior or abbot, the plea of *alien née* shall not disable him to bring any reall or mixt action concerning his house, because he is *in auter droit*, as before is said (4).

[*] 29 E. 3. Br. Denizen, 15. Vid. Staunf. Pl. Cor. 197. a.

"Out of the ligeance of our sovereigne lord the king." Here *Littleton* doth not say, out of the realme or beyond the sea (5), (as he doth Sect. 439, 440, 441. 677.) but out of the ligeance; for (as hath beene said before) a man may be borne out of the realme, viz. of *England*, as in *Ireland*, *Jersey*, and *Guernsey*, &c. (6) and yet seeing he is not borne out of the ligeance of the king, as *Littleton* here speaketh, he is no alien. But hereof there is

---

(1) Here, as also generally where lord Coke mentions *professed* persons, he must, we conceive, be understood to write as of the law before the dissolution of monasteries, and the consequent establishment of the protestant faith. See *ante* 3. b. note 7.—[Note 201.]

(2) Et nota *it shall be tried by the record, if he be in amity or not, viz. a proclamation of war. But a proclamation prohibiting commerce, as anciently between the emperor and the queen, doth not disable a German in a personal action.* Trin. 41 Eliz. C. B. Hal. MSS.—[Note 202.]

(3) But now, on declaring war, the king usually, in the proclamation of war, qualifies it, by permitting the subjects of the enemy resident here to continue so long as they peaceably demean themselves; and, without doubt, such persons are to be deemed alien friends in effect.—[Note 203.]

(4) *A female alien shall have dower.* Rot. Parl. 8 H. 5. n. 15. 9 H. 5. n. pro comitissâ *Arundell.* Hal. MSS.—See *ante* 31. b. note 9.—[Note 204.]

(5) See *ante* 107. a. n. 6, there, and post. 44. a.

(6) Rot. Parl. 9 H. 6. n. 20. *indenization of one born in Wales.* Simile Rot. Parl. 23 H. 6. n. 26. Co. 2 Inst. 741, on stat. 2 H. 4. Hal. MSS.

is so much and so plentifully spoken in our bookes, and especially in the case of *Calvin, ubi supra*, as this shall suffice.

"*And aske judgment if he shall be answered.*" So as the tenant or defendant shall neither plead *alien née* to the writ or to the action, but in disability of the person as in case of villenage and outlawrie before. [i] And *Littleton* is to be intended of an alien in league: for if he be an alien enemy, the defendant may conclude to the action.

[i] Livre d'Entries, Alien, I. (Doct. Plac. 89. Dy. 2. b.)

2 Bl. 1326. 3 Burr. 1734.

Sect. 199.

THE fourth is a man, who by judgement given against him upon a writ of præmunire, facias, &c. *is out of the king's protection. If he sue any action, and the tenant or defendant shew all the record against him, he may aske judgement if he shall be answered; for the law and the king's writs be the things, by which a man is protected and holpen; and so, during the time that a man in such case is out of the king's protection, he is out of helpe and protection by the king's law, or by the king's writ.*

(3 Inst. 119.) "*PRÆMUNIRE.*" Some hold an opinion, that the writ is called a *præmunire*, because it doth fortifie *jurisdictionem jurium regiorum coronæ suæ* of the kingly lawes of the crown against foreine jurisdiction, and against the usurpers upon them, as by divers acts of parliaments appears. But in truth it is so called of a word in the writ; for the words of the writ be, *præmunire facias præfatum A. B. &c. quòd tunc sit coram nobis, &c.* where *præmunire* is used for *præmonere*, and so do divers interpreters of the civill and canon law use it; for they are *præmuniti* that are *præmoniti*. By the statutes before quoted in the margent you shall perceive what statutes were made before *Littleton* wrote, and what have beene ordained since to make offences in danger of a *præmunire*.

For statutes, Vid. 35 E. 1. Stat. de Carlisle. 25 E. 3. c. 22. 25 E. 3. Stat. de Provisors. 27 E. 3. c. 1. 38 E. 4. c. 3. 2 R. 2. c. 12. 3 R. 2. c. 3. 12 R. 2. c. 5. 16 R. 2. c. 5. 2 H. 4. c. 3 & 4. 6 H. 4. c. 1. 24 H. 8. c. 12. 25 H. 8. c. 19, 20. 26 H. 8. c. 16. 1 Eliz. ca. 1. 5 Eliz. c. 1. 13 Eliz. ca. 1, 2. 8. 27 Eliz. c. 2. 39 Eliz. ca. 18.

For Precedents, Vide Mich. 29 E. 3. coram rege in Thesaur. Pasch. 44 E. 33. Ibid. Melbourne's case. Mich. 38 H. 6. Ibid. the case of Rich. Beauchamp and others. Hil. 25 H. 8. coram rege, the case of Nic. Bishop of Norwich. Trin. 36 H. 6. Rot. 9. coram rege, the case of the Bishop of Bangor. Mich. 26 & 27 Eliz. coram rege, Perrot against D. Bevance and others. Booke of Entries, fo. 429, & 430. & ibid. Mich. 9 H. 7. f. 23.

Book cases. 21 E. 3. 40. b. 18 H. 6. 6. 9 E. 4. 2. 35 E. 3. 7. 24 H. 8. tit. Præmunire, 16. 10 H. 4. 12. 27 E. 3. 84. 6 H. 7. 14. 44 E. 3. 36.

"*Out of the king's protection.*" The judgement in a *præmunire* is, that the defendant shall be from thenceforth out of the king's protection, and his lands and tenements, goods and chattels ☞ forfeited to the king, and that his body shall remaine in prison at the king's pleasure. So odious was this offence of *præmunire*, that a man that was attainted of the same, might have been slaine by any man, without danger of law; because [k] it was provided by law, that a man might do

[130. a.]

11 H. 7. tit. Præmunire, p. 5. 17 H. 7. Justice Spilmans in Turberville's case. Kelwey, f. 195. Doct. & Stud. lib. 2. cap. 32. Brooke, tit. Præmunire 21. Temps E. 6. Bishop Barloe's case. [k] 24 H. 8. Brooke Coron. 196.

to

to him as to the king's enemy, and any man may lawfully kill an enemy. But queene *Elizabeth* and her parliament [*], liking not the extreme and inhumane rigor of the law in that point, did provide, that it should not be lawful for any person to slay any person in any manner attainted in or upon any *præmunire*, &c. Tenant in taile is attainted in a *præmunire*, he shall forfeit the land but during his life; for albeit the statute of 16 *R.* 2. ca. 5, enacteth that in that case their lands and tenements, goods and chattels, shall be forfeit to the king, that must be understood of such an estate as he may lawfully forfeite, and that is during his own life. And these generall words do not take away the force of the statute *de donis conditionalibus*, but he shall forfeit all his fee simple lands, states for life, goods and chattels; and so was it resolved in *Trudgin's* case.

[*] 5 Eliz. ca. 1. Hil. 21 El. Trudgin's case, resolved per les Justices. 7 H. 4. 20. Simon Beverley's case. (Post. 391. 2 Ro. Abr. 177.)

"*For the law and the king's writs, &c.*" There be three things, as here it appeareth, whereby every subject is protected, viz. *rex, lex, et rescripta regis*, the king, the law, and the king's writs. The law is the rule, but it is mute. The king judgeth by his judges, and they are the speaking law, *lex loquens*. The processe and the execution, which is the life of the law, consisteth in the king's writs. So as he that is out of the protection of the king, cannot be aided or protected by the king's law, or the king's writ. *Rex tuetur legem, et lex tuetur jus.* [*l*] Besides men attainted in a *præmunire*, every person that is attainted of high-treason, petit-treason, or felony, is disabled to bring any action; for he is [*] *extra legem positus*, and is accounted in law *civiliter mortuus*.

[*l*] 4 E. 4. 8. 1 E. 4. 1. b. 30 E. 3. 4. 8 Eliz. Dier, 24. [*] Mich. 9 E. 3. coram rege. Rot. 84. Warw.

It is to be understood, that there is a generall protection of the king whereof *Littleton* here speaketh; and this extends generally to all the king's loyall subjects, denizens and aliens within the realme, whose offences have not made them uncapable of it, as before it appeareth. And there is a particular protection by writ, which is one of the king's writs that *Littleton* here speaketh of. This particular protection is of two sorts; one, to give a man immunity or freedome from actions or suits; the second, for the safetie of his person, servants and goods, lands and tenements, whereof he is lawfully possessed, from violence, unlawfull molestation or wrong. The first is of right, and by law; the second are all of grace, (saving one) for the generall protection implyeth as much. Of the first sort some are *cum clausulâ* (*volumus*); so called, because the writ hath this word (*volumus*) in it, viz. *volumus quòd interim sit quietus de omnibus placitis et quærelis, &c.* and the other a protection *cum clausulâ* (*nolumus*); so called for the like reason. Of protections *cum clausulâ* (*volumus*) for staying of pleas and suites there be foure kindes, viz. 1. *Quia profecturus* (so called by reason they are part of the words of the writ). 2. *Quia moraturus* (so named for distinction for the like cause. 3. *Quia indebitatus nobis existit* of the matter. 4. When any sent into the king's service in warre is imprisoned beyond sea. The former are for staying of actions and suits in generall. The third is for staying of suits of the subject for debts and duties due by the king's debtor to them. Of the fourth you shall reade hereafter in his place. For the former two these nine things are to be observed. 1. For what cause they are to be granted. 2. For what persons they are allowable. 3. A threefold time is to be considered, viz. the time of the purchase of them, the time of the continuance of them, and the time when they shall be cast. 4. In what place the service is to be

Protection, { Generall. Particular.

Of the Generall, vide 7 Co. Calvin's case, per totum. (F. N. B. 28. B. 1 Leon. 185. Mo. 239. 2 Ro. Abr. 32.)

be performed. 5. In what actions these protections are allowable. 6. Under what seale and to whom they are directed. 7. Who is to allow or disallow of them. 8. By whom they are to be cast, and in what manner. 9. How upon just cause they may be repealed or disallowed. I must but point at these matters, to make the studious reader capable of them, and referre him to the bookes and other authorities at large, being excellent points of learning.

As to the first, it is of two natures: the one concernes services of war, as the king's souldier, &c. the other wisedome and counsell, as the king's ambassador or messenger *pro negotiis regni*. Both these being for the publique good of the realme, private mens actions and suites must be suspended for a convenient time; for *jura publica anteferenda privatis;* and againe *jura publica ex privatis promiscuè decidi non debent.* [a] And the cause of granting of a protection must be expressed in the protection, to the end it may appeare to the court that it is granted *pro negotiis regni et pro bono publico,* [b] or, as some others say, *pur le common profit del realme.* And *Britton* saith, *nostre service, sicome estre en nostre force, et le defence de nous et de nostre people, &c.* [*] A man in execution *in salvâ custodiâ* shall not be delivered by a protection.

[a] 39 H. 6. 39. 3 H. 6. tit. Protection, 2. 13 R. 2. ca. 16.
[b] Mirr. cap. 3. sect. 23. Britton, fo. 281. Fleta, lib. 6. cap. 7, 8, &c. Bracton.
[*] 5 Marie, Dyer, 162. (Cro. Cha. 389.)

[c] To the second, these protections are not allowable onely for men of full age, but for men within age, and for women (1), as necessary attendants upon the campe, and that in three cases, *quia lotrix, seu nutrix, seu obstetrix.*

[c] 19 H. 6. 51. 30 E. 3. 21. F. N. B. 28. L. 11 E. 3. Rot. Pat. 3 part, for the Countesse of Warwick.

[d] Corporations aggregate of many are not capable of these two protections, either *profecturæ* or *moraturæ*, because the corporation itselfe is invisible, and resteth onely in consideration of law. [e] Protection for the husband shall serve also for the wife. [130. b.]

[d] 30 E. 3. 1. 21 E. 4. 36. 21 E. 3. 97.
[e] 35 H. 6. 3. 48 E. 3. 23. 48 E. 3. 7. 4 H. 5. Protection, 107.

[f] Albeit the vouchee, tenant by resceit, preier in aide, or garnishee, bee no parties to the writ, yet before they appeare, a protection may be cast for them; because when the demandant grants the voucher or resceit, in judgment of law they are made privie. But if the demandant counterplead the voucher or resceit, then untill it be adjudged for them, and so they privie in law, a protection cannot be cast for them. And so it is of the garnishee, a protection may be cast for him at the day of the returne of the *scire facias.* [g] No protection can be cast for the

[f] 45 E. 3. Protect. 37. 8 H. 6. 18. 30. 8 H. 6. 16. 9 H. 6. 36. 40 E. 3. 18. 32 E. 3. Protect. 54. 21 E. 3. 14 H. 4. 16. 45 E. 3. tit. Protect. 40.
14 E. 3. Protect. 66. (2 Ro. Abr. 324.) [g] 24 E. 3. 26. 47 E. 3. 5. 5 H. 5. 5. 38 E. 3. 1. F. N. B. 28. G. 20 R. 2. Protect. 106. 22 H. 6. 28. 9 H. 6. 36. 43 E. 3. 36. 17 E. 3. 24. 25 E. 3. 43. 24 E. 3. 26. 13 E. 3. Protect. 71. 14 E. 3. ib. 65. 63. 20 E. 3. ibid. 84.

---

(1) A respectable writer, considering women as not requisite in a camp, thinks, that here lord Coke mistakes *protections* for *essoins.* Barr. on Ant. Stat. Ir. ed. 154. But as we apprehend, those who have been accustomed to a camp-life, will bear testimony to the necessity of each of the three capacities mentioned by lord Coke.—[Note 205.]

the demandant or plaintife; because the tenant or defendant cannot sue a re-sommons, or a re-attachment, but the plaintife onely, that sued out the summons or attachment, &c. must sue also the re-sommons or re-attachment. And so it is of an actor in nature of a plaintife, &c. as the garnishee after appearance, and an avowant, and the like. [h] An officer of the king's reseeit, or any other officer in any court of record, whose attendance is necessary for the king's service or administration of justice, being sued cannot have a protestion cast for him.

[h] 7. H. 4. 3. a.

[i] In every action or plea reall or mixt against two, where protection doth lie, a protection cast for the one doth put the plea without day for all. So it is in debt, detinue, and account. But in trespasse, or any action in nature of trespasse, which is in law severall, where every one may answer without the other, there a protection cast for the one shall serve for him onely, unless they joyne in pleading; or if they plead several pleas, and one *venire facias* is awarded against all, there a protection cast for one, shall put the plea without day for all; and therefore in former times the plaintife used to sue out severall *venire facias* in those cases for feare of a protection, &c.

[i] 9 E. 3. Protect. 80, 81. 32 E. 3. ib. 55. 16 E. 2. ib. 77. 13 E. 3. ib. 70. 41 E. 3. ib. 95. 41 E. 3. 32. 42 E. 3. 9. 5 H. 5. 7. 3 H. 4. 15. 2 R. 2. Protect. 45. 43 E. 3. ibid. 31. 2 H. 6. 22. 21 H. 6. 41.

38 E. 3. 12. 7 H. 6. 21. 33 E. 3. Protect. 116. 4 H. 4. 4. 29 E. 3. 41. 45 E. 3. 24. 28. 11 E. 4. 7. F. N. B. 28. K. (11 Co. 5. b.)

[k] As to the three-fold time, first, a protection *profecturæ* regularly must not be purchased hanging the plea. But this faileth, when he goeth in the king's service in a voyage royall; and that is two-fold; either touching warre, and that onely is when the king himselfe or his lieutenant, that is *prorex* goeth; or when any goeth in the king's ambassage, *pro negotio regni*, or for the marriage of the king's daughter, or the like, this is also called a voyage royall. But a protection *moraturæ* may be purchased and cast *pendente placito*.

[k] 3 H. 6. Protect. 2. 39 H. 6. 39. 44 E. 3. 12. 13 R. 2. c. 16. 3 H. 4. 16. 11 H. 4. 7. 7 E. 4. 27. 28 H. 6. 1. 17 H. 6. Protect. 56. 10 E. 3. 54. 13 R. 2 cap. 16.

13 E. 3. Amerciment, 18. 7 Co. 7, 8. Calvin's case. (2 Ro. Abr. 322. Ante 69. b.) F. N. B. 28. F.

[l] Regularly a protection cannot be cast, but when the party hath a day in court, and when if he made default, it should save his default. Therefore when execution is to be granted against body, lands, or goods, no protection can be cast; because the defendant hath no day in court. If a protection be cast at the *nisi prius* for one, if before the day in banke it be repealed by *Innotescimus*, yet because it was once well cast, it shall save his default; but if the protection be disallowed, either for variance, or that it lay not in the action, or the like, there it shall turne to a default.

[l] 4 H. 6. 22. 17 E. 3. 76. 33 E. 3. tit. Protect. 115. 34 E. 3. ib. 124. 27 E. 3. 79. 29 E. 3. Protect. 85. 88. 2 E. 4. 15. 19 E. 3. Protect. 82. 79. 13 E. 3. ib. 72. 9 E. 3. 21. 3 H. 6. 55.

4 H. 6. 22. 11 H. 6. 14. 14 H. 6. 22. 21 H. 6. 10. 27 H. 6. 4. 28 H. 6. 1. 35 H. 6. 58. 44 E. 3. 2. 16. 48 E. 3. 8. 7 H. 4. 5. 14 H. 4. 23. 27 E. 3. 78.

[m] If a man hath a protection, and notwithstanding plead a plea, yet at another day of continuance after that a protection may be cast; so at a day after an exigent; but after appearance he cannot cast a protection in that terme, untill a new continuance be taken.

[m] 22 E. 3. 4. 16 E. 3. Protect. 47. 44 E. 3. 16. 8 E. 3. Amerciament, 18. 35 E. 3. Protection, 123.

Thirdly,

[n] 39 H. 6. 39. F. N. B. 38. F. Fleta, lib. 6. ca. 8. Temps E. 1. Grand cape, 26. (Post. 254. b.)

[n] Thirdly, no protection, either *profecturæ* or *moraturæ*, shall indure longer than a yeare and a day next after the *teste* or date of it. And so it is of an *essoigne de service le roy*. If a protection bear *teste* 7. *die Januarii*, and have allowance *pro uno anno*, the re-summons, re-attachment, or re-garnishment. may be sued 8. *Januarii* the next yeare; and yet that is the last day of the yeare.

[o] Brit. fol. 282. 283, & 280. Fleta, lib. 6. cap. 8. accord.

And where *Britton*, treating of an essoigne beyond the *Græcian* sea, in a pilgrimage, &c. saith thus, [o] *ascu gent nequident se purchasent nos lettres de protection patents durable a un an, ou a 2 ou a 3 ans, et jalameyns font attorneys generals, ausi per nos letters patents: et ceux font bien et sagement, car nul grand seignior, ne chivalier de nostre realme, ne doit prender chemyn sauns nostre conge, car issent poet le realme remainer disjarny de fort gente.*

Three things are hereupon to be observed. First, that this was a protection of grace, whereof more shall be said hereafter. Secondly, that it was for the safetie of the great men of the realme, and that they should make general attornies, so as no actions or suits should be thereby staid. Thirdly (by the way), that great men could not passe out of the realme without the king's licence. [p] A protection granted to one, &c. untill he be returned from *Scotland*, was disallowed for the incertaintie of the time.

[p] 1 E. 3. 25.

[q] 7 Co. 8. Calvin's case. 7 E. 4. 29. F. N. B. 38. C. G. H. 7 H. 4. 14. 19 H. 6. 35. 38 H. 6. 3. 32 H. 6. 3 R. 2. Rot. Parliament, nu. 21. 22 E. 4. Protect. 18. 8 R. 2. ibid. 125. 6 R. 2. ibid. 14.

[q] To the fourth, the protection, as well *moraturæ* as *profecturæ*, must be regularly to some place out of the realme of *England*, and that must be to some certaine place, as *super salvâ custodiâ Caliciæ, &c.* and not to *Carlisle* or *Wales*, which are within the realme, or to the like. But it may be to *Ireland* or *Scotland*, because they are distinct kingdomes; or to *Calice*, *Aquitaine*, or the like. But a protection *quia moratur super altum mare*, will not serve, not onely because (as some thinke) that *mare non moratur*, but for the incertaintie of the place, and for that a great part of the sea is within the realme of *England*. 11 H. 4. 57. Regist. Judic. 14. 36 H. 6. tit. Protect. 27. Regis. orig. 88. sæpe.

[r] Bract. li. 5. 139, 140. Britton, 181. Flet. li. 6. ca. 7, 8, &c. 41 E. 2. Protect. 109. 34 E. 3. ib. 122. 19 E. 3. ib. 78. 33 E. 3. ib. 99. 21 E. 3. 13. [s] 10 H. 6. Protect. 105.

[r] To the fifth, in some actions protections shall not be allowed by the common law; and in some actions they are ousted by act of parliament. Actions at the common law, as all actions that touche the crowne, as appeales of felony, and appeales of mayhem. [s] So ☞ where the king is sole partie, no protection is to be allowed; in like manner in a *decies tantum*, where the king and the subject are plaintifes; but, in late acts of parliament, protections in personal actions are expressly ousted. A protection may be cast against the queene the consort of the king. Post. 133. b. Sect. 200.

[181. a.]

[t] 39 H. 6. 39. 43 E. 3. 6. & 32. 27 H. 6. 1. F. N. B. 28. 17 E. 3. 23. 4 Co. 35. Bosom's case. Bract. lib. 5. fol. 139, 140. (2 Ro. Abr. 325, 326.

[t] In a writ of dower *unde nihil habet*, no protection is allowable, because the demandant hath nothing to live upon. Otherwise it is in a writ of right of dower. Likewise in a *quare* impedit, or assise of darreine presentment, a protection lieth not, for the imminent danger of the laps. Neither lieth a protection in assise of *novel disseisin*; because it is *festinum remedium*, to restore the disseisee to his freehold, whereof he is wrongfully and

without

without judgement disseised. [u] In a *quare non admisit*, a protection is not allowable, because it is grounded upon the *quare impedit;* and the like in a certificate upon an assise for the like reason; *et sic de similibus.* A protection *quia profecturus* is not allowable (as hath beene said) in any action commenced before the date of the protection, unlesse it be in a voyage royall. [w] An infant is vouched, and at the *pluries venire facias*, a protection was cast for the infant; and disallowed, because his age must be adjudged by the inspection of the court.

[u] 15 E. 3. tit. Protection, 52. 12 E. 3. ib. 69. 31 E. 1. ib. 112.

[w] 19 E. 2. Protect. 111. 32 E. 3. ibid. 54.

[x] By act of parliament no protection shall be allowed in an attaint (but at the common law a protection for one of the petite jury had put the plea without day for all); nor in an action against a gaoler for an escape; nor for victuals taken or bought upon the voyage or service; nor in pleas of trespasse, or other contract made or perpetrated after the date of the same protection.

[x] 23 H. 8. c. 3. 34 E. 1. Protection, 38. 7 H. 4. c. 4. 1 R. 2. cap. 8.

[y] In a writ of error brought by an infant upon a fine levied, the plaintife sued a *scire facias* against the conusee, for whom a protection was cast, and the court examined the age of the plaintiffe, and by inspection, adjudged him within age, and recorded the same, and then allowed the protection; and this can be no mischiefe to the plaintife: whereupon it followeth, that albeit the plaintife dyeth afterwards before the fine be reversed, yet, after his age adjudged and recorded, his heire shall in that case reverse the fine for the nonage of his ancestor. [a] And so it was resolved in the case of *Kekewiche* (1) in a writ of error brought by him, by the opinion of the whole court of the king's bench. Otherwise it is if the plaintife dyeth before his age inspected.

[y] 21 E. 3. 24. 31 E. 3. Protect. 97. 5 E. 4. 50. 35 H. 6. 43. 46. 8 E. 4. 8. 17 E. 3. 22. 13 E. 3. Protect. 73. (Post. 380. b. Mo. 78. 189. Cro. Jam. 230.)

[a] Pasch. 12. Ja. Regis, in the King's Bench.

[b] Note, in judiciall writs which are in nature of actions, where the partie hath day to appeare and plead, there a protection doth lie; as in writs of *scire facias* upon recoveries, fines, judgements, &c. Albeit by the statute of *W.* 2. essoignes and other delayes be ousted in writs of *scire facias*, yet a protection doth lie in the same. So it is in a *quid juris clamat*, and the like. But in writs of execution, as *habere facias seisinam, elegit*, execution upon a statute, *capias ad satisfaciendum, fieri facias*, and the like, there no protection can be cast for the defendant; because he hath no day in court, and the protection extendeth onely *ad placita et querelas*, and must be allowed by the court, which cannot be but upon a day of appearance.

[b] 13 E. 3. Protect. 72. Fleta, l. 2. c. 12. 40 E. 3. 18. 48 E. 3. 18, 19. 37 H. 6. 32. 21 E. 4. 19. 15 H. 7. 8. 47 E. 3. 5. 17 E. 3. 68. 14 E. 3. Protect. 64. W. 2. cap. 45.

[c] In a writ of disceit brought against him that obtained and cast a protection upon an untrue surmise in delay of the plaintife, that protection is allowable. In an action brought upon the statute of labourers a protection doth lie, *et sic de similibus.*

[c] 20 E. 3. Protect. 83.

[d] To the sixth, no writ of protection can be allowed, unlesse it be under the great seale, [*] and it is directed generally.

[d] 35 H. 6. 2. Artic. super. Cart. 6.

46 E. 3. Petition, 19. [*] 2 Co. 17. Lane's case. 8 Co. 68. Trollop's case. 20 H. 6. 25. 2 E. 4. 4. 38 H. 6. 23.

[e] To the seventh, the courts of justice, where the protection is cast, are to allow or disallow of the same, bee they courts of record

[e] 43 E. 3. Protect. 96.

(1) S. C. Mo. 844.

record or not of record, and not the sherife, or any other officer or minister.

[f] 21 E. 4. 18. [f] To the eighth the protection may be cast, either by any stranger, or by the partie himselfe. An infant feme-covert, a monke, or any other, may cast a protection for the tenant or defendant. And this difference there is when a stranger casteth

[g] 38 H. 6. 23. it, and when the tenant or defendant casteth it himselfe; [g] for the defendant or tenant casting it, he must shew cause wherefore he ought to take advantage of the protection; but an estranger neede not shew any cause, but that the tenant or defendant is here by protection.

[h] 44 E. 3. 12. 47 E. 3. 6. [h] As to the ninth, a protection may be avoyded three manner of wayes. First, upon the casting of it before it be allowed. Secondly, by repeale thereof after it be allowed. (2) By disallowing of it many wayes; as for that it lieth not in that action, or that he hath no day to cast it, or for materiall variance betweene the protection and the record, or that it is not under the

[i] 13 R. 2. c. 16. 11 H. 4. 70. 7 H. 6. 22. 22 H. 6. 50. 30 H. 6. 3. 19 H. 6. 35. 21 E. 4. 20. 1 H. 6. 6. 42 E. 3. 9. 44 E. 3. 2. 39 E. 3. 4. 20 E. 3. Protect. 80. great seale, or the like. [i] Thirdly, after it be allowed, by *Innotescimus;* as if any tarry in the country without going to the service for which he was retained over a convenient time after that he had any protection, or repaire from the same service upon information thereof to the lord chancellor, he shall repeale the protection in that case by an *Innotescimus*. But a protection shall not be avoyded by an averment of the partie in that case, because the record of the protection must be avoyded by matter of as high nature. 34 E. 3. ib. 119.

[k] 44 E. 3. 4. 12. 47 E. 3. 6. 34 E. 3. Protect. 119. 28 H. 6. 3. 34 H. 6. 22. 30 H. 6. 3. 32 H. 6. 4. [k] ☞ There is a clause in the protection to this effect: *præsentibus minimè valituris, si contingat ipsum, &c. à custodia castri prædicti recedere.* Or, *si contingat iter illud non arripere, vel infra illum terminum à partibus transmarinis redire.* Whereupon there be two conclusions to bee observed. [131. b.]

First, that though the protection be allowed by the court for a yeare, yet if it be repealed by an *Innotescimus*, that the resommons or re-attachment shall be granted upon the repeale within the yeare; for the protection that was allowed had the said clause in it. And of that opinion be our later bookes; and the repeale by *Innotescimus* should serve for little purpose, if the law should not be taken so.

Secondly, that albeit he that had the protection, either *moraturæ* or *profecturæ*, returne into *England*, and haply be arrested and in prison, yet, if he came over to provide munition, habiliments of warre, victuals, or other necessaries, it is no breach of the said conditionall clause, nor against the act of 13 *Richard* 2. cap. 16, for that in judgement of law comming for such things as are of necessity for the maintenance of the warre, *moratur* according to the intention of the protection and statute aforesaid. And thus much of the two first protections, *cum clausulâ volumus, profecturæ* and *moraturæ*.

[l] Registrum 281. b. F. N. B. 28. B. [l] As to the third protection *cum clausulâ volumus*, the king by his prerogative regularly is to be preferred in payment of his

(2) The sense requires *thirdly* here; and that where *thirdly* is, it should be *fourthly*. But the print in the former editions is as we have given it.

his duty or debt by his debtor before any subject, although the king's debt or duty be the latter; and the reason hereof is, for that *thesaurus regis est fundamentum belli, et firmamentum pacis.* (1) And thereupon the law gave the king remedy by writ of protection to protect his debtor, that he should not be sued or attached until he paid the king's debt. But hereof grew some inconvenience, for to delay other men of their suits, the king's debts were the more slowly paid. And for remedie thereof [*m*] it is enacted by the statute of 25 *E.* 3. that the other creditors may have their actions against the king's debtor, and proceed to judgement, but not to execution, unlesse he will take upon him to pay the king's debt, and then he shall have execution against the king's debtor for both the two debts.

33 H. 8. c. 29. in the preamble 41 E. 3. tit. Execution, 38. 18 E. 3. ibid. 56. 27 E. 3. 88. b. 4 E. 4. 16. 3 Eliz. Dier, 197. Rot. Pat. 27 E. 3. part. 1. m. 2.

[*m*] 25 E. 3. cap. 19. (Cro. Cha. 389. 390. Hob. 115.)

This kind of protection hath (as it appeareth) no certaine time limited in it. But in some cases the subject shall be satisfied before the king; [*n*] for regularly whensoever the king is intitled to any fine or duty by the suit of the party, the party shall be first satisfied as in a *decies tantum*. And so if in an action of debt the defendant denie his deede, and it is found against him, he shall pay a fine to the king, but the plaintife shall be first satisfied; and so in all other like cases. And so it is in bills preferred by subjects in the star-chamber, there costs and dammages (if any be) shall be answered before the king's fine, as it is daily in experience.

[*n*] 41 E. 3. 15. 17 E. 3. 73. 29 E. 3. 13. 4 H. 4. 16.

The fourth protection *cum clausulâ volumus* is, when a man sent into the king's service beyond sea is imprisoned there, so as neither protection *profecturæ* or *moraturæ* will serve him; and this hath no certaine time limited in it; [*o*] whereof you shall reade at large in the *Register*, and *F. N. B.*

[*o*] Regist. sæpe F. N. B. 28. C.

[*p*] Now we are at length come to protections *cum clausulâ nolumus;* all which, saving one, are of grace, and, as hath beene said, are implyed under the generall protection; for, as *Fitzherbert* saith, every loyall subject is in the king's protection. Of these protections of grace, you shall not read much in our yeare books, because they stayed no actions or suites. [*q*] Of the divers formes of these you shall reade at large in the *Register*, and *F. N. B.* which were too long and needlesse to be here recited.

[*p*] Vide 7 Co. 8, 9. Calvin's case. Ant. 130 a.

[*q*] Regist. 280. &c. F. N. B. 29. A. B. C. D. E. F. G. H. Register, 280. Statut. de 14 E. 3. F. N. B. 30 A. 2 Inst. 4.

The protection *cum clausulâ nolumus*, that is of right, is, that every spirituall person may sue a protection for him and his goods, and for the fermors of their lands and their goods, that they shall not be taken by the king's purveyor, nor their carriages or chattels taken by other ministers of the king, which writ doth recite the statute of 14 *E.* 3.

Of these protections I cannot say any thing of mine owne experience; for albeit queene *Elizabeth* maintained many warres, yet she granted few or no protections; and her reason was, that he was no fit subject to be imployed in her service that was subject to other men's actions, lest she might be thought to delay justice (2.)

Sect.

(1) See ante 30. b.

(2) Since lord Coke's time protections have fallen wholly into disuse; lord Cutts, a famous officer in the reign of William the third, being the last person indulged with one, of whom our Reports take notice. 3 Blackst. Comm. 8th ed. 289, and 3 Lev. 332. However, it is still usual in acts of parliament to guard against the use of protections in suits, to which persons acting under the authority of the legislature are parties.—[Note 206.]

Sect. 200.

THE fifth is, where a man is entred and professed in religion. If such a one sue an action, the tenant or defendant may shew, that such a one is entred into religion in such a place, into the order of Saint Benet, *and is there a monke professed, or into the order of friers, minors or preachers, and is there a brother professed, and so of other orders of religion, &c. and aske judgement if he shall be answered. And the cause is this; that when a man entreth into religion, and is professed, he is dead in the law, and his sonne, or next cousin incontinent shall inherit him, as well as though he were dead indeed. And when he entreth into religion, he may make his testament, and his executors; and they may have an action of debt due to him before his entry into religion, or any other action that executors may have, as if he were dead indeed. And if that he make no executours when he entreth into religion, then the ordinary may commit the administration of his goods to others, as if he were dead indeed.*

[a] Bract. lib. 5. fo. 415. 421. Brit. ca. 22. fo. 89. Fleta, lib. 6. ca. 41. 5 E. 2. tit. Nonabil. 26. Antl. 93. b. 3 H. 6. 24. 1 E. 3. 9. 7 H. 4. 2. Doct. & Stud. 141. 21 R. 2. Judgment, 263. 11 R. 2. ib. 107. (Post. 136. a.)

"*ENTRED and professed in religion.*" [a] It is to be observed, that a man doth enter into religion at his first comming, and liveth under obedience; but he is not professed till a yeare be past, or some time of probation. And he is said to be professed, when he hath taken the habit of religion, and vowed three things, obedience, willful poverty, and perpetual chastity. And therefore our author saith here, *entred and professed.* [132. a.]

[b] 4 H. 4. ca. 17. 25 H. 8. ca. 12.

"*Into the order of friers, minors* [b], *or preachers.*" It appeareth in our bookes, that of friers there were foure orders, viz. minors, augustins, preachers, and carmelites; and the *francisscani, capuchini,* and *observantes,* are included under the title of minors; and they were called observants, because they be not conventuall or joyned together in a brotherhood, but live separately, and bind themselves to observe more strictly the rites of their order [c] *Cùm quis semel se religioni contulerit, renunciat omnibus quæ sæculi sunt, habitâ distinctione, utrùm habitum probationis susceperit, vel habitum professionis.*

[c] Bracton, fo. 421. b.

[d] Bracton, fo. 301. 426. 250, 251. Fleta, lib. 6. ca. 41.

"*He is dead in the law.*" *Civiliter mortuus,* or *mortuus sæculo.* [d] There is a death in deede, and there is a civill death, or a death in law, *mors civilis* and *mors naturalis,* as here it appeareth; and therefore to oust all scruples, leases for life are ever made during the naturall life, &c. (1) If the father enter into religion, then shall his sonne and heire have an assize of mordancester, and the writ shall say, [e] *Si W. pater &c. die quo obiit habitum religionis assumpsit, in quo habitu professus fuit, ut dicitur.*

[e] F. N. B. 196. 5 E. 4. 3.

"*As*

(1) See acc. 2 Co. 48. b. Blackst. Comm. 8th ed. v. 1. p. 132. v. 2. 121. But by lord Coke's observing here, that *natural* is added to *oust all scruples,* it seems as if he did not conceive it to be absolutely necessary.—[Note 207.]

[132. b.] ☞ *As well as though he were dead indeed.*" But yet to three purposes, profession, that is, the civill death, hath not the effect of a naturall death.

First, this civill death shall never derogate from his owne grant, nor be any mean to avoid it. And therefore if tenant in taile maketh a feoffment in fee, and entreth into religion his issue shall have no formedon during his life; because that should be in derogation of his own grant, and be a meane to avoyd the same. (F. N. B. 150. F.)

[*f*] Secondly, it shall never give her availe, without whose consent he could not have entred into religion, and therefore his wife after his civill death shall not be indowed, untill his naturall death. But if the wife after her husband hath entred into religion, alien the land which is her owne right, and after her husband is deraigned, the husband may enter and avoid the alienation. [*f*] 32 E. 1. Dower, 176. 31 E. 3. Collusion, 29. 33 E. 3. Entre conge, 52. 24 E. 4. 14. (Ante, 33. b.)

Thirdly it shall not worke any wrong or prejudice to a stranger that hath a former right; and therefore if the disseisor entreth into religion, and is professed, so as the land descends to his heire, yet this descent shall not tolle the entrie of the disseisee.

[*g*] A woman cannot be professed a nunne during the life of her husband. But some do hold a diversitie, [*h*] that *ante carnalem copulam*, the husband or wife may enter into religion without any consent, but *post carnalem copulam* neither of them can without consent of the other. [*g*] 5 E. 4. 3. a. [*h*] 18 H. 6. 33. per Fortesc.

[*i*] But if a man holdeth lands by knights service, and is professed in religion, his heire within age, he shall be in ward. [*k*] If I be disseised, and my brother releaseth with warranty, and is professed in religion, and the warranty descendeth upon me, this warrantie shall bind me; because I am his heire, and such inheritance as my brother had shall descend upon me. [*i*] 31 E. 3. Collusion, 29. [*k*] 34 E. 3. Garranty, 71. Vid. the Chapter of Warranty, Sect. † Post. 392. b.

[*l*] And if one joyntenant be professed in religion, the land shall survive to the other. If a man or woman be professed in religion in *Normandie*, or in any other foraine part, such a profession shall not disable them to bring any action in *England*, because it wanteth triall; but they must be professed in some house of religion within this realme, for that may be tried by the certificate of the ordinarie, so as of foraigne professions the common law taketh no knowledge (1). [*m*] And yet in some case one that is professed in religion within the realme shall have an action; as if he be made an executor, or if he be an administrator, he shall maintain an action, not in his owne right, but in right of the dead. [*l*] 21 R. 2. Judgm. 263. (Post. 181. b.) [*m*] 10 E. 3. 511. 14 E. 3. Executors, 87. 5 H. 7. 25. 21 H. 6. 30. 3 H. 6. 24.

[*n*] If a monke be made a bishop, or a parson, or a vicar, he shall have an action concerning his bishopricke, parsonage, or vicarage, *et sic de similibus*. [*n*] 44 E. 3. 9. Nonability, 3. 14 H. 8. 16.

[*o*] And if a monke be farmer of the king, yielding a rent, he shall have an action concerning that farme. And albeit *Littleton* speaketh generally of one that is professed in religion, yet must it not be understood of the soveraigne or head of the religious house, as of the abbot, prior, or the like; [*] for albeit [*o*] 2 H. 4. 7. 8 H. 5. 6. 7 E. 4. 30. 44 E. 3. 4. 20 E. 3. Vil. 10. & Nonability, 9. 49 E. 3. 4.

[*] Bract. fo. 415, 416. 429. Mir. c. 2. sect. 14. 14 H. 4. 37. b. 5 H. 7. 26. Vid. Sect. 296. 14 E. 4. 36.

they

† *Probably sections 718, 735, 736 & 737; as there Littleton teaches that warranty descends always to the heir at common law.*

(1) See ante 8. b. n. 7. to which add the arguments of the case of *Thornley* and *Fleetwood*, 1 Stra. 347. Com. 207. 10 Mod. 118. 255. 406. 9 Mod. 54.

they be professed in religion, yet by the policie of the law, they are persons able to purchase, and to implead and to be impleaded, to sue and to be sued, for any thing that concernes the house of religion; for otherwise the house might be prejudiced, and other men also of their lawful actions. And this is the ancient law of *England*, as it appeareth in these words, [p] *des biens des gents de religion appent l'action al chiefe en son nosme pur luy et son covent.* But what if a monke, &c. were beaten, wounded, or imprisoned, &c. doth the law give no remedie therefore? Yes, verily; [q] for in that case the abbot and the monke shall joyne in an action against the wrong doer; and if the writ be *ad damnum ipsius prioris*, the writ is good; and if it be *ad damnum ipsorum* it is good also. Also if a monke be by a conspiracie falsely and maliciously indicted of felony and robberie, and afterwards is lawfully acquitted, his soveraigne and he shall joyne in a writ of conspiracy and the like. And where *Littleton* speaketh of a man that is professed in religion, the same law is of a nunne, *sanctimonialis, mutatis mutandis.*

[p] Mir. ubi supra.

[q] 22 Ass. 87. 21 E. 3. 41, 42. 22 E. 3. 2. 37 H. 6. 8. 32 H. 6. 36. Bract. l. 5. f. 416. 420. 13 E. 3. Bre. 261. 22 E. 3. 2. 38 H. 6. 7. b. 24 E. 3. 34. b. 45. 7 R. 2. Nonabilitie, 3. 9.

[r] A wife is disabled to sue without her husband, as much as a monke is without his sovereign; and yet we read in books that in some cases a wife hath had abilitie to sue and be sued without her husband: [s] for the wife of sir *Robert Bellknap*, one of the justices of the court of common pleas, who was exiled or banished beyond sea, did sue a writ in her owne name, without her husband, be being alive; whereof one said *ecce modo mirum quod fœmina fert breve regis, non nominando virum conjunctum robore legis.*

[r] 4 H. 3. Bre. 766.

[s] 2 H. 4. f. 7. a. (1 Bulstr. 140. Mo. 7. 666. 851. 1 Ro. Rep. 400.)

[t] King *Edward* the third brought a *quare impedit* against the lady of *Maltravers*; and she pleaded, that she was covert of baron; whereunto it was replyed for the king, that her husband the lord *Maltravers* was put in exile for a certaine cause; and she was ruled to answer.

[t] 10 E. 3. 53.

[u] King *Henrie* the fourth brought a writ of ward against *Sibel B.* who pleaded that she was covert baron, &c. whereunto it was replied for the king, that her husband for a crime that he had committed against the king and the peers, was relegate or exiled into *Gascoigne*, there to remaine untill he obtained the king's grace; and *Gascoigne* chiefe justice, *ex assensu sociorum* awarded that she should answer.

[u] 1 H. 4. 1. b.

Sir *Tho. Egerton*, lord chancellor, in his argument which he published apart by himself in *Colvin's* case, *de post natis* demanded what former president there was for the warrant of the lady *Bellknap's* case in 2 *H.* 4. 7. (1) which occasioned me to search, and upon search I found that the like judgment had been given before at the parliament holden in *Crast. Epiph. an.* 19 *Edw.* 1. where the case was, that *Thomas* of *Weyland* being abjured the realme for felony in the yeare before *Margerie de Mose* his wife, and *Richard* sonne of the said *Thomas*, exhibited their petition of right unto the parliament, for the mannor of *Sobbir*, wherein her husband had but an estate for life joyntly with her, and the inheritance in *Richard* the son by fine. The earle of *Gloucester*, lord of the fee, (who, claiming the land by escheat, had taken the possession thereof) alledged, *quòd non fuit juri consonum, quod aliqua fœmina intraret* in

[133. a.]

Pl. in Parliam. 19 E. 1.

(1) See Ellesm. Argum. in the case of the *post nati*. 56.

in aliquas terras vivente marito suo, eò quòd præfatus Thomas abjuravit regnum, et adhuc vivit; et asserit idem comes nunquam hujusmodi casum accidisse, et inde petit post multas allegationes, quòd possit prædictum manerium tenere ut eschaetam suam. Super quo per ipsum dominum regem præceptum fuit, quòd tam justic' sui de utroque banco quàm cæteri de regno suo, tam milites quàm servientes in legibus et consuetudinibus Angliæ experti, mandarentur, quòd essent coram rege et ejus consilio, &c. ad certioorandum ipsum regem, qualiter et quomodo in casu isto fuerit procedendum, et qualiter temporibus præteritis et antecessorum suorum in casibus consimilibus fieri consuevit, et interim scrutantur recorda de consimilibus; ubi recitnatur duo vel tres consimiles casus. Et quia, licèt priùs non videbatur aliquibus juri consonum fuisse, quòd uxor in vitâ viri secundum sanctam ecclesiam, qualitercunque deliquisset quoad forum regium non posset nec deberet à viro suo separari, et sic quicquid foret in possessione uxoris converteretur in potestatem viri sui, et hoc manifestè imminueret contra consuetudinem regni; et etiam quia quidam dubitabant, quòd de possessionibus et bonis uxoris vir possit aliqualiter sustentari: tamen coram consilio domini regis, vocatis thesaurar' et baronibus et justiciariis de utroque banco, concordatum est quòd prædicta Margeria rehabeat talem seisinam, &c. secundum purportum finis prædict. &c. (2) *Patet etiam consimile exemplum tempore Henrici patris regis.* I have cited this solemne resolution the more at large, because there be many excellent things to be observed in it: so as by that which hath been said, it plainly appeareth, that this opinion, concerning the hability of the wife of a man adjured or banished, was not first hatched by the judges in *Henry* the fourth's time. And here is to be observed, that an abjuration, that is, a deportation for ever into a forreine land, like to profession, (whereof our author speaketh here) is a civil death; and that is the reason that the wife may bring an action, or may be impleaded during the naturall life of her husband. And so it is, if by act of parliament the husband be attainted of treason or felony, and saving his life, is banished for ever, as *Belknap*, &c. was, this is a civill death, and the wife may sue as a *feme sole*. And hereby you may understand your bookes, which treat of this matter. But if the husband, by act of parliament, have judgement to be exiled but for a time, which some call a relegation, that is no civill death (3). And in *E.* 2. an abjuration is called a divorce betweene the husband and wife. *Sed opus est interprete;* for by law no subject can be exiled or banished his country, whereby he shall *perdere patriam*, but by the making of the statute of 35 E. 1. ca. 1. exilium Hugonis de Spencer patris et filii tempore E. 2. 31 E. 1. Cui in vita, 31.. (Ante 3. a.)

Note the ancient triall of difficult matters in law.

The great authority of judicial records and precedents.

A solemn resolution of the law in this point.

1 Bos. 358. n. 2 Bos. 232. n. 3 Wms. 38.

(3 Inst. 217.) 8 E. 2. Coron. 425. So resolved in parliament upon

authority

(2] The whole record of Weyland's case is amongst the collection of Parliamentary Records lately published; and by this it appears that lord Coke is not very accurate in the *words* of his extract. 1 Parl. Rec. 66. Amongst other deviations from the record, one is, that he mentions *two or three like cases* to have been recited, whereas in the record the *only one* taken notice of is that of Matilda the wife of Robert Cissor, in the reign of Henry the third.—[Note 208.]

(3) But though it is not a civil death, yet for the time the effect is the same to the wife; and therefore it is equally necessary that she should have a right to sue alone. For the authorities on this subject, see 4 Vin. 152. 1 Com. Dig. 18. Carth. 149.—[Note 209.]

authority of parliament, or in case of abjuration, and that must be upon an ordinary proceeding in law, as it was in this case of *Weyland*.

Another example we have in our bookes to this effect. If the husband had aliened the land of his wife, and after had committed felony and beene abjured the realme, the wife shall have a *cui in vita* in his life-time, agreeable with the said resolution in parliament, for that the abjuration was a civill death (4).

See in the *Register*, a woman was banished out of the towne of *Calice* for adultery, by the law or custome of that place, and there appeareth *charta pardonationis pro muliere bannitâ. Sed nos non habemus talem consuetudinem.*

Regist. fol. 312. b.

[a] Vide in my preface to the Sixth Booke. This was law before the Conquest. 10 E. 3. 26. b. 30 E. 3. 5. 18 E. 3. 1. 22 E. 3. 21. 49 E. 3. 4. 49 Ass. 8.

[a] But by the common law, the wife of the king of *England* is an exempt person from the king, and is capable of lands or tenements of the gift of the king, as no other feme covert is, and may sue and be sued without the king; for the wisedome of the common law would not have the king (whose continual care and study is for the publike, *et circa ardua regni*) to be troubled and disquieted for such private and petty causes: so as the wife of the king of *England* is of ability and capacity to grant and to take, to sue and be sued as a feme-sole by the common law.

11 H. 4. 67. 14 E. 3. Voucher, 110. 20 E. 3. Nonabil. 9. 31 E. 3. Quar. imp. 146. 3 H. 7. 14. 19 H. 6. 2. 28 H. 6. 13. 7 H. 7. 7. a. 26 H. 6. Aid le roy, 24. Flet. li. 2. ca. 63. in fine. Pl. Com. 231. Staunf. Prer. 10 b. (Anne 3. a.)

[b] 18 E. 3. 2. 33 E. 3. Brief, 916. F. N. B. 101. A.

[b] And such a queene hath many prerogatives; as, she shall find no pledges, for such is her dignity, as she shall not be amerced.

The queene nor the king's sonne are restrained by the statute of 1 *H.* 4. cap. 6, concerning grants by the king.

[c] 18 E. 3. 32. 24 E. 3. 35. 75.

[c] In a *quare impedit* brought by her, some say, that plenarty is no plea, no more than in the case of the king.

[d] 32 E. 3. Bre. 346. 9 E. 3. 33. Plo. 260.

[d] If any bailife of the queene's bring an action concerning the hundred, he shall say, *in contemptum domini regis et reginæ.*

☞ The queene shall pay no tolle.

[e] F. N. B. 235. A.

[e] If the tenant of the queene alien a certaine part of his tenancie to one, and another part to another, the queene may distraine in any one part for the whole, as the king may doe; but other lords shall distraine but for the rate; and therefore where the queene so distraineth, there lyeth a writ *de onerando pro ratâ portione.*

[133. b.]

[f] F. N. B. 1. F.

[f] The writ of right shall not be directed to the queene no more than to the king, but to her bailife. Otherwise it is when any other is lord.

[g] 14 E. 3. Voucher, 110. 21 E. 3. 53. 22 E. 3. 3. b. 17 E. 3. 65. 10 E. 3. 17. 5 E. 3. 4.

[g] In case of aide prier of the queene, it is *domina reyina inconsulta*, and the cause of the aide prier shall not be counterpleaded no more than in the king's case. And see where the aide shall be granted of the king and queene, and where of the queene onely, and she of the king. [h] But a protection shall

15 E. 3. Aide del roy, 66. 10 E. 3. 18. 26 H. 6. Aide le roy, 24. [h] 21 E. 3. 13. 34 E. 3. Protect. 122. 11 H. 4. 67. b.

be

(4) Vid. Mich. 9 & 10 E. 1. Rot. 46. *A wife shall have a writ of deceit against her husband, who levies a fine in her name.*—Vid. Rot. Parl. 3 & 4 E. 4. n. 42. *Special act to enable the duchess of Exeter to act as a single woman during the life of her husband, who was attainted of treason.* Hal. MSS.—See the act in Ro. Parl. v. 5. p. 548.—[Note 210.]

be allowed against the queene, but not against the king. Neither shall the queene be sued by petition, but by a *præcipe*.

[*i*] The queene is not bound by the statute of *Marlebridge* for driving a distresse into another country. [*i*] 30 E. 3. 5.

[*k*] If any doe compasse the death of the queene, and declare it by any overt fact, the very intent is treason, as in the case of the king. [*k*] L'estat. de 25 E. 3. de Proditionibus.

[*l*] No man may marry the queene dowager without the king's licence. (1). But let us now returne to *Littleton*. [*l*] Rot. Parl. 8 H. 6. nu. 7.

"*He may make his testament and his executors, &c.*" [*m*] If *A.* be bound to the abbot of *D.* *A.* is professed a monke in the same abbey, and after is made abbot thereof, he shall have an action of debt against his owne executors. [*m*] 4 E. 4. 25. 6 E. 4. 4. 45 E. 3. 10. a. 18 E. 4. 19. 22 H. 6. 5. 5 H. 7. 25. b.

"*Then the ordinary may commit the administration, &c. as if he were dead indeed.*" [*n*] Note the statute of 31 *E.* 3. ca. 11, that giveth actions to the administrators, speaketh of a man that dies intestate, which by the authority of *Littleton* extendeth as well to a civill death as to a naturall. [*n*] Pl. Com. 280, 281. Greisbrooke's case.

Sect. 201.

THE sixth is, where a man is excommunicated by the law of holy church, and he sueth an action reall or personall, the tenant or defendant may pleade, that he, that sueth, is excommunicated, and of this it behoves him to shew the bishop's letters under his seale, witnessing the excommunication, and aske judgment; if he shall be answered, &c. But in this case, if the demandant or plaintife cannot deny it, the writ shall not abate (le breve n'abatera my) *but the judgment shall be, that the tenant or defendant shall go quit without day, for this, that when the demandant or plaintife hath purchased his letters of absolution, and shewed them to the court, he may have a resummons, or a reattachment, upon his originall, after the nature of his writ. But in the other five cases the writ shall abate, &c. if the matter shewed may not be gainsaid.*

"*EXCOM-*

---

(1) We have searched in vain for the parliamentary roll of 8 Hen. 6, cited in the margin as an authority for this position. It is neither amongst the printed Statutes at large, nor amongst the Rolls of Parliament lately published. Yet it is taken notice of as a statute in the Abridgment of Parliamentary Records. Cott. Rec. 589. In another of lord Coke's works, he cites it as of the 8 Hen. 6. See 2 Inst. 18. But we cannot find any such statute in print.* It is not meant by this to doubt the existence of such a statute. We only apprize the reader of the inaccuracy in the reference to it. For the doctrine of marriages of the *royal family*, we refer the curious reader to the opinion of the judges in the reign of George the first, when they were consulted on the prerogative claimed by the king over his grand-children; and to the debates, whilst the act of the last reign for regulating the future marriages of the royal family was under the consideration of parliament. See Fortesc. Rep. 401. 12 Geo. 3. c. 11. Ann. Reg. for 1772, and the two protests of the dissentient lords in Journ. Dom. Proc. 8 March 1772.—[Note 211.]

[* In 1 Bl. C. 226, there is a reference to this statute of 8 Hen. 6. 4 Riley Plac. Parl. 672, where the statute can be found at length.]

"EXCOMMUNICATED, *excommunicatus, excommunicatio.*" [a] *Sicut quis poterit habere lepram in corpore, ita et in animâ. Excommunicato interdicitur omnis actus legitimus, ita quòd agere non potest, nec aliquem convenire, licèt ipse ab aliis possit conveniri.*

Excommunicatio est nihil aliud quàm censura à canone vel judice ecclesiastico prolata et inflicta, privans legitimâ communione sacramentorum, et quandoque hominum. [*] It is divided into the greater and the lesser. *Minor est, per quam quis à sacramentorum participatione conscientiâ vel sententiâ arceatur. Major est, quæ, non solum à sacramentorum, verùm etiam fidelium communione excludit, et ab omni actu legitimo separat et dividit.* But either of them both disableth the party. [b] *Cum excommunicato, autem, nec orare, nec loqui, nec palam, nec absconditè, nec vesci licet, exceptis quibusdam personis.* But every ☞ excommunication disableth not the party. [134. b.]

[c] If bailifos and commons, or any other corporation aggregate of many, bring an action, *excommengement* in the bailifes shall not disable them, for that they sue and answer by attorney. Otherwise it is of a sole corporation. But if executors or administrators be excommunicated, they may be disabled; because they, which converse with a person excommunicate, are excommunicate also. [d] If a bishop be defendant, an excommunication by the same bishop against the plaintiffe shall not disable him, and it shall be intended for the same cause, if another be not shewed.

10 H. 7. 8 & 9. 18 E. 3. 58. 28 E. 3. 97. 16 E. 3. Excom. 5. 20 E. 3. ibid. 9. 3 H. 4. 3.

"*The bishop's letters under his seale.*" [e] None can certifie excommengement but only the bishop, unlesse the bishop be beyond sea or *in remotis;* or one that hath ordinary jurisdiction, and is immediate officer to the king's courts, as the archdeacon of *Richmond*, or the dean and chapter in time of vacation. [f] But in ancient time every officiall or commissary might testify excommengement in the king's court; and for the mischiefe that ensued thereupon, it was ordained by parliament, that none should testifie excommengement but the bishop only.

[g] If a bishop certifie that another bishop hath certified him, that the partie which is his diocesan is excommunicated, this certificat upon another's report is not sufficient. [h] If the bishop of *Rome*, or any other having foraigne authority doth excommunicate any subject of this realm, and certifieth so much under his seale of lead, this shall not disable the party; for the common law disallowes all acts done in disability of any subject of this realm by any forraine power out of the realme, as things not authentique, whereof the judges should give allowance. [i] If the bishop certifieth the excommunication under seal, albeit he dieth, yet the certificate shall serve. [k] *Si quis innodatus fuerit per excommunicationes diversas pro diversis delictis, et profert literas absolutionis de unâ sententia, non erit absolutus, quousque de omnibus aliis absolvatur.*

[i] 14 E. 3. Excom. 8. 8 E. 2. ibid. 26. [k] Hill. 14 E. 3. Coram rege, London, in Thesaur. (Ante 97. a. Post. 344.)

"*Bishop.*" *Episcopus*, a bishop, is regularly the king's immediate officer to the king's court of justice in causes ecclesiasticall, and all the bishoprickes in *England* are of the king's foundation, and the king is patron of them all; [l] and at the first they were donative,

[a] Bract. lib. 5. fo. 415. 426, 427. Fleta, lib. 6. c. 44. Britton, ca. 49. fo. 125. (F. N. B. 62. Doctr. Plac. 8.)

[*] F. N. B. 64 F.

[b] Bracton, 426. b. acc.

[c] 30 E. 3. 15. 42 E. 3. 13. 21 H. 6. 30. 21 E. 4. 49.

[d] See Artic. Cleri, ca. 7. 5 E. 3. 8. 8 E. 3. 70. 9 H. 7. 21.

[e] Bracton, lib. 5. fo. 426. b. 12 E. 4. 15. 20 H. 6. 17. 20 E. 3. Excommengement, 20. 33 E. 3. ibid. 29. 44 E. 3. ib. 23. 11 H. 4. 14. F. N. B. 64, 65. 239. 7 E. 4. 14. 8 H. 6. 3. Registr. 67. (8 Co. 68. 1 Ro. Abr. 883.)

[f] 11 H. 4. 62. in Debt.

[g] 33 E. 3. Excom. 29. F. N. B. 65. (Dy. 371. b. 4 Inst. 327.)

[h] 16 E. 3. Excom. 4. 31 E. 3. ib. 4. & 6. 30 Ass. 19. F. N. B. 64. 4 H. 7. 15. 12 E. 4. 15. 14 H. 4. 14.

[l] 17 E. 3. f. 40. 25 E. 3. cap. de Provis. 25 H. 8. ca. 10. 8 Co. 73, le case de deane & chapter de Norwich. Mat. Par. pag. 62. Vid. Sect. 133, 134.

donative, and so it appeares by our bookes, and by acts of parliament, and by history, and that was *per traditionem annuli & pastoralis baculi*, i. e. the crosier (1). And king *Henry* the first, being persuaded by the bishop of *Rome* to make them elective by their chapter or covent, refused it (2). [*m*] But king *John* by his charter acknowledging the custome and right of the crowne in former times, yet granted *de communi consensu baronum*, that they should bee eligible, which after was confirmed by divers acts of parliament. And afterward the manner and order, as well of election of archbishops and bishops, as of the confirmation of the election and consecration, is [*n*] enacted and expressed in the statute of 25 *H.* 8. But by the statutes of 31 *H.* 8. and 1 E. 6. (3) they were made donative by the king's letters patents, both which statutes are repealed (4), and the statute of 25 *H.* 8. doth yet remaine in full force and effect (5).

[m] Rot. Patent. 15 January, 17 Reg. Johannis. Matt. Par. pag. 252. 35 E. 1. L'estat de Carlisle. 25 E. 3. Lestatut. de Provis. 13 R. 2. ca. 2.
[n] 25 H. 8. ca. 20.

And

(1) Mr. Washington, one of the writers against the dispensing power in the reign of James the second, insists, that in the Saxon times bishoprics were conferred in parliament; and that the king's investiture was subsequent to such election. For proof of this position, one of his chief authorities is the following passage in Ingulphus: *A multis annis ante retroactis nulla erat electio prælatorum mere libera et canonica; sed omnes dignitates, tam episcoporum quàm abbatum, regis curia pro suâ complacentiâ conferebat.* Ingulph. Hist. fol. 509. b. Observat. on Eccles. Jurisd. 24. Another instance relied on is the election of Wulstan bishop of Worcester, which Matthew Paris describes in the words following: *Ulstanus, electo ad archiepiscopatum Eboracensem Aldredo, unanimi consensu, tam cleri quàm totius plebis, rege insuper, ut quem vellent sibi eligerent præsulem et animarum pastorem, annuente, in episcopum ejusdem loci eligitur.* Matth. Par. Hist. 20.—[Note 212.]

(2) After some struggles, Henry gave up the point of investiture; but, according to Mr. Washington, elections of bishops continued as before till king John's time; and he says, there are precedents of many bishops elected in parliament in the reigns of Stephen and Henry the second. Observat. on Eccles. Jurisd. 33, and 2 Spelm. Concil. 42 & 119.—[Note 213.]

(3) 31 H. 8. c. 9, and 1 E. 6. c. 2. But the former statute only relates to the new bishoprics erected by Henry. See Rastall's 3d ed. of Stat.—[Note 214.]

(4) But notwithstanding the repeal of the 1 E. 6, the election of bishops is, as that statute emphatically expresses it, mere *shadow*, *colour*, and *pretence;* for by the 25 of Hen. 8. if they do not elect the person recommended by the king's *letter missive*, which accompanies his *congé d'élire*, they incur the penalties of a *præmunire*. See s. 7. There is no such statute now in force, in respect to deaneries, which we have observed in a former note; and yet the election to the *old* deaneries is in practice controlled by the king's letter missive, as much as the election to bishoprics. See ante 95. a. note 4. It is probable, therefore, that the *letter missive* is of considerably greater antiquity as to both than the statute of Henry the eighth. Ibid.—[Note 215.]

(5) This was once doubted; for the 1 Mar. st. 2. c. 2, which repealed the 1 Edw. 6, was, by an oversight, as it seems, wholly abrogated by the 1 Jam. 1. c. 25, instead of being abrogated merely so far as relates to the marriage of priests. At length, however, the judges held, that the 1 E. 6. c. 2, was virtually repealed by the 1 & 2 Ph. & M. c. 8, and 1 Eliz. c. 1. See Tracts by Antiq. Soc. v. 3. p. 416. 12 Co. 7.—It is observable, that lord Coke, in this his account of the patronage of bishoprics, omits distinguishing those of the *old* foundation from those of the *new*. But this is material, the latter being still *donative* by letters patent, according to the statute of 31 H. 8. which authorized their erection. See 31 H. 8. c. 9, in Rastall's edition of the Statutes.

—As

And where *Littleton* saith, that the bishop under his seale must testifie, &c. it is to be knowne, [*o*] that none but the king's courts of record, as the court of common pleas, the king's bench, justices of gaole delivery, and the like, can write to the bishop to certifie bastardy, mulierty, loyalty of matrimony, and the like ecclesiastical matters; for it is a rule in law, that none but the king can write to the bishop to certifie; and therefore no inferiour court, as *London*, *Norwich*, *Yorke*, or any other incorporation, can write to the bishop, but [*p*] in those cases the plea must be removed into the court of common pleas, and that court must write to the bishop, and then remand the record againe. And this was done in respect of the honor and reverence which the law gave to the bishop, being an ecclesiasticall judge, ☞ and a lord of parliament by reason of the baronie which every bishop hath (1). And this was [a] the reason [a] a *quare impedit* did not lye of a church in *Wales* in the county next adjoyning, for that the lordship's marchers

[o] 2 E. 3. Corone, 160. 8 E. 3. 59. 24 E. 3. 33. 44 E. 3. 28. 8 R. 2. Conusans, 88. (2 Ro. Abr. 589.)

[p] 41 E. 3. 42 E. 3. 18 E. 3. 61. 14 H. 4. 25. 3 H. 4. 12. Regist. 7. a. F. N. B. 6. E.

[a] 8 E. 3. 59. 36 H. 6. 33. tit. Quar. Imp. Brooke, 109. 35 H. 6. 30. 11 H. 6. 3. 24 E. 3. 33.

[134. b.]

—As to the *Irish* and *Welsh* bishoprics, about which lord Coke is silent, the former, by force of the Irish statute of 2 Eliz. c. 4, are made *donative* by the king's letters patent; but what the latter are, we cannot at present inform the reader, Mr. Browne Willis's *Survey of the Cathedrals*, which is the only book we are possessed of on the subject, not stating how the Welsh bishops are created.—[Note 216.]

(1) Acc. ante 70. b. 94. a. & 97. a.—We have already taken notice, that according to lord Hale, the title by which bishops sit in parliament, is, not having *baronial* possessions, but *usage* and *custom*; and that his notion had been ably controverted by bishop Warburton. Ante 70. b. n. 2. However, on further investigating the subject, we incline to concur with lord Hale. But then it is with some little addition. In the Anglo-Saxon times the bishops certainly were admitted to sit in parliament; and as this was prior to their holding their estates by a baronial tenure, it could not then be on account of their baronies; nor will it be easy to suggest any other probable reason for their presence during that period, than an usage founded on the propriety of having the heads of the church to guard it from injury, and to assist the other members of the legislature in their deliberations on religion and other ecclesiastical concerns. At the Conquest, as all agree, the possessions of the bishops were converted into baronies; and for a long time after they were summoned to parliament as barons by tenure. But it is no less certain, that, for many centuries past, they have been called to sit, without any regard to their temporal possessions, or the tenure by which they are holden; which is more especially true in the instance of the new sees erected by Henry the eighth, the bishops of these never having had any estates by a baronial tenure, and consequently having no claim to be called to parliament otherwise than as prelates of the church, and by reason of the usage, which had so long before prevailed in respect to their order. If all this be so, then, though the bishops once sat in parliament for their baronies, yet lord Coke's position, which imports that they still sit by the same title, is not strictly accurate; but we should rather adopt lord Hale's idea of their sitting by usage as more applicable to the present circumstances. Perhaps, indeed, lord Coke only meant to refer to the more ancient reason of their being summoned to parliament, and thence to infer, that in presumption of law they are still deemed to be called on the same account; in which case there is little more than a difference of words between him and lord Hale. As to bishop Warburton's hypothesis on this subject, we still think that he shows great ability; but at the same time we cannot help owning, that he appears to us to have

marchers could not write to the bishop: [b] neither shall conusance be granted in a *quare impedit*, because the inferior court cannot write to the bishop. And herewith agreeth antiquitie. [c] *Nullus alius præter regem potest episcopo demandare inquisitionem faciendam.* [d] And another speaking of loyaltie of marriage, *nec alius quàm rex super hoc demandaret episcopo, quod inde inquireret. Episcopus alterius mandatum, quàm regis, non tenetur obtemperare.* And therewith agreeth *Britton* also.

[b] 15 E. 3. Conusans, 41. Jurisdict. 24. 40 E. 3. 2. Vide Sect. 134.
[c] Bract. lib. 3. 106.
[d] Fleta, lib. 5. cap. 14 †. Britt. fol. 248. b.

" *The writ shall not abate* (le breve n'abatera my), *&c.*" *Abater* is a *French* word, and signifieth *destruere* or *prosternere*, to destroy or prostrate. And *abatement de briefe* is a prostration or overthrowing of the writ.

[*] " *Shall go quit without day, &c.*" That is, to go quiet without any continuance to any certaine day; and therefore the defendant is not bound to any certaine attendance, untill the party purchaseth his letters of absolution, and the re-attachment or resummons be sued, the entry of which award is *ideo loquela prædicta remaneat sine die quousque, &c.*

[*] Bract. l. 5. fol. 425. 11 R. 2. Excom. 25. 13 E. 4. 8. 3 Ass. p. 12. Vide Sect. 691.

" *Day.*" *Dies*, [e] in legall understanding is the day of appearance of the parties, or continuance of the plea. And you shall understand, that first in all reall actions there are *dies communes* common dayes, whereof you shall reade in divers ancient statutes.

[e] 51 H. 3. cap. 1 & 2. Marlebr. ca. 12. 32 H. 8 ca. 21.

[f] Also in all summons upon the originall there must be fifteene dayes after the sommons before the appearance. [g] But if the originall be returned *tarde* and *sommons alias* goeth forth, there must be nine returnes betweene the *teste* and the returne. And so in other judiciall processe in reall actions, saving if conusans be demanded to be holden within his mannor, there processe shall be awarded from three weekes to three weekes.

[f] Articul. super Cart. ca. 15. 28 E. 1.
[g] 8 H. 6. 20. 50 H. 6. 35. 8 Eliz. Dier, 252. (2 Inst. 567.)

And

† *It should be as it seeme, Fleta, lib. 5. cap 25.*

---

have too much indulged in speculation, more adverting to what struck him as the most rational and proper grounds of admitting the bishops into the house of lords, than to the fact of the real title. He represents the bishops to sit as *barons by tenure* so far as regards the *judicial* capacity of the lords, and as *prelates of the church*, so far as the lords act in a *legislative* character. But the fact on which he builds the first part of his distinction fails him; because, for the reasons already stated, the bishops no longer have baronies by tenure, nor have had any for several centuries past. Besides, independently of this, the whole of the speculation seems to us unfounded in any sufficient authority and consequently the mere offspring of modern refinement; our simple and unlettered ancestors, when they laid the foundations of the English parliament, not being likely to have acted under the influence of a policy so deep, as the nice distinction thus attributed to them necessarily supposes. At present we have only to add further on this curious and difficult subject, that, as we have touched it so slightly, our observations should be understood as intended to convey only a general idea. Should the reader have occasion to penetrate more deeply into the subject, he must consult the several pieces published in 1679 on the controverted question, whether the bishops can vote in the preliminary steps of a bill of attainder; particularly the tracts by bishop Stillingfleet and Mr. Hunt for the right, and those by lord Hollis against it. See 1 Burn. Hist. fol. ed. 460. 2 Stillingfleet's Eccles. Cas. 228. Hunt's Argument for the Right of the Bishops in Capital Cases, 128. Hollis's Remains, 122. See further, Seld. tit. Hon. ed. 1678, p. 697. Staunf. Pl. C. 153.—[Note 217.]

And before the statute of *articuli super chartas* in all sommons and attachments in plea of land there shall be contained the terme of fifteene days. [q] And it appeareth as well by the statutes as by the ancient authors of the law, who wrote before the statute, that this was the ancient common law; and the reason of these long dayes given in reall actions was the recovery being so dangerous, that the tenant might the better provide him both of answer and of proofes. [*] But by consent they may take other than common dayes.

[q] Mir. cap. 2. sect. 19. Bract. lib. 5. fol. 334, & lib. 4. fol. 255. Brit. fol. 279. b. Fleta, l. 6. c. 6. 12 E. 4. 15. [*] 11 H. 6: 23. 15 E. 3. Jour, 22. 21 E. 3. 29. 15 Ass.

And it is not amisse to note what the ancient law was in proceeding against a man for his life. And therefore heare what *Britton* saith: *Sur le presentment de cest felony* (under which he includeth also treason) *voilons nous* (for he wrote in the king's name) *que trestous ceux, que ent serr' endites, face le viscont hastiment prender, et safement lour corps en prison garder, et que ilz sont menes devant nous, ou devant nos justices: et pur ceo que nulluy ne soit disgarnis de lour respons, voilons que ceux, que issint soient prise, que ilz eynt temps de purveyer lour respons* 15 *jour au meyns silz le prient, et en dementiers soient safement gardes.*

Britton, f. 10. b.

[r] Fortescue in libro de Laudibus Legum Angliæ. Mirror, c. 4. Sect. Sept choses disturben judgement mortels.

[r] *Vide Fortescue* of this matter. And see the *Mirror*, that in some cases the party convicted had forty dayes, or at least thirty dayes to shew some matter to disturbe (that is, to arrest) judgement, which now I know is gone *in desuetudinem*, and great expedition is now made in pleas of the crowne concerning the life of man. *Sed de morte hominis nulla est cunctatio longa.*

[e] 9 Co. 118. b. Zancher's case. (2 Inst. 568.)

[s] And the use of the king's bench at this day is, that if the offence be committed in another county than where the bench sits, and the indictment be removed by *certiorari*, there must be fifteene dayes betweene every processe and the returne thereof; but if it be committed in the same county where the bench sit, they may proceed *de die in diem;* but so they will do rarely. But let us returne againe to the common pleas.

[a] Artic. super. Cart. ubi supra. F. N. B. 177. C. 11 Ass. 30. 12 Ass. 4. 22 Ass. 79. 3 H. 6. Ass. 2. 9 E. 4. 5. a. 27 E. 3. 1. 2 W. 1. cap. ult. [*] F. N. B. 177. D. 7 Ass. 7. 14 Ass. 4. 24 E. 3. 31. 39 E. 3. 20. 9 E. 4. 18. 12 E. 4. 15. 8 H. 5. Error, 87. 12 E. 4. 15. [b] 41 E. 3. Jour. 16. 8 E. 4. 4. 1 H. 6. 4. 27 Ass. 33. [c] 3 E. 2. Avowrie, 188. 15 E. 3. Jour. 20. 22 E. 3. 20. 1 E. 3. 4. 9 Co. 49. The Earl of Shrewsbury's case. 33 H. 6. 42.

Secondly, there is a day called *dies specialis;* [a] as in an assise in the king's bench or common pleas, the attachment need not be 15 dayes before the appearance. Otherwise it is before justices assigned. But generally, in assizes, the judges may give a speciall day at their pleasure, and are not bound to the common dayes; [*] and these daies they may give as well out of terme as within. So upon an imparlance the court may give any speciall or particular day, but that must be in the terme time; and likewise in a *scire facias*, upon a fine or a recovery in a reall action, because it is a writ of execution; and so it is in a *per quæ servitia* and the like, and in all judiciall writs: in processe against an infant to judge of his age, or where the husband prayeth in ayd of his wife, or in a *pone* at the suit of the defendant, there need not be fifteen dayes. Also after demurrer in law, the court may give what day they will. [b] And it is worthy the noting, that if in an assise the parties be adjourned to *Westm. usque* 15 *Paschæ*, there they be not demandable till the fourth day; but if it be adjourned *usque diem Lunæ*, or *diem Martis*, there the parties are demandable on that day.

Thirdly, [c] there is a day of grace, *dies gratiæ*, or a day of courtesie. The name doth shew of what kind it is; and regularly this day is granted by the court, at the prayer of the ☞ demandant or plaintife in whose delay it is, and never at the prayer of tenant or defendant. But it is worthy of observation, [d] that a day of grace is never

[135. a.]

[d] 14 E. 3. Jour. 24. 15 E. 3. ibid. 21. 22 E. 3. 9. 27 E. 3. 88.

granted,

granted, where the king is party by aide prayer of the tenant or defendant; nor where any lord of parliament or peere of the realme is tenant or defendant. [e] And sometimes the day that is *quarto die post*, is called *dies gratiæ;* for the very day of returne is the day in law, and to that day the judgement hath relation: but no default shall be recorded till the fourth day be past, unlesse it be in a writ of right, where the law alloweth no day, but onely the day of returne. This day is sometimes called *dies amoris*, and sometimes a *dies datus*. But it were too long to enumerate all. This shall be sufficient to give the reader a taste to understand the residue concerning this matter.

[e] 22 E. 4. Jour. 39. 18 E. 3. ibid. 20. 38 E. 3. 20. 9 Ass. 21. 21 E. 3. 13. 41 E. 3. ibid. 16. 33 H. 6. 42. 34 H. 6. 27. 10 Eliz. Dier, 269.

39 H. 6. 29. 24 E. 3. 28. 24 E. 3. Breve, 556. Bract. lib. 5. fol. 367.

[f] There is also a day of appearance in court by the writ, and by the roll. By writ, when the sherife returns the writ. By the roll, when he hath a day by the roll, and the sherife returnes not the writ, there the defendant, to save himselfe from corporall pain, as by imprisonment, or to prevent the losse of issues, or to save his freehold or inheritance, may appeare by the day he hath by the roll.

[f] 21 E. 3. 43. 8 H. 6. 2. a. 22 H. 6. 20. 3 E. 4. 15. 6 E. 4. 7 E. 4. 15. 8 E. 4. 18. 3 H. 7. 8. 12 H. 7. 11. b. 27 H. 8. 14. 11 Co. 40. 17 E. 3. 2. 11 Eliz. Dier, 286.

[g] Note, it is said commonly that the day of *nisi prius*, and the day in bank, is all one day. That is to be understood as to pleading, but not to other purposes.

There are *dies juridici* (which [h] *Britton* calleth *temps covenables*) and *dies non juridici*. *Dies juridici* (except it be in assises) are only in the tearme. [i] And there be also in the tearme *dies non juridici*. As in all the foure tearmes the sabbath day is not *dies juridicus*, for that ought to be consecrated to divine service (1). Also in *Michaelmasse* tearme the feasts of *All Saints* and of *All Soules* (2); in *Hillarie* tearme the *Purification of the Blessed Virgin Marie;* and in *Easter* terme the feast of the *Ascension* are not *dies juridici*, but set apart by the ancient judges and sages of the law for divine service. As for *Trinity* tearme, it sometimes had seven dayes of returne, and was as long as *Michaelmasse* tearme is now: but for avoyding of infection in that hot time of the yeare, and that men might not be letted to gather in harvest, three returnes (since *Littleton* wrote) viz. *Crastino Sancti Johannis Baptistæ*, *Octabis Sancti Johannis Baptistæ*, *and* 15 *Sancti Johannis Baptistæ*, are by the statute of 32 *H.* 8. cut off, and become *dies non juridici*. And in those dayes the feast of *Saint John the Baptist* was not *dies juridicus*. And the said statute, called *Dies Communis in Banco*, is in divers points (since *Littleton* wrote) altered, as by the said statute appeareth. And in ancient time respect and reverence was had by law to certaine times, as it appeareth [k] by the statute of *W.* 1. cap. 51, which hath a short but

[g] 21 H. 6. 10. 20. 4 H. 6. 9. 40 E. 3. 31. (Cro. Jam. 646.)

[h] Britton, fol. 134. a. (2 Inst. 264.)

[i] Mirr. cap. 3. sect. Exception de temps, & cap. 5. sect. 1. (Plowd. 265. Cro. Cha. 602. Cro. Eliz. 227.)

32 H. 8. cap. 21.

[k] W. 1. cap. ultimo.

---

(1) Writ of summons in a common recovery was made returnable in a month from the day of Easter, which happened to be *Sunday;* and the tenant in tail who was vouchee, died the same day. The judgment was reversed; because it could not be given till the day after the vouchee's death, and then it came too late. *Swan* and *Broome*, 4th part Burr. v. 3. p. 1596. But though *Sunday* is not *dies juridicus* for giving judgment, or awarding judicial process, yet it is for some other purposes, as for exhibiting an information on the 5 & 6 E. 6, against engrossing. W. Jo. 156.—[Note 218.]

(2) In consequence of the abbreviation of Michaelmas term, by the 24 Geo. 2. c. 48, these two days do not now fall within it.—[Note 219.]

but an excellent preamble: viz. *Et pur ceo que grand charitie serra de faire droit a touts en tout temps, ou mestier serroit; purvieu est per assentment des prelates, que assises de novel disseisin, mortdauncestor, et darreine presentment, fuissent prises en le Advent, en Septuagesime, et en Quaresme, auxibien come (le home) prent lenquestes: et ceo pria le roy as evesques.*

[l] 7 Ass. p. 7. 14 Ass. 5. F. N. B. 177, &c. Britton, fol. 134. b.

[l] This statute is expounded in bookes, which I have onely added, to the end the studious reader might understand the bookes that darkly speake of this matter, and be ignorant of nothing that belongs to the understanding of any part of the law. Now *Advent* is a moneth before the feast of the *Nativity of our Saviour Christ*, so called *de adventu Domine in carne. Septuagesima* beginneth ever on the sabbath day, and is the third sabbath before *Shrove Sunday*, so called, because it is the seventieth day before the feast of *Easter*. *Sexagesima* is the second sabbath before *Shrove Sunday*, so named, because it is the sixtieth day before *Easter;* and so of *Quinquagesima* and *Quadragesima*,

[m] W. 1. cap. 51. fait anno 3 E. 1. Britton, fol. 134, ca. 53.

[m] whereof you shall reade in acts of parliament, and ancient authors (3). Now as there be *dies juridici*, so there be *horæ convenientes*, whereof the *Mirror* saith, [n] *abusion, que len tient, pleas per dimenches (id est sabbaths) ou per auters jours defendus, ou devant le soleil levy, ou noctantre, ou en dishonest lieu.*

[n] Mirr. lib. 5. sect. 1.

[o] Bract. lib. 4. fol. 264. Britton, fol. 209. (Cro. Eliz. 43. 1 Saund. 286.)

[o] Furthermore, there are (as ancient authors term them) *dies solaris et dies lunaris, secundum quod Deus divisit lumen à tenebris, ex quibus duobus diebus efficitur unus dies, qui dicitur artificialis, ex die præcedente et nocte subsequente, qui constat ex 24 horis.*

But we at this day, retaining the same method, do differ in words. For we say, *dierum alii sunt naturales, alii artificiales; dies naturalis constat ex 24 horis, et continet diem solarem et noctem:* and therefore in indictments of burglary, and the like, we say, *in nocte ejusdem diei. Iste dies naturalis est spatium, in quo sol progreditur ab oriente in occidentem, et ab occidente iterum in orientem. Dies artificialis sive solaris incipit in ortu solis, et desinit in occasu:* and of this day the law of *England* takes hold in many cases. Now divers nations begin the day at divers times. The *Jewes*, the *Chaldeans*, and *Babylonians*, begin the day at the rising of the sun; the *Athenians* at the fall; the *Umbri* in *Italy* beginne at midday; the *Ægyptians* and *Romanes* from midnight; and so doth the law of *England* in many cases. Of all which you shall reade plentifull matter in our bookes, and in my Reports, which by this short instruction you shall the better understand.

Gen. cap. 1. ver. 4, 5.

[p] Bract. lib. 5. fol. 359. Britton, fol. 209. a.

[p] There is also *annus minor* and *major*. The lesser yeare consisteth of 365 dayes and sixe houres, whereby in every fourth yeare there is *dies excrescens*, which makes that year to have *in rei veritate* 366 daies, and that is called *annus major*. [q] A quarter of a year containeth by legall computation 91 dayes, and half a yeare containeth 182 dayes; for the odde hours in legall computation are rejected; and by [r] the statute *de anno bissextili*, it is provided, *quòd computentur dies ille excrescens et dies proximè præcedens pro unico die*, so as in computation that day excrescent is not accounted.

[135. b.]

[q] 17 Eliz. Dier, 345. (2 Ro. Abr. 521.)

[r] 21 H. 3. stat. de anno bissextili.

A month,

(3) See further as to *dies non juridici*, Spelman's Treatise on the Terms amongst his Posthuma, page 87.

A month, *mensis*, is regularly accounted in law 28 dayes, and not according to the solar month, nor according to the kalendar [*s*], unlesse it be for the account of the laps in a *quare impedit*. There is *mensis solaris*, and *mensis lunaris*. *Solaris est* 12 *pars anni, viz. spatium* 30 *dierum horarum* 10 *et minutorum* 30, *et lunaris est spatium* 28 *dierum*.

[*s*] 6 Co. 62. Catesbye's case. (2 Ro. Abr. 521. Cro. Jam. 167.)

"*Resummons or reattachment.*" These are writs that the demandant or plaintife, after he hath obtained his letters of absolution, may sue out to bring the tenant or defendant againe into court to have day, to make answer unto him. [*t*] And these writs doe lye in all cases when the plea is discontinued or put without day, either in this case, or in case when the demandant or tenant hath his age, or for the *non venue* of the justices, or in case of a protection, or *essoine de service le roy, &c.* Of these writs there be two sorts, viz. generall and speciall, whereof you may see presidents, and reade more at large in the case of discontinuance of processe in my Reports, and need not here to be inserted.

[*t*] Bract. lib. fo. 425. Britton, ca. 74. 7 Co. 29. 30. (Post. 363. a.)

"*Upon his original.*" This is intended of his originall writs, or of that which is instead of an originall writ. But note, that in the other five cases the writ shall abate; and in the case of excommengement the writ shall not abate, but the plea to be put without day untill the plaintife purchase his letters of absolution, and sue out his resummons, or reattachment.

But in the case of outlawry the writ shall abate if he obtaine not his pardon. 44 E. 3. 27.

In ancient times more persons seemed to be disabled than these six recited by *Littleton*. As first, he that was a leper, and by the writ *de leproso amovendo* was *propter contagionem morbi prædicti* (as the writ saith) *et propter corporis deformitatem* (as others say) to be removed from the society of men to some solitary place; and thereupon [*u*] it is said, *datur etiam exceptio tenenti ex personâ petentis peremptoria propter morbum petentis incurabilem et corporis deformitatem; ut si petens leprosus fuerit, et tam deformis quòd aspectus ejus sustineri non possit, et ita quòd à communione gentium sit separatus, talis quidem placitare non potest, nec hæreditatem petere.* [*x*] And herewith *Britton* agreeth. Treating of disabled men, as men outlawed, adjured the realme, attainted of felony, &c. he addeth, *nemesel, ouste de commongents.*

[*u*] Bract. lib. 5. fol. 421.

[*x*] Britton, fol. 39. & 88.

[*y*] And *Fleta* saith, *competit etiam ei exceptio propter lepram manifestam, ut si petens leprosus fuerit, et tam deformis quòd à communione gentium meritò debet separari; talis enim morbus petentem repellit ab agendo.*

[*y*] Fleta, lib. 6. cap. 39.* 22 E. 3. in dors. clau. 20 Part. nu. 14. F. N. B. 234. Register.

And if these ancient writers be understood of an appearance in person, I think their opinions are good law; for they ought not to sue nor defend in proper person, but by atturney: for they are separated *à communione gentium propter contagionem morbi et deformitatem corporis.*

Before the Conquest, this disease was not known in *England*; for master *Camden*, writing of *Burton Lazers* in *Leicestershire*, saith, [*a*] *primis Normannorum temporibus collecta per Angliam stipe nosocomium hoc constructum ferunt, quo tempore lepra (quæ à nonnullis elephantiasis) gravissimè vi contagionis per Angliam serpsit.* And it is called *morbus elephantiasis*, because the skinnes of lepers are like to elephants. [*b*] And the law of *England*, for the removing of the lepers from the society of men to some solitary place, is grounded upon God's law.

[*a*] Camden in Leicestershire, verbo Burton.

[*b*] Levit. cap. xiii. verse 44, 45, 46. Num. cap. v. verse 1, 2. iv. Regum. c. 15.

* *It should be cap.* 40, *as it seems.*

Also

[c] Bract. l. 5. 420, 421. Britton, f. 39. Fleta, l. 6. c. 37.

[d] 33 H. 6. 18. F. N. B. 27. G.

[e] 27 H. 8. 11. 40 E. 3. 16. 20 E. 4. 2. F. N. B. 27. H. (2 Inst. 261.)

[c] Also there was a time when ideots, madmen, and such as were deafe and dumbe naturally, were disabled to sue, because they wanted reason and understanding (*tales enim non multùm distant à brutis*). But at this day they all may sue; for the suit must be in their name, but it shall be followed by others. [d] And note, that when an ideot doth sue or defend, he shall not appeare by gardian or procheine amy, or atturney, but he must be ever in person; [e] but an infant, or a minor, shall sue by procheine amy, and defend by gardian.(1). But now let us heare what *Littleton* will say unto us.

Sect.

---

(1) Acc. Fitzh. N. B. 27. H. At common law, infants could neither sue nor defend, except by *guardian;* by whom was meant, not the guardian of the infant's person and estate, but either one admitted by the court for the particular suit on the infant's personal appearance, or appointed for suits in general by the king's letters patent. F. N. B. 27. H. & L. Sty. 369. Bro. Gardein, pl. 11. & 17. But this rule was found inconvenient, it sometimes happening, that an infant was secreted by those having the legal custody of him, and so prevented from applying to have a guardian *ad litem* appointed. Hence was seen the necessity of permitting any person to litigate for the infant's benefit, who should be disposed to risk the expense. On this principle the statute of Westminster the first enables any one to sue as *prochein amy* for an infant in an assise, where the infant himself is essoigned by his guardian, or otherwise disturbed from suing the assise. 3 E. 1. c. 49. 2 Inst. 261. The statute of Westminster the second extended this provision, by permitting the *prochein amy* to sue in *all* actions; and though in this statute, as well as in the former, eloignment of the infant was mentioned, yet by construction it is not deemed necessary, but the *prochein amy* may sue, whether that circumstance occurs or not, it being considered merely as an instance of the necessity of the case, and as such only taken notice of by those who framed the statute. 13 E. 1. c. 15. 2 Inst. 390. But notwithstanding these statutes, as there is not any thing in them which prohibits the suing by guardian, we presume, that it remains as lawful as it was before. It is therefore probable that Fitzherbert and lord Coke, when they tell us, that an infant *shall* sue by *prochein amy*, did not mean to exclude the election of suing either in that way or by guardian. That Fitzherbert did not mean this, appears from his afterwards mentioning, without disapprobation, a case of debt, in which suing by guardian was allowed. Coke too, in his report of Rawlyns's case, says, that on search many precedents of infants suing by guardian were found; nor in that case was any objection grounded on its being a suit by guardian. 4 Co. 53. b. But whether we construe the meaning of these two judges rightly or not, a case occurred, in which the point is said to have been so adjudged. Young *v.* Young, W. Jo. 177. However the reader should at the same time be apprized, that according to another report of the same case, the court delivered no opinion on the point, whether an infant may sue by guardian. Cro. Cha. 86. See further on this subject Palm. 295, and Vin. Abr. *Guardian and Ward*, N. 7.— What we have hitherto advanced as to suing by *prochein amy* applies to the courts of common law only. As to our courts of equity, the usual practice in them is to sue for infants by *prochein amy*, and to defend by guardian. But it is said that they may sue in either way. Pract. Reg. in Chanc. 296.— [Note 220.]

Sect. 202.

ALSO, if a villeine be made a secular chaplaine, yet his lord may seise him (2) *as his villeine, and seise his goods, &c. But it seemeth, that if the villeine enter into religion, and is professed, that the lord may not take nor seise him, because he is dead in law; no more than if a free man taketh a niefe to his wife, the lord cannot take nor seise the wife of the husband, but his remedy is to have an action against the husband, for that he took his niefe to wife without his licence and will, &c. And so may the lord have an action against the soveraigne of the house, which taketh and admitteth his villeine to be professed in the same house, without the licence and leave of the lord, and he shall recover his damages to the value of the villeine. For he which is professed a monke, shall be a monk, and as a monke shall be taken for terme of his naturall life, unlesse he be deraigned* (sinon que il soit deraigne) *by the law of holy church. And he is bound by his religion to keep his cloyster, &c. And if the lord might take him out of his house, then he should not live as a dead person, nor according to his religion, which should not be inconvenient, &c.*

"*SECULAR chaplaine* [*a*]" is he that is *infra sacros ordines;* but he is not regular, (that is) liveth not under certain [136. a.] rules, ☞ nor hath vowed those three things above specified (*).

[a] Mir. cap. 2. sect. 18. Doct. and Stud. fol. 141. 4 E. 4. 25. per Danby. 27 Ass. pl. 49.

[*b*] "*Enter into religion, and is professed.*" That is intended (as hath been said) when he is regular and profest under certain rules, as to become one of the foure orders of friers (that is to say) *freres Minors, Augustines, Preachers,* or *Carmelites,* or become a monke, canon, or nunne, &c. *Qui ad vivendum regulariter se astringunt, sive sunt monachi, sive canonici regulares sive sanctimoniales.* For all these are regular and votaries, and are dead persons in law; but so are not the secular persons, as prebends, parsons, vicars, &c.

[*b*] Britton, cap. 31. fol. 79. Doctor and Student, fo. 141. (Doctr. Plac. 9. Ante 132. a.) 4 H. 4. cap. 14.

And therefore it is holden in our bookes, [*c*] that if a secular priest taketh a wife, and hath issue und dyeth, the issue is lawfull, and shall inherite as heire to his father, &c. for (as it was then holden) the marriage was not void, but voidable by divorce, and after the death of either partie no divorce can be had (1).

[c] 21 H. 7. 39. 19 H. 7. tit. Bastardy, 33. 5 E. 2. tit. Nonability, 26. 47 E. 3. Casu ult. (12 Co. 9. 1 Ro. Abr. 340.)

But if a man marrieth a nunne, or a monke marrieth, these marriages were holden void, and the issues bastards; because (as it was then holden) the marriage was utterly voyde, for that the nunne and the monke (as *Littleton* here saith) were dead persons in law. And that is the reason yielded by *Littleton,* wherefore a villeine, being professed in religion, cannot be seised by

(2) Vide tamen Pasch. 8 E. 1. rot. 7, *the case of Edward Rowald* contra. —Hal. MSS.

(1) See 2 Inst. 687.

(*) Ante 93. b. 132. a.

by the lord, because he is dead in law; and yet his blood or bondage is not thereby altered, but his person in respect of his profession only privileged. [d] *In decretalibus statutum est, quòd nullus episcopus spurios aut servos, donec à dominis suis fuerint manumissi, ad sacros ordines promovere præsumat.* But notwithstanding his person is privileged till he be disgraded. And so it is holden in our old bookes. [e] If a villeine be made a knight, for the honour of his degree his person is priviledged, and the lord cannot seise him untill he be disgraded. *Nullam vilem personam, natione spurium, vel servilis conditionis, ad militiæ strenuitatis ordinem promoveri licebit; sed cùm à dominis suis petantur ut nativi, ipsis primò degradatis, statim ad judicium procedatur.* [136. b.]

[d] Glanvil. lib. 5. cap. 5. Britton, fo. 79. & 82.

[e] Fleta, lib. 2. cap. 44. Britton, ubi supra.

[f] F. N. B. 78. B. 30 E. 1. tit. Villein, 46. 33 E. 3. ib. 21. (Post. 127. b.) 18 E. 2. ib. 30. 46 E. 3. 6. 4 E. 4. 25. 1 H. 4. 6. 13 E. 1. Villein, 36. 18 Ass. 10. Doct. & Stud. 141. Mirror, ca. 2. sec. 18. acc.

"*If a free man taketh a niefe.*" [f] Some have holden, that by this marriage the wife shall be free for ever; but the better opinion of our bookes is, that she shall be priviledged during the coverture onely, unlesse the lord himselfe marrieth his niefe; and then some hold, that she shall be free for ever(1).

If a niefe be regardant to a mannor, and she taketh a freeman to husband by licence of the lord, and the lord maketh a feoffment in fee of the mannor, the husband dieth, the feoffee shall not have the niefe, but the feoffor, for that during the marriage she was severed from the mannor. And so is the booke 29 *Ass.* (which is falsely printed) to be understood.

[g] 16 H. 3. nuper obiit, 17. 8 H. 3. Breve, 789. F. N. B. 197.

[g] If two coparceners be of a villeine, and one of them taketh him to husband, she and her husband shall not have a *nuper obiit* against her coparcener, but after the decease of her husband she shall.

[h] Vide Britton, fol. 82. Fortesc. c. 43. 46 E. 3. 6. a.

[h] "*But his remedy is to have an action against the husband, &c.*" Albeit marriage is lawfull, yet when it worketh a prejudice to a third person, an action in this case lyeth against the husband to the value of his losse. And albeit he did not know her to be a niefe, yet the action lyeth against him; for he must take notice thereof at his perill, [i] unlesse she be out of the service of the lord, and vagrant; and then if one not knowing her to be a niefe marrieth her, some say, that in that case no action lyeth against the husband. [k] And likewise the lord shall have an action against those that were the meanes to make the villeine a knight.

[i] 7 R. 2. tit. Barre, 240. (F. N. B. 168 B. 1 Leon. 240.)

[k] Britton, fol. 82. b.

31 H. 6. c. 5. 12 H. 7. c. 7. 11 H. 4. 5. b.

"*Soveraigne,*" *præcipuus, chiefe;* as here, *soveraigne of the house,* is the chiefe of the house.

31 H. 8. c. 29.

"*Unlesse he be deraigned* (sinon que il soit deraigne)." This word (*deraigne*) commeth of the *French* word *derayer*, or *deraigner*, that is to say, to displace or to turne one out of his order; and hereof cometh *deraignment*, a displacing or turning out of his order. So when a monke is deraigned, he is degraded

(1) See ante 123. n. 3. Post. 137. b.

degraded and turned out of his order of religion, and become a lay man.

"*Which should be inconvenient.*" *Ab inconvenienti* is a good argument in law, as *Littleton* often observeth*. And here *Littleton* concludeth, that the lord cannot take a monke out of his house, for that it should be inconvenient, which *Littleton* here sheweth, for divers reasons, and therefore unlawfull. And the inconvenience is, that where a man of religion should live according to his profession in religion, by the taking of him out he should not. 40 Ass. 27. Finchden.

"*If the lord might take him, &c.*" By this it appeareth, that if a man detaineth a villeine in his house, the lord of the villeine may take him out of the house; for here the impediment, wherefore the lord could not take him out of the house, was, for that the villeine was a monke professed. And so in case of the wardship here next following.

Sect. 203.

IN the same manner it is, if there be a gardeine in chivalry of the body and land of an infant within age, if the infant, when he comes to the age of 14 *yeares, entreth into religion, and is profest, the gardian hath no other remedy (as to the wardship of the body) but a writ of ravishment* de gard *against the soveraign of the house. And if any being of full age, who is cousin and heire of the infant, entreth into the land, the gardian hath no remedy as to the wardship of the land, for that the entry of the heire of the infant is lawfull in such case.*

"*A WRIT of ravishment de gard.*" This writ is given by the statute of *W.* 2. cap. 35, *in verbis conceptis;* the words of which writ be, that the defendant, *talem hæredem,* [137. a.] *cujus maritagium ad ipsum A.* ☞ *pertinet, &c. rapuit et abduxit, &c. contra pacem.* Now *rapere* signifieth properly to take away by violence and force. And when the soveraigne took and admitted the ward into his house to be professed, this in judgment of law is a ravishment of the ward; and as it appeareth in our bookes before the said statute, there lay a general action of trespass in that case. 9 Co. Doctor Hussey's case, fol. 72.

"*After the age of* 14 *yeares, &c.*" Our author mentioneth this age because it is prohibited by the statute of 4 *H.* 4, that no childe shall be received into any house of religion before that age without consent of his parents and gardians, &c. 4 H. 4. cap. 17.

"*The gardian hath no remedy, &c.*" Here it appeareth, that, by the profession of the ward, the lord loseth the wardship of the land, because he is *civiliter mortuus,* a dead man in law, and cannot hold any inheritance; neither can the gardian continue the wardship of the land, because by the civill death of the ward the inheritance is descended to another, who is either to be in ward, or pay reliefe. So as in this case the gardian hath *damnum,* but

* *See ante, Mr. Hargrave's note,* 1, *fol.* 66.

(Noy, 184. 1 Ro. Abr. 107. Post. 197. b.)

but it is *absque injuriâ*, because he loseth the wardship of the land by act of law, viz. the descent thereof to another; and therefore the law giveth to him no remedy in this case, neither by any formed writ, nor by action upon his case; for *Littleton's* words are generall (he hath not any remedy).

Sect. 204.

ALSO, in many and divers cases the lord may make manumission and enfranchisement to his villeine. Manumission is properly, when the lord makes a deed to his villeine to enfranchise him by this word (manumittere), *which is the same as to put him out of the hands and power of another. And for that that by such deed the villeine is put out of the hands and out of the power of his lord, it is called manumission. And so every manner of infranchisement made to a villein may be said to be a manumission.*

[l] Glanvill. lib. 5. cap. 5. Britton, fol. 78. &c. 82. 97. 116. Fleta, lib. 3. cap. 13. & lib. 2. cap. 44.

"*MANUMISSION,*" [*l*] *Manumittere, quod idem est quod extra manum vel potestatem ponere.*

Quia quamdiu quis in servitute est, sub manu et potestate domini sui est.

Qui in potestate domini sui est, in manu domini sui esse dicitur; sed postquam manumissus est, ab illo liberabitur, ergo dicitur quasi extra manum, id est, extra potestatem domini sui missus. And here is to be noted (as in many other places is observed) what regard *Littleton* hath to the true etymologies of words.

[m] Mirr. ca. 2. sect. 18.

"[*m*] *Enfranchisement.*" (Hereby *Littleton* explaineth manumission.) It is derived from the *French* word *franchise*, that is, liberty; and in the common law it hath divers significations: sometimes the incorporating of a man to be free of a company or body politique, as a free man of a city, or burgesse of a burrough, &c. sometimes to make an alien a denizen; and here to manumise a villeine or bondman. So as this word (*enfranchisement*) is more general than *manumission;* for that is properly applyed to a villein; and therefore every manumission is an infranchisement, but every infranchisement is not a manumission. [*n*] There be two kindes of manumissions, one expresse, and the other implyed. Expresse, when the villeine by deed in expresse words is manumised and made free. The other implyed, by doing some act that maketh in judgement of law the villeine free, albeit there be no expresse words of manumission or enfranchisement. [*o*] If a villein be manumised, albeit he become ingratefull to the lord in the highest degree, yet the manumission remaines good: and herein the common law differeth from the civill law, for *libertinum ingratum leges civiles in pristinam redigunt servitutem, sed leges Angliæ semel manumissum semper liberum judicant, gratum et ingratum.*

[137. b.]

[n] Mirr. cap. 2, sect. 18.

[o] Fortescue, cap. 46.

There be also some cases where the villein shall be privileged from the seisure of the lord, albeit he be not absolutely manumised or infranchised. Sometimes *ratione loci;* [*p*] as if a villeine

[p] 39 E. 3. 6. b. F. N. B. 79. a. (Dy. 266. b. 283. b.)

remaine

remaine in the ancient demeane of the king a yeare and a day without claime or seisure of the lord, the lord cannot have a writ of *nativo habendo*, or seise him, so long as he remaines and continues there (2); and the reason of this was, in respect of the service he did to the king in plowing and tillage of the demeane, and other labours of husbandry for the king's benefit. And herewith agree old bookes, [*q*] which say, that this immunity was sometimes granted by common consent to the king for his profit, and for the help or ease of his villeins. [*r*] If a villein be a priest of the king's chappel, the lord cannot seise him in the presence of the king, for the king's presence is a privilege and protection for him. Sometimes *ratione professionis;* [*s*] as if a villeine be professed a monke, or a niefe a nun, as hath been sayd. [*t*] Sometimes (as some have said) *ratione dignitatis;* as if the villeine be made a knight, &c. Sometimes *ratione matrimonii;* as if a niefe marry a free man, she is priviledged during the marriage, but not absolutely enfranchised; for if her husband dye, she is niefe againe, unlesse the lord himself marrieth the niefe, and then she is enfranchised for ever, as hath been said before (1). And it shall not be amisse to observe the wisdome of our ancients, with what solemnity (for more surety thereof) manumissions were made. *Qui servum suum liberat, in ecclesiâ, vel mercato, vel comitatu, vel hundredo, coram testibus et palam faciat, et liberas ei vias, et portas conscribat apertas, et lanceum, et gladium, vel quæ liberorum arma, in manibus ei ponat.* Our author having spoken of an expresse manumission, here followe infranchisements in law.

[*q*] Glanvil. lib. 5. cap. 5. Fleta, lib. 2. cap. 44. Brit. fol. 79. Mirror, cap. 2. sect. 18. (2 Ro. Abr. 736, 737.)
[*r*] 27 Ass. p. 49.
[*s*] Glanvil. lib. 5. ca. 5.
[*t*] Britton, ubi supra. (Ante 136. b.)
Lib. Rub. cap. 78.

Sect. 205.

ALSO, if the lord maketh to his villeine an obligation of a certaine sum of money, or granteth to him by his deed an annuity, or lets to him by his deed lands or tenements for terme of yeares, the villeine is enfranchised.

FOR when the lord enableth the villeine to have an action against him, as for debt or annuity, &c. or giveth to the villeine a certaine and fixed estate in lands, tenements, or hereditaments, as a lease for yeares, this amounteth to an infranchisement, not only during the yeares, but for ever; [*u*] and albeit the lease be made to the villeine without deed, yet it is an infranchisement for ever. (5 Co. 56. a.)
[*u*] 50 E. 3. tit. Vil. 25. 11 H. 7. 13.

Sect.

(2) Post. 254. b.
(1) Ante 123. a. n. 3.

☞ Sect. 206. [188. a.]

ALSO, if the lord maketh a feoffment to his villeine of any lands or tenements, by deed or without deed, in fee simple, fee taile, or for terme of life or yeares (1), *and delivereth to him seisin, this is an enfranchisement.*

Vide 24 E. 3. 32. 12 H. 3. tit. Vill. 42.

This is evident, and agreeth with our bookes.

Sect. 207.

BUT if the lord maketh to him a lease of lands or tenements, to hold at will of the lord, by deed or without deed, this is no enfranchisement; for that he hath no manner of certainty or surety of his estate, but the lord may oust him when he will.

"*BY deed.*" So as a deed made to a villeine by the lord is no infranchisement, when the deed transferreth no certaine or fixed estate, but revocable at the lord's will. If the lord release to his villeine all the right in *Black Acre*, and the villeine is not thereof seised, this is no infranchisement, because it is voyd, and can give no cause of action. If the lord attorneth to his villeine, this is no infranchisement.

11 H. 7.

Sect. 208.

ALSO, if the lord sueth against his villeine a præcipe quòd reddat, *if he recover, or be nonsuite after appearance, this is a manumission, for that he might lawfully have entered into the land without suit. In the same manner it is, if he sue against his villeine an action of debt or account, or of covenant, or of trespasse, or of such like, this is an infranchisement, for that he might imprison the villeine, and take his goods without such suite. But if the lord sue his villeine by appeale of felonie, where he was indited of the same before* (1)*, *this shall not enfranchise the villeine, albeit that the matter of appeale be found against the lord, for that the lord could not have the villeine to be hanged without such suit. But if the villeine were not*(2)† *indited of the same felonie before the appeal sued against him, and*

* † *These are notes* 1, *and* 2, *of* 138. *b. in the* 13*th and* 14*th editions. It should have been observed before, that the notes on Littleton should be referred to rather by the number of the section of Littleton than by that of the folio of Coke on Littleton. This way of reference seems the more proper when it is considered, that Littleton is always referred to by the number of the section, and never by the number of the folio of Coke on Littleton, and that, in the fifteenth, sixteenth, and present, editions, many of Littleton's sections, or some words of the same, are not in the same folio, or half folio, in which they are in the prior editions.*

---

(1) The words *or yeares* not in L. and M. Roh. nor P. They first appear in Redm.

(1) * *Where he was indited of the same before* in Red. but not in L. and M. Roh. nor P.

(2) † *not* in Roh. and Red. but not in L. and M. nor P.

and afterward is acquited of this felony, so as he recover damages against his lord for the false appeale, then the villeine is infranchised, because of the judgment of damages to be given unto him against his lord. And many other cases and matters there be, by which a villeine may be enfranchised against his lord, &c. But enquire of them [Sed de illis quære (3)].

"*IF the lord sueth against his villeine a* præcipe quòd reddat, *&c. this is a manumission.*" And the principall reason hereof is, for that by this suit he enableth the villeine to be a person able to render him the land by course of law, where the lord without any such suit might have entered. [a] But if the tenant in tayle be of a manor whereunto a villeine is regardant, and enfeoffeth the villein of the mannor, and dyeth, the issue shall have a *formedon* against the villeine, and after the recovery of the mannor he shall seise the villein. And

[138. b.]

☞ the reason is, for that he could not seise the villeine till he had recovered the mannor, which was the principall, and at the time of the writ brought he was no villeine.

[a] 24 E. 3. Discont. 16. Vid. Britton, 78. & 126.

(Ante 122. b. 2 Ro. Rep. 409.

The tenant infeoffes the villeine of the lord and an estranger upon collusion: in this case, although the lord may enter upon the villeine for the moity, yet may he have a writ of ward against them both without infranchisement of the villeine; for if the lord should enter upon the villeine, then should his seigniory be suspended, and then could not he have a writ of ward against the other.

The lord, upon a writ of covenant brought by the villeine, levies a fine to his villeine of land which is ancient demesne; the lord of whom the land is holden reverseth the fine in a writ of deceit; albeit the authority and jurisdiction of the court is disproved, and that the lord of the villeine shall be restored to the land given by the fine, yet it is an enfranchisement, for that he answered to the writ of covenant, and the fine was voydable, and not voyde; and therefore, being once an enfranchisement, it cannot be avoided by the reversing of the fine.

"*Be nonsuite, (id est) non est prosecutus breve suum.*" For by the law the plaintife is first agent at every continuance; and therefore the record sayeth, *quod petens seu querens* (naming them) *obtulit se*, who if he be called, and make default, then he is said to be nonsuit, *id est, non est prosecutus, &c.*

By *Littleton* here it appeareth, that there is a nonsuite before appearance at the returne of the writ, or after appearance at some day of continuance. [x] The difference between a *nonsuit* and a *retraxit* on the part of the demandant or plaintife is this. A *nonsuite* is ever upon a demand made, when the demandant or plaintife should appeare, and he makes a default. A *retraxit* is ever when the demandant or plaintife is present in court ☞ (as regularly he is ever by intendment of law, until a day be given over, unlesse it be when a verdict is to be given, for then he is demandable). And this is in two sorts, one privative and the other positive. Privative, as upon demand made, that he make default,

[139. a.]

[x] 8 Co. 58. 62. Becher's case. 3 H. 6. 13. Brooke, tit. Nonsuit, 1. 8 H. 6. 7. 50 E. 3. 12.

(3) *de illis quære* not in L. and M. nor Roh.

default, and depart in despite of the court; and then the entry is [y] *et postea eodem die revenit ad barram prædict' tenens, et præd' petens tunc solenniter exactus non venit, sed à sectâ suâ predictâ in contemptum curiæ se retraxit, ideo consideratum est, &c.* Positive, as when the entry is, *et super hoc idem quærens dicit, quòd ipse non vult ulterius placitum suum prædictum prosequi, sed abinde omnino se retraxit, ideo, &c.* Another form thereof is, *quòd idem quærens fatetur se (seu cognovit se) ulterius nolle prosequi versus prædict' defend', &c. de placito prædicto.* [z] A departure in despight of the court is on the part of the tenant, and is, when the tenant or defendant after appearance and being present in court upon demand makes departure in despight of the court, and then the entry is, *et prædict' tenent seu defendens licet solenniter exactus non revenit, sed in contemptum curiæ recessit et defaltam fecit, idio, &c.* It is called a *retraxit*, because that word is the effectual word used in the entry, as before it appeareth, and it is ever on the part of the demandant or plaintife. [a] Another difference between a *retraxit* and a nonsuit is, that a *retraxit* is a barre of all other actions of like or inferior nature: *qui semel actionem renunciavit, amplius repetere non potest.* But regularly a nonsuit is not so, but that he may commence an action of like nature, &c. againe. For it may be, that he hath mistaken somewhat in that action, or was not provided of his proofes, or mistaking the day, or the like. But yet for some special reasons, nonsuit in some actions is peremptory.

[y] Tr. 5 H. 6. Rot. 320. in Com. Banco.

[z] F. N. B. 78. F. 106. D. 19 E. 2. Villein, 31.

[a] 8 Co. ubi supra.

In a *quare impedit*, if the plaintife be nonsuite after appearance, the defendant shall make a title, and have a writ to the bishop; [b] and this is peremptory to the plaintife, and is a good barre in another *quare impedit* (1); and the reason is, for that the defendant had by judgement of the court a writ to the bishop, and the incumbent, that commeth in by that writ, shall never be removed, which is a flat barre as to that presentation; and of this opinion is *Littleton* in our bookes: And the same law, and for the same reason, it is in the case upon a discontinuance.

[b] 5 E. 3. 35. 2 H. 5. 31 H. 6. 15. 22 H. 6. 44, 45. 23 H. 6. 1. 55. 19 E. 4. 9. 21 E. 4. 2. b. &c. F. N. B. 38. K. 7 Co. 27. b. Sir Hugh Portman's case.

[c] In a writ *de nativo habendo*, nonsuit after appearance is peremptory; for thereby the villeine is infranchised. And so it is if two be plaintifes in a *nativo habendo*, if one be nonsuit, this is the nonsuit of both, and no summons and severance doth lie in that case, albeit it be a reall action. And this is, *in favorem libertatis*; for in a *libertate probandâ* nonsuit after appearance is not peremptory, neither is the nonsuit of the one the nonsuit of both.

[c] 6 E. 2. Vill. 26. 12 E. 2. ibid. 28. 19 E. 2. ibid. 31. F. N. B. 78. E. 4 E. 2. Nonsuit, 29.

[d] Nonsuit in an appeale of murder, rape, robbery, &c. after appearance is peremptory; and this is *in favorem vitæ*; for if the defendant be acquitted, and take out processe upon the statute of *W.* 2. against the abettors, or if he purchase his originall writ, for that cause he may be nonsuit.

[d] 9 H. 4. 1. 12. Staunf. Pl. Cor. 148. a. & 171. a. 22 Ass. 97. Fitz. Cor. 184. 22 E. 3. 6. 47 E. 3. 16. 7 H. 7. 5. 40 E. 3. Dam. 77.

[e] If the plaintife in an appeale of mayhem be nonsuit after

17 E. 2. Coron. 386. 3 E. 2. Action sur l'estat, 28. [e] 43 Ass. 39. 40 Ass. 1. (1 Sid. 32.)

appearance,

(1) But lord Dyer held the nonsuit not peremptory, if another *quare impedit* was brought within the six months. Dall. 81, 82. Perhaps, however, he only meant to assert this in the case of a nonsuit *before* appearance. As to lord Coke's doctrine, other authorities for it may be added to those he cites. See 1 Brownl. 161. 2 Salk. 559. 2 Inst. 363. 2 Ro. Abr. 689.—[Note 221.]

appearance, it is peremptory; for the writ saith *felonicè maihemavit*, and therefore the nonsuit is peremptory.

[*f*] In an attaint, if the plaintife after appearance be nonsuit, it is peremptory; and the reason is, for the faith that the law gives to the verdict, and for the terrible and fearefull judgement that should be given against the first jury if they should be convicted; and therefore upon the nonsuit, the plaintife shall be imprisoned, and his pledges amerced. But if the processe in an attaint be discontinued, the plaintife may have another writ of attaint, because upon the nonsuit there is a judgment given, but not upon the discontinuance. *Note*, it is truly said, that *exceptio probat regulam;* for these cases excepted stand upon their special and particular reasons, and fall not within the general reason of the rule. It is a general rule, that nonsuite before appearance is not peremptory in any case, for that a stranger may purchase a writ in the name of him that hath cause of action, as shall be said hereafter in this Section.

[*f*] 32 Ass. 13. 19 Ass. 13. 20 E. 3. Attaint, 42. 22 E. 3. 7. F. N. B. 108. D.

[*g*] In reall or mixt actions the nonsuit of one demandant is not the nonsuit of both, but he that makes default shall be summoned and severed; but regularly in personall actions, the nonsuit of the one is the nonsuit of both, unless it be in certaine particular cases.

[*g*] 11 H. 6. 23. 35. F. N. B. 35. B. 19 E. 3. tit. Sever. 14. 3 E. 2. Nonsuit, 18. 19 E. 3. Sev. 16. 12 E. 3. ib. 22. 38 E. 3. 9. 29 H. 6. 45. 38 E. 3. 35. 41 E. 3. Nonsuit, 10. 45 E. 3. 10. 2 H. 4. 2. (2 Ro. Abr. 132. 10 Co. 134.)

[*h*] In personall actions brought by executors there shall be summons and severance, because the best shall be taken for the benefit of the dead. And so it is in an action of trespasse, as executors for goods taken out of their owne possession. Like law in account as executors by the receit of their owne hands.

[*h*] 42 E. 3. 13. 48 E. 3. 14. 28 H. 6. 3. 11 E. 2. Sev. 26. 13 E. 3. ib. 15. 18 E. 3. ib. 28. 5 E. 3. ibid. 20. 7 E. 3. 12.

[*i*] In an *audita querela* concerning the personalty, the nonsuite of the one is not the nonsuit of the other, because it goeth by the way of discharge and freeing of themselves, and therefore the default of the one shall not hurte the other.

[*i*] 15 E. 3. Sever. 23. 6 Co. 25 Ruddock's case.

[*k*] In a *quid juris clamat*, the nonsuit of the one is the nonsuit of both, because the tenant cannot attorne according to the grant.

[*k*] 20 E. 3. Severance, 17.

[*l*] Some actions follow the nature of those actions whereupon they are grounded; as the writs of error, attaint, *scire facias*, and the like. If a reall action be brought by severall *præcipes* against two or more, if the demandant be nonsuite against one, he is nonsuite ☞ against all; for as to the demandant it is but one writ under one *teste*. *Note*, severance is two-fold, viz. by summons *ad sequendem simul*, and that is when one of the demandants or plaintifes never appeared; and by award of the court of nonsuit without any summons, and that is after appearance.

[139. b.]

[*l*] 47 E. 3. 6. b. 47 Ass. 3. 29 Ass. 34. 7 H. 4. 45. 34 H. 6. 31. 25 H. 6. 19. 29 E. 3. 37. 6 Co. ubi supra. 22 H. 6. 42. 4 E. 4. 33. 19 E. 2. Nonsuit, 32. 18 E. 3. ibid. 13. 20 E. 3. ib. 26, 27. 19 E. 3. ib. 12. 3 E. 3. ibid. 17. 38 E. 3. 9. 20 H. 6. 45. 44 E. 3. 16. 19 E. 3. Severance, 16. (1 Sid. 378.)

[*m*] The king's majesty cannot be nonsuite, because in judgement of law he is ever present in court; but the king's attorney, *qui sequitur prodomino rege*, may enter an *ulterius non vult prosequi*, which hath the effect of a nonsuite. But in an information by an informer, *qui tam, &c.* the informer may be nonsuited.

[*m*] 6 R. 2. Nonsuit, 13. 25 H. 8. Nonsuit, Br. 63. 20 H. 7. 5. (2 Ro. Abr. 130, 131. Post. 227. b.)

[*n*] At the common law, upon every continuance or day given over before judgement, the plaintife might have been nonsuited;

[*n*] 2 H. 4. ca. 7. 3 E. 3. 21. 47 E. 3. 1, 2. 3 E. 4. f. 11.

and

and therefore before the statute of 2 *H.* 4, after verdict given, if the court gave a day to be advised, at that day the plaintife was demandable, and therefore might have been nonsuit, which is now remedied by that statute.

[o] 2 H. 5. 5. 8 R. 2. Nonsuit, 34.

[*o*] But after demurrer in law joyned, if the court doth give a day over, at that day the demandant or plaintife is demandable, and therefore may be nonsuit, for that is not holpen by any statute.

[p] 9 H. 7. 1. 21 E. 3. 32. 11 Co. 39. 41. Metcalf's case. (2 Ro. Abr. 131. contra.)

[*p*] And after an award to account, the plaintife may be nonsuit; and so note a diversity betweene an interlocutory award of the court, and a final judgement (1).

By these few instructions you shall the more easily understand the bookes of tearmes and yeares, and other authorities of law. And here (to returne to *Littleton*) it is to be noted, that albeit the lord be nonsuit, yet the infranchisement of the villeine doth remaine, for that grew by the appearance to the writ, and cannot be taken away by the nonsuit subsequent. So it is if the writ do abate, yet the infranchisement remaines.

[q] 7 H. 4. 8. 11 H. 4. 13. 9 E. 4. 23. 7 H. 4. 8. a. 7 H. 7. 6. b. 5 H. 7. 15.

[*q*] "*After appearance.*" For otherwise a stranger may purchase a writ in his name; and therefore *Littleton* materially added these words after appearance.

"*Præcipe.*" There be three kinds of *præcipes*. 1. A *præcipe quòd reddat*, whereof *Littleton* here speaketh; 2, a *præcipe quòd permittat;* and 3, a *præcipe quòd faciat*, whereof you may read plentifully in the *Register* and *Fitzherbert's Natura Brevium*, and belongs not properly to this treatise.

"*Account.*" Of this sufficient hath beene said before.

Vide Sect. 748. 4 Co. 80. Noke's case. F. N. B. 145.

"*Covenant,*" *Conventio.* Hereof there be two kinds, viz. a covenant personall, and a covenant reall; and a covenant in deed, and a covenant in law.

[r] W. 2. cap. 12. 22 Ass. p. 39. 33 H. 6. 2. 14 H. 7. 2. 40 Ass. 18. 40 E. 3. 42.

"*Where he was indited of the same.*" [*r*] For if the villeine be not first indited of it, then, upon the acquittall of the villeine, the villeine shall recover damages against the lord by the statute of *W.* 2. *Quia multi per malitiam, &c.* and consequently shall be enfranchised. But if the villeine be formally indited of the felony, then though the villeine be acquitted upon the appeale, he shall recover no damages against the lord. For wheresoever the lord giveth to the villeine a just cause of action, he is enfranchised. [*s*] And therefore if the lord kill his villeine, his sonne and heire shall have an appeale, and thereby his heire shall be enfranchised, because the offence of the lord gave to the heire a just cause of action against the lord.

[s] Kelway 134.

Sect.

---

(1) But Brooke says, that the *award* to account is a *judgment*, and therefore that a man cannot be nonsuited after such award. Bro. Abr. *Nonsuit* pl. 17. 21 E. 3. 7. Rolle to the same purpose cites 3 H. 4. 7. 21 E. 3. 7. 21 H. 6. 26. 1 H. 7. 1. b. See 2 Ro. Abr. 131. However, he adds, that the 27 E. 3. 87, and Co. Litt. and *contra*. Lord Coke's opinion is particularly warranted by Metcalfe's case in the Eleventh Report, which, as he here explains, proceeded on the distinction between an *interlocutory* and a *final* judgment.—[Note 222.]

Sect. 209.

ALSO, if the lord of a mannor will prescribe, that there hath beene a custome within his mannour time out of minde of man, that every tenant within the same mannor, who marrieth his daughter to any man without licence of the lord of the mannour, shall make fine (1), *and have made fine to the lord of the mannor for the time being, this prescription is voyd. For none ought to make such fine but onely villeines. For every free man may freely marry his daughter to whom it pleaseth him and his daughter. And for that this prescription is against reason, such prescription is voyd.*

"*THAT there hath beene a custome, &c.*"

Here some may object, that such a custome may have a lawful beginning; for *Littleton* in the beginning of this Chapter, Sect. 174, alloweth, that [*a*] a freeman may take lands of the lord to be holden of him, that is, to pay a fine for the marriage of his sonne or daughter; and therefore [*b*] some have thought that such a custome generally within the mannor should be good. But the ☞ answer is, that though it may be so in a particular case upon such a special reservation of such a fine upon a gift of land, yet to claime such a fine by a generall custome within the manner, is against the freedome of a freeman, that is not bound thereunto by particular tenure. But a custome may be alledged within a mannor, [*b*] that every tenant (albeit his person be free) that holdeth in bondage or by native tenure, the freehold being in the lord, shall pay to the lord, for the marriage of his daughter, without licence, a fine: and it is called *marchett*, as it were a *chete* or fine for marraige (2). And here *Littleton* saith, that none ought to pay such fines but villeines, (that is) either villeines of blood, or freemen holding in villenage or base tenure. So note a diversity betweene a freeholder and a freeman holding in villenage. Villeines use to pay to their lords in acknowledgement of their bondage for their several heads, and thereupon it is called *chevage*, *chevagium*, of the *French* word *chiefe*, as it were the service of the head. Of which *Bracton*, saith, [*c*] *chevagium dicitur recognitio in signum subjectionis et dominii de capite suo.* And sometimes it is written, *chivage*, but more properly *chiefage*. [*d*] *Chevagium* signifieth also a great misprision for any subject to take summes of money, or other gifts yearly in the name of *chevage*, because they take upon them to be their chiefe heads or leaders (3).

[140. a.]

[*a*] 10 E. 3. 23. Roger de Vale's case. 15 E. 3. Aid, 33.

[*b*] 34 H. 6. 15. a. per Litt.

[*b*] 43 E. 3. 5. 14 H. 6. 15.

[*c*] Bracton, lib. 1. cap. 10. Britt. fol. 79. b.

[*d*] 27 Ass. 44.

"*For*

---

(1) The words *at the will of the lord*, are added in L. and M.

(2) See further as to *marchet*, the word in Spelm. Gloss. and the Appendix to Robinson on Gavelkind, p. 2.

(3) The case cited by lord Coke from the Book of Assises, consists of various articles inquired of by a jury in the court of king's bench; and the seventeenth of these relates to those, *who receive persons under their patronage, taking from them certain yearly fees, by gift, rent, or in the name of chevage to maintain*

" For that this prescription is against reason, it is voyd." This containes one of the maximes of the common law, viz. that all customes and prescriptions that be against reason are voyd.

(2 Ro. Abr. 265. Ante, 113. a.)

Sect. 210.

BUT in the county of Kent, where lands and tenements are holden in gavel-kinde, there, where, by the custome and use out of minde of man, the issues male ought equally to inherite, this custome is allowable, because it standeth with some reason; for every son is as great a gentleman as the eldest son is, and perchance will grow to greater honour and valour, if he hath any thing by his ancestors, or otherwise peradventure he would not encrease so much, &c.

" *IN*[e] *the county of* Kent." For that in no county of *England* lands [f] at this day be of the nature of gavelkinde of common right, saving in *Kent* onely. But yet in divers parts of *England*, within divers mannors and seigniories, the like custom is in force.

[e] Vide Pestatute de Consuetudinibus Kanciæ, ann. 21 E. 1. 2 E. 3. 12. 3 E. 3. 21. 38. 23 Ass. pl. 12.

(f) Vide Mirror, cap. 1. sect. 3. 8 E. 3. 42. b. (Post. 175 b.)

" *In Gavel-kinde.*" That is, *gave all kinde:* for this custome giveth to all the sons alike (4).

" *The issues male to inherite.*" And this is the generall custome extending to sons. But yet [g] by custome, when one brother dieth without issue, all the other brethren may inherit (1).

[g] 23 Ass. pl. 21. (1 Ro. Ab. 624.)

☞ [124. b.]

" *Every sonne is as great a gentleman as the eldest son is.*" By this it appeareth, that gentry and armes (A) is of the nature of gavelkinde; for they descend to all his sons, every son being a gentleman alike. Which gentry and armes do not descend to all the brethren alone, but to all their posterity. But yet *jure primogenituræ*, the eldest shall beare, as a badge of his birthright, his

---

maintains them in wrong or right. Lambard, in treating of unlawful assemblies, describes the offence of chevage from the book of Assises, and takes notice of it as still inquirable. Lamb. Eirenarch. ed. 1602, p. 163.—[Note 223.]

(4) This was the common etymology when lord Coke wrote; and it was countenanced by Mr. Lambard, in the explication of words prefixed to his Anglo-Saxon laws. Lamb. de Prisc. Anglor. Leg. voc. Terra ex Scripto. But the latter afterwards inclined to a more probable derivation, conjecturing that *gavel* signified *rent*, and so *gavelkind* imported land of such a *kind* as to yield *rent*. Lamb. Perambulat. of Kent, ed. 1596, p. 529. Mr. Somner pursues the same idea, and expatiates to support it. Somn. Gavelk. 1st ed. 3. It is rather surprising that lord Coke did not hit upon a like derivation, as elsewhere he describes *gavel* or *gabel* to signify *rent*. Post. 142. a.—See further to this point Robins. on Gavelk. 1.—[Note 224.]

(1) This extension of the custom of gavelkind to *collaterals* prevails universally in Kent. See Robins. on Gavelk. 92.—[Note 225.]

(A) As to arms ante 27. a. and the extract from a MS. in the College of Arms given in Dallaway, on the science of heraldry, 369. I understand that in the case of a woman, the right to bear arms stops with her unless she is an heiress, in which case the right becomes transmissible.

his father's armes without any difference, for that, as *Littleton* saith, *Section* 5, he is more worthy of blood; but all the younger brethren shall give several differences, *et additio probat minoritatem*, and [*h*] *hæreditas inter masculos jure civili est dividenda.*

Ante 27. a. Post. 189. a. [h] Fortescue, cap. 40.

" *Or otherwise peradventure he would not encrease so much.*" The reason of this is rendered by the poet.

Haud facile emergunt, quorum virtutibus obstat
Res angusta domi. ———

Juvenal, Sat. 3.

But now by the statute of 31 *H.* 8. a great part of *Kent* is made descendable to the eldest sonne, according to the course of the common law (2), for that, by the meanes of that custome, divers ancient and great families after a few descents came to very little or nothing.

31 H. 8. ca. 3. V. 18 H. 6. cap. 1. (1 Sid. 136.)

In plures quoties rivos deducitur amnis,
Fit minor, ac undâ deficiente, perit.

Sect. 211.

ALSO, where by the custome called Burrough English *in some burrough, the youngest son shall inherit all the tenements, &c. this custome also stands with some certaine reason; because that the younger son (if he lacke father and mother) because of his younger age, may least of all his brethren helpe himself, &c.*

"*BY the custome called Burrough English.*" Of this custome *Littleton* hath spoken before in the Chapter of Burgage. And in our bookes there is a special kind of Borough *English* [*i*]; as it shall descend to the younger son, if he be not of the halfe blood; and if he be, then to the eldest son (3).

Vid. Sect. 165. Vin. Desc. A. B. [i] 32 E. 3. tit. Age, 81.

[*k*] Within the mannor of *B.* in the county of *Berks*, there is such a custome, that if a man have divers daughters, and no son, and dieth, the eldest daughter shall only inherit; and if he have no daughters, but sisters, the eldest sister by the custome shall inherit, and sometimes the youngest. And divers other customes there be in like cases. And herewith agreeth *Britton*, who saith, [*l*] *de terres des ancients demeynes soit use solonque le antient usage del*

[k] Mich. 10 Ja. Eliot's case, in Briefe defaux Judgement. [l] Brit. 187. b.

---

(2) There are six other statutes for disgavelling particular lands in Kent, besides the 31 H. 8, though that is the only statute in print. They are mentioned in Mr. Robinson's book on Gavelkind, and the learned writer is very full in his explanation as well of them, as of the 31 H. 8. especially observing, that they are construed to alter only the partible quality of the customary descent to males, which agrees with lord Coke's manner of mentioning the 31 H. 8. See Robins. on Gavelk. p. 75.—[Note 226.]

(3) The reader will find the chief instances of special kinds of Borough-English brought together in Mr. Robinson's book on Gavelkind. See Append. p. 6.—[Note 227.]

del lieu, dount en ascun lieu le tient lieu per usage, que le heritage soit departible entre touts les enfants freres et sores, et en ascun lieu que le eigne avera tout, et en ascun lieu que le puisne frere avera tout.

"*Because of his younger age, may least of all his brethren helpe himselfe, &c.*" Here by (*&c.*) are implyed those causes wherefore a youth is lesse able to ayd himselfe, &c. which the poet briefely and pithily expresseth thus:

Horace.

☞ *Imberbis juvenis, tandem custode remoto,* [141. a.]
Gaudet equis, canibusque, et aprici gramine campi,
Cereus in vitium flecti, monitoribus asper,
Utilium tardus provisor, prodigus æris,
Sublimis, cupidusque, et amata relinquere pernix.

And againe, no living creature more infirme than man:

Hor.

Nil homine infirmum tellus animalia nutrit
Inter cuncta magis.——

Sect. 212.

BUT if a man will prescribe, that if any cattle were upon the demeanes of the mannor there doing damage, that the lord of the mannor for the time being hath used to distreine them, and the distresse to retaine till fine were made to him for the damages at his will, this prescription is voyd; because it is against reason, that if wrong be done any man, that he thereof should be his own judge; for by such way, if he had damages but to the value of an halfpenny, he might assesse and have therefore an C. *pound, which should be against reason. And so such prescription, or any other prescription used, if it be against reason, this ought not, nor will not be allowed before judges* (ceo ne doit (1) estre allow devant judges); quia malus usus abolendus est (2).

10 E. 3. 23.
4 E. 3. 54.
7 E. 3. 24.
38 E. 3. 18.
2 H. 3. 4.
3 H. 4.
8 H. 6. 19.
5 H. 7. 9. b.

"*IT is against reason, that if wrong be done any man, that he thereof should be his own judge.*" For it is a maxime in law, *aliquis non debet esse judex in propriâ causâ.* * And therefore a fine levied before the baylifes of *Salop* was reversed, because one of the bailifes was partie to the fine, *quia non potest esse judex et pars* (3).

* Hil. 4 H. 4. coram rege Salop. (2 Ro. Abr. 92, 93. 1 Ro. Abr. 492. 496.)

"Malus usus abolendus est:" and every use is evill, that is (as our author saith) against reason, *quia in consuetudinibus*

---

(1) *Instead of* doit *it is* voet *in L. and M. Roh. and P.*

(2) Sect. 174, is placed here in L. and M. as we have formerly noticed. See 117. b. note 2.

(3) See 14 Vin. Abr. 573. 4 Com. Dig. 6.

nibus non diturnitas temporis, sed soliditas retionis est conside- (5 Co. 84.)
randa (4).

And by this rule cited by our author, at the parliament holden at *Kilkenny* in *Ireland*, *Lionel* duke of *Clarence* being then lieutenant of that realme, the *Irish* customs called there the *Brehon* law (for that the *Irish* call their judges *Brehons*) was wholly abolished, for that (as the parliament sayd) it was no law, but a lewd custome, *et malus usus abolendus est* (5). An. 40. E. 3. at Kilkenny. The Brehon law. Vide Sect. 265.

But our student must know, that king *John* in the twelfth yeare of his raign went into *Ireland*, and there, by the advice of grave and learned men in the laws whom he carried with him, by parliament *de communi omnium de* Hibernià *consensu*, ordained and established, that *Ireland* should be governed by the lawes of *England* (1), which of many of the *Irishmen*, according to their own desire, was joyfully accepted and obeyed, and of many the same was soone after absolutely refused, preferring their *Brehon* law before the just and honourable lawes of *England*. *Rex, &c. baronibus, militibus, et omnibus liberè tenentibus salutem. Satis, ut credimus, vestra audivit discretio, quòd quando bonæ memoriæ Johannes, quondam rex Angliæ, pater noster, venit in Hyberniam, ipse duxit secum viros discretos et legis peritos, quorum communi consilio, et ad instantiam Hybernensium, statuit et præcepit leges Anglicanas in Hybernià, ita quòd leges easdem in scripturas redactas reliquit sub sigillo suo ad Scaccarium Dublin.* (Vaugh. 293.) [141. b.] Rot. Pat. 11 H. 3. 7 Co. 22. b. Calvin's case.

Rex comitibus, baronibus, militibus, et liberis hominibus et omnibus aliis de terrâ Hyberniæ salutem. Quia manifestè esse dignoscitur contra coronam et dignitatem nostram et consuetudines et leges regni nostri Angliæ, quas bonæ memoriæ dominus Johannes rex, pater noster, de communi omnium de Hybernià consensu, teneri statuit in terrâ illâ, quòd placita teneantur in curiâ Christianitatis de advocationibus ecclesiarum et capellarum, vel de laico feodo, vel de catallis, quæ non sunt de testamento, vel matrimonio: vobis mandamus, prohibentes quatenus hujusmodi placita in curiâ Christianitatis nullatenus sequi præsumatis in manifestum dignitatis et coronæ nostræ prejudicium, sciturí pro certo, quòd si feceritis, dedimus in mandatis justitiario nostro Hyberniæ statuta curiæ nostræ in Anglià contra transgressiones hujus mundati nostri cum justitiâ Rot. Patent. 18 H. 3. m. 17. n. 21. H. H. C. L. 180.

---

(4) See Dav. Rep. 32, and 7 Vin. Abr. 180. 185.

(5) Acc. 4 Inst. 358.—So much of the Irish statutes of 40 E. 3, as relates to abolishing the Brehon law, is in Dav. on Ireland, fol. ed. 28. The other heads of these statutes are also given in the same book, p. 44. What were the most exceptionable parts of the Brehon law, or Irish customs, are explained, ibid. 36, in Spens. Irel. 1st ed. 4. and Ware's Antiq. of Ireland, Harris's ed. 69.—[Note 228.]

(1) Some think, that the laws of England were introduced into Ireland before this charter of John, by his father Henry the second. This opinion is strongly enforced by the testimony of an historian of the reign of Henry the third; for Matth. Paris writes, that *rex Henricus, antequam ex Hibernià rediret, apud Lismore concilium congregavit, ubi leges Angliæ sunt ab omnibus gratanter receptæ, et, juratoriâ cautione præstitâ, confirmatæ.* Molyn. Case of Irel. Lond. ed. 20. p. 24, and Matth. Par. ad. ann. 1172. vit. H. 2. ibid. cit. The other authorities to establish the same fact are well collected by Mr. Harris in his edition of Ware's Antiquities of Ireland. See p. 78. See further 1 Lel. Hist. Irel. 76, and Vaugh. 293. Cowp. R. 210.—[Note 229.]

justitiâ procedat, et quòd nostrum est exequatur. In cujus, &c. teste rege apud Winchcomb, 28 *die Octobris, anno regni nostri* 18. *Et mandatum est justitiario Hyberniæ per literas clausas, quòd prædictas literas patentes publicè legi et teneri faciat.*

Rot. Patent. 30 H. 3.

Rex, &c. pro communi utilitate terræ Hyberniæ, et pro unitate terrarum, provisum est, quòd omnes leges et consuetudines, quæ in regno Angliæ tenentur, in Hybernià teneantur, et eadem terra eisdem legibus subjaceat, ac per easdem regatur, sicut Johannes rex, cùm illic esset statuit et firmiter mandavit. Ideo volumus, quòd omnia brevia de communi jure, quæ currunt in Angliâ, similiter currant in Hybernià sub novo sigillo regis. In cujus, &c. teste meipso apud Woodstocke. Wherein it is to be observed, that union of lawes is the best meanes for the unity of countries.

* Tri. 13 E. 1. coram rege in Thesaur. in longo placito. [m] 3 R. 3. 12. in Camera Stellata. 1 H. 7. 3. (4 Inst. 350.)

* *Una at eadem lex esse debet tam in regno Angliæ quàm Hyberniæ.* [m] *Terra Hyberniæ inter se habet parliamentum et omnimodas curias prout in Angliâ, et per idem parliamentum facit leyes et mutat leges, et illi de eâdem terrâ non obligantur per statuta in Angliâ, quia hii non habent milites parliamenti* (2).

By an act of parliament (called *Poyning's* law) holden in *Ireland* in the tenth yeare of *Henry* the seventh, it is enacted, that all statutes made in this realme of *England* before that time, should be of force and be put in use within the realme of *Ireland* (3); which (though it be by way of digression) is not unnecessary for our student to know. But now let us heare our author (4).

CHAP.

---

(2) From citing this passage of the year-book of Richard the Third, according to which English statutes do not bind Ireland, and from this manner of mentioning the same passage in his 12th report, one might infer that lord Coke was of that opinion. 12 Co. 111, 12. But in Calvin's case, referring to the same year-book, he explains it to mean, where Ireland is not *specially named;* and so he states the rule to be in the 4th Institute. 7 Co. Calvin's case, 22. b. 4 Inst. 350, 351. Here also he cites the year-book of 1 Hen. 7, which controls the year-book of R. 3: Lord Coke's explanation in Calvin's case evinces his sentiments more strongly; because Ireland, if considered as quite distinct in government from England, would have been a more apt instance to support his doctrine in favour of the post-nati of Scotland. We do not, however, mean by this to offer any opinion on the controversy about the political connection between England and Ireland. It is a subject of too much importance and delicacy, as well as of too much extent, to be discoursed of in a note. See 6 Geo. 1. c. 5. 22 G. 3. c. 53, and 23 G. 3. c. 28. The first of these statutes asserts the legislative power of Great Britain over Ireland, and also the appellant jurisdiction. By the two latter both are annihilated.† 4 Inst. 201. H. H. C. L. 147.—[Note 229*.]

(3) Irish stat. 10 H. 7. c. 22.

(4) The statute for taking away military tenures leaves the tenure by villenage as it was before; one of the provisoes declaring, that the act shall not be construed to *alter or change any tenure by copy of court-roll, or any services incident thereunto.* 12 Cha. 2. c. 24. s. 7.—[Note 230.]

† *The controversy mentioned by Mr. Hargrave in this note ceased to be a subject of importance in the year* 1801, *when Great Britain and Ireland were, by the joint concurrence of their respective parliaments, united into one kingdom. See* 39 *&* 40 *Geo.* 3. c. 67.

Chap. 12. Of Rents. Sect. 213.

THREE manner of rents there be, that is to say, rent service, rent charge, and rent secke. Rent service is, where the tenant holdeth his land of his lord by fealtie and certaine rent, or by homage fealtie and certaine rent, or by other services and certaine rent. And if rent service at any day, that it ought to be payed, be behinde, the lord may distraine for that of common right.

SOME have divided rents into foure kindes, viz. rent service, rent charge, rent distreynable of common right, (whereof somewhat shall be said in this Chapter) and rent secke.

"*Rent*," in *Latine redditus*, [a] by some *dicitur à redeundo, quia retroit, et quotannis redit.* *And others say it is derived of *reddere*, for that the rent is reserved out of the profits of the land, and is not due till the tenant or lessee take the profits; for *reddendo inde* or *solvendo*, or *reservando inde*, or the like, [b] is as much to say as the tenant or lessee shall pay so much out of the profits of the lands; for *reddere nihil aliud est quàm acceptum aut aliquam partem ejusdem restituere. Seu reddere est quasi retro dare*, and hereof commeth *redditus* for a rent.

[142. a.]

[a] Fleta, lib. 3. ca. 14. Britton, ca. 41. Mirror, ca. 2. sect. 16. Pl. Com. 132. b. * 10 Co. 127. Clun's case.

[b] Pl. Com. 138, 139, &c. in Browning's and Bestling's case. 35 H. 6. 34. Domesday. Statutum de gavilletto, anno 10 E. 2. (Ante 87. b. Post. 144. 2 Ro. Abr. 446.)

Here note for the better understanding of ancient records, statutes, charters, &c. *gabel*, or *gavell*, *gablum*, *gabellum*, *gabellettum*, *galbellettum*, and *gavillettum*, do signifie a rent (1), custome duty, or service, yielded or done to the king or any other lord; as, *Wallingford continet* 276 *hagas, i. e. domos reddentes* 9 *libras de gablo, i. e. de redditu:* and *Oxford hæc urbs reddebat pro theolonio et gablo regi* 20 *l. et sextarios mellis, comiti Alpharo* 10 *libras.* And this is the legall signification thereof (2).

"*Rent*

(1) See acc. ante 140. a. note 4.

(2) But though in old deeds *gavelet* may often signify *rent*, and this use of the word may best agree with its origin, yet it is not the only legal signification. On the contrary, the word is now most usually applied to a remedy or process, peculiar in denomination to Kent and London, by which the lord of the fee, when his tenant is in arrear for rent or service, may force him to pay the arrears and damages by seizing the land, and holding it till payment. In Kent this remedy is founded on immemorial usage; Mr. Robinson learnedly deducing it as well from the general law of fiefs, as from the practice of our Anglo-Saxon ancestors; and the passages cited by another eminent writer, in treating of forfeiture by *cesser*, tending to the same point. Robins. on Gavelk. 243. Wright's Ten. 197. The *gavelet*, thus prevailing by the custom of Kent, may be used whether there is a sufficient distress on the land or not, but is restricted to gavelkind tenure. Robins. on Gavelk. 243. To London a writ of the same denomination was given for rent service *generally* by the 10 of Edward the second, which is therefore called the statute of *gavelet*. But by the words of the statute this latter *gavelet* only lies where the lord cannot obtain payment by distress. From this account of the *gavelet* in Kent and London

"*Rent service.*" It is called a rent service, because it hath some corporall service incident unto it, which at least is fealty, as here it appeareth.

Vide Sect. 218. (Ante 47. a.)

"*His land.*" [c] A rent service cannot be reserved out of any

[c] 44 E. 3. 45. 5 Co. 4. Seignior Mountjoye's case. 9 Ass. 24. 30 Ass. 5. 17 E. 3. 75. 7 Co. 23. Butt's case. Pl. Com. 139.

inheritance

London, it appears that Sir Henry Spelman was well justified, when, after giving the etymon of *gavelet*, and describing it sometimes to signify the tenure of *gavelkind*, he adds, *gaveletum juris etiam processus est huic dicatus tenuræ, casu quo tenens redditus & servitia ultra modum subducit; quod et Londoniensibus ceditur statuto an.* 10 *Edwardi* 2, *de gaveleto.* Spelm. Gloss. voc. *Gaveletum.* We take notice of this passage from Spelman, because the learned and ingenious observer on our ancient statutes seems to have misunderstood the *gavelet* thus described; for though the word originally imported *rent*, yet our explanation shows that it also means *a process for the recovery of rent*, technically called *gavelet*, both in Kent and London. See Barr. on Ant. Stat. 2d ed. 149.—Besides the two remedies thus called *gavelet*, there is another very similar one for rent-service in all parts of the kingdom; and this is the writ of *cessavit*, which is regulated by, if it did not wholly originate from, the statutes of Gloucester and Westminster the second. 6 E. 1. c. 4. 13 E. 1. st. 1, c. 21. 41. But lord Coke, in his comment on the statute of Gloucester, mentions his having read the record of the proceedings on a *cessavit* in the reign of king John. 2 Inst. 295. Yet this seems strange, because, in the reign of this prince, the lord of the fee had a much more easy way of recovering his tenant's land for default of service, than by a *cessavit* in the court of the king; namely, a distress of the land by a process of seizure in his own court. The latter mode continued till the 52 of Hen. 3, took it away, by prohibiting distress of the freehold except by the king's writ, and so leaving the tenant's chattels as the only subject for the lord's distress. It was this alteration of the old law, which, as we apprehend, gave occasion to introducing the *cessavit* by the statutes of Gloucester and Westminster; nor at the utmost can we account for an earlier use of the *cessavit* than the 52 of Hen. 3. Perhaps, therefore, lord Coke's case of king John was nothing more than a process of *cesser* in the lord's court, and he might only call it a *cessavit* by reason of the resemblance between the proceedings on the writ of *cessavit* in the king's court, and those on the process of *cessavit* in the court of the lord.—These remedies of *gavelet* and *cessavit* are now fallen wholly into disuse, Mr. Lambard, not remembering an instance of resorting to the customary *gavelet* of Kent in his time, and the cases in our books on both the *gavelets* and the *cessavit* being all of ancient date; from which it may be presumed, that distress of the tenant's good is now usually a very sufficient, or at least a preferable remedy. Lamb. Perambulat. ed. 1596, p. 554. Nor whilst the others continued in use, were they applicable, except when the tenure was in fee. Booth on Real Act. 133. But in imitation of them, it hath long been the practice to reserve a power of re-entry for non-payment of rent on granting leases for lives or years: and the legislature have also interposed against lessees, as well to obviate the difficulty from the niceties of an entry for forfeiture at common law, by enabling landlords to recover possession by ejectment in a special manner, as to qualify and prevent an abuse of the tenant's remedy of injunction in equity. 4 Geo. 2. c. 28. Further, on a like principle of convenience, a summary jurisdiction is given to justices of the peace, enabling them to restore the possession to the landlord, where the tenant deserts the premises in lease, without leaving a sufficient distress. 11 G. 2. c. 19. See further as to the *cessavit* and other remedies for substraction of services, 3 Blackst. Comm. 8th ed. 230.—[N. 231.]

inheritance but such as is manurable, whereinto the lord may enter and take a distresse, as in lands and tenements, reversions, remainders, and, as some have said, out of the herbage of lands, and regularly not out of any inheritances incorporeall, or that lye in grant. [d] By act of law one rent or service may issue out of another; as if *A.* before the statute of *quia emptores terrarum* had given lands to *B.* to hold to him by fealty and ten shillings rent, and *B.* had made a feoffment in fee to C. &c. whereby there was a mesnalty created; in this case *C.* should hold of B. either by the same services the law created, or such as he specially reserved, and *B.* did by operation of law hold those services of *A.* by fealty and ten shillings rent, that is to say, by rent and service out of rent and service; and if the rent be behinde, the lord paramount may distraine upon the land for his rent, for both mesnalty and seigniory do issue out of the land, the mesnalty immediately, and the seigniory mediately, which is worthy of due consideration and observation.

[d] 8 H. 6. 21. 5 H. 7. 36. 21 H. 7. 39. 1 H. 4. 82. 10 H. 6. 12. 19 E. 3. tit. Gard. 40. 21 H. 6. 11.

"*Certaine rent.*" [e] For the rent must be certaine, or which may be reduced to a certainty; for *id certum est, quod certum reddi potest.* [f] *Continetur carta reddendo inde annuatim ad tales terminos, vel faciendo inde talia servitia, vel tales consuetudines, quæ omnia debent esse certa et in chartâ expressa, &c.* But of this I have spoken Sect. 136. And the rent may as well be in delivery of hens, capons, roses, spurres, bowes, shafts, horses, hawkes, pepper, comine, wheat, or other profit that lyeth in render, office, attendance, and such like, as in payment of money. [g] But a man upon his feoffment or conveyance cannot reserve to him parcell of the annuall profits themselves, as to reserve the vesture or herbage of the land or the like (3), for that should be repugnant to the grant: *non debet enim esse reservatio de proficuis ipsis, quia ea concedunter, sed de redditu novo extra proficua.*

[e] Britton, fol. 100. a. (Ante 96. a.)
[f] Fleta, lib. 3. ca. 14. (Ante 91. b.)
[g] 38 H. 6. 38. a. (Ante 47. a. 4. b.)

"*May destraine for that.*" For where there is a fealty, &c. incident to the rent, there is a distresse incident also thereunto. [h] But it is to be understood, that for a rent or service, the lord cannot distreine in the night, but in the day time: and so it is of a rent charge. But for damage feasant one may distreine in the night, otherwise it may be the beasts will be gone before he can take them.

[h] Mirror, ca. 2. sect. 16. 10 E. 3. Avowry, 137, 11 H. 7. 5.

"*Of common right.*" Of common right, [i] that is, by the common law, so called, because the common law is the best and most common birth-right, that the subject hath for the safeguard and defence, not only of his goods, lands and revenues, but of his wife and children, his body, fame, and life also. So as the meaning of *Littleton* in this particular case is, that the lord may distreine for his rent of common right, that is, by the common law, without any particular reservation or provision of the party. And it is to be observed, that the common law of *England* sometimes is called right, sometimes common right, and sometimes *communis justitia.* In the grand charter the common law is called right. *Rectum nulli vendemus, nulli negabimus, aut differemus justitiam*

[i] W. 1. ca. 1. 2 H. 4. ca. 1. 7 H. 4. ca. 1. 4 H. 8. ca. 8.

(3) See Bro. Abr. *Reservation,* 46. D. & Stud. dial. 2. c. 22.

justitiam vel rectum. In the statute of *W.* 1. c. 1. it is called *common droit. En primes voet le roy, et commande, que le peace des. eglise et de la terre soit bien garde et maintain en touts points, et que common droit soit fait a touts, auxibien aux poers come aux riches, sauns regard de nulluy;* which agreeth with the ancient law in the time of King *Edgar. Porro autem has populo quas servet proponimus leges. Primùm publici juris beneficio quisquam fruitur, idque ex æquo et bono, sive is dives sive inops fuerit, jus reddit.* And *Fleta* saith, *Item quod pax ecclesiæ et terræ inviolabiliter observetur, et quòd communis justitia singulis puriter exhibeatur.* And all the commissions and charters for execution of justice are, *facturi quod ad justitiam pertinet secundum legem et consuetudinem Angliæ.* So as in truth justice is the daughter of the law, for the law bringeth her forth. And in this sense ☞ being largely taken, as well the statutes and customes of the realme, as that which is properly the common law, is included with *common right.* *Littleton* in this his treaties nameth *common right* sixe times.

Lamb. fo. 78. inter Leges Regis Edgari.

Fleta, lib. 1. c. 29.

Vide Sect. 214. 216. 226. 252. 331.

[142. b.]

Sect. 214.

AND if a man will give lands or tenements to another in the taile, yielding to him certaine rent by the yeare (1), *he of common right may distraine for the rent behind, though that such gift was made without deed, because that such rent is rent service. In the same manner it is, if a lease be made to a man for life, or the life of another* (2), *rendering to the lessor certaine rent, or for tearme of yeares rendering rent.*

35 H. 6. 34. (Cro. Elis. 33. Post. 225. b.)

"*WITHOUT deed.*" For it is a rule in law, that a rent service may be reserved without deed.

Vide Sect. 131, 132. (Ante 57. b. 141. b.)

"*In the same manner it is if a lease be made, &c.*" For these be rents services, because fealty is incident to these rents; for (as it hath been said before) a lessee for life or years shall do fealty. And if a man make a lease at will reserving a rent, the lessee shall not do fealty, and yet the lessor shall distreine for the rent of common right.

"*Rendering,*" commeth of the word *reddo, i. e. rem pro re dare,* and signifieth yielding, or repaying; but of this I have spoken before in this Chapter, Sect. 213.

Sect. 215.

BUT in such case, where a man upon such a gift or lease will reserve to him a rent service, it behoveth, that the reversion of the lands and tenements be in the donor or lessor. For if a man will make a feoffment in

(1) *by the yeare* not in L. and M. nor Roh. but in P. and Red.
(2) *or the line of another* not in L. and M. nor Roh. but in P. and Red.

in fee, or will give lands in taile, the remainder over in fee simple, without deed, reserving to him a certaine rent, this reservation is void, for that no reversion remaines in the donor, and such tenant holds his land immediately of the lord, of whom his donor held, &c.

"REVERSION," *Reversio*, commeth of the *Latine* word *revertor*, and signifieth a returning againe; and therefore *reversio terræ est tanquam terra revertens in possessione donatori, sive hæredibus suis, post donum finitum, &c.* as in the cases that *Littleton* here hath put. (Ante 22. b. Plowd. 151. a. 162. a. Cro. Cha. 400. 548. 2 Ro. Abr. 60.)

"*It behoveth, that the reversion, &c. be in the donor or lessor, &c.*" This is not to be understood only of a reversion immediately expectant upon the gift or lease. For if a man maketh a gift in tayle, the remainder in tayle, reserving a rent, and keepe the reversion in himselfe, this is a rent service. (Ante 47 a.)

[143. a.] "*Reserving.*" *Reserve* commeth of the *Latine* word *reservo*, that is, to provide for store; as when a man departeth with his land, he reserveth or provideth for himselfe a rent for his owne livelihood, And sometime it hath the force of *saving* or *excepting*. So as [*k*] sometime it serveth to reserve a new thing, viz. a rent, and [*l*] sometime to except part of the thing in *esse* that is granted (1). [*k*] 8 E. 4. 48. 26 Ass. pl. 66. (Ant. 47. a.) [*l*] 35 H. 6. 34. (Post. 317. a.)

And it is to be understood, that in the case of the gift in taile, lease for life or years, the fealtie is an incident inseparable to the reversion, so as the donor or lessor cannot grant the reversion over, and save to himselfe the fealty, or such like service. But the rent he may except; because the rent, although it be incident to the reversion, yet it is not inseparably incident. If a man maketh a gift in taile without any reservation, the donee shall hold of the donor by the same services that he held over. (Ant. 23. a.)

[*m*] But otherwise it is of an estate for life or years; for there if he reserveth nothing, he shall have fealty onely, which is an incident inseparable to the reversion, as hath been said. [*m*] Litt. fo. 4. Old Tenures, 5. 38 E. 3. 7. 33 H. 6. 7.

"*The remainder over in fee simple without deed.*" Here it appeareth, that if a man maketh a gift in taile, the remainder in fee, without deed [*n*], the remainder is good, and passeth out of the donor by the livery of seisin: and so it is of a lease for life or yeares, the remainder over in fee; for the particular estate and the remainder, to many intents and purposes, make but one estate in judgment of law. *Vide Sect.* 60. [*n*] 40 E. 3. 10. 10 E. 4. 1. 12 E. 4. 16. 15 E. 4. 18. 18 E. 4. 12. 18 H. 8. 4. 3 H. 7. 13.

"*Remainder,*" in legall Latine, is *remanere*, coming of the Latine worde F. N. B. 219. 11 H. 4. 39. 38 E. 3. 36. 44 E. 3. 8. (Ant. 49. b.)

---

(1) In a preceding note lord Coke asserts, that reservation is *always* of a thing newly created out of the land demised. Ante 47. a. But here he is more qualified in expression, and allows the word to be *sometimes* used to *except* part of the thing granted. However, the former is the more technical use of the word; *exception* being a more proper term than *reservation* for the latter purpose. The learning on this subject will be found under the title *Reservation* in Viner's Abridgment. See Plowd. 361. a.—[Note 232.]

[o] 2 Co. 51. Cholmelie's case. (Ant. 49. a. Plowd. 25. a. 35. a.)

worde *remaneo;* for that [o]it is a remainder or remnant of an estate in lands or tenements, expectant upon a particular estate created together with the same at one time, as in the cases here of *Littleton* appeareth (2).

Sect. 216.

AND this is by force of the statute of quia emptores terrarum. *For before that statute, if a man had made a feoffment in fee simple, by deed or without deed, yielding to him and to his heires a certaine rent, this was a rent service, and for this he might have distrained of common right; and if there were no reservation of any rent, nor of any service, yet the feoffee held of the feoffor by the same service, as the feoffor did hold over of his lord next paramont.*

(2 Inst. 500. Ant. 98. b.)

"*QUIA emptores terrarum.*" Hereof is spoken before in the Chapter of *Frankalmoigne, Sect.* 140.

(Ant. 142. b.)

"*By deed or without deed, &c.*" For all rent services may be reserved without deed (as hath been said), and as it appeareth here.

And at the common law if a man had made a feoffment in fee by parol, he might upon that feoffment have reserved a rent to him and his heires; because it was a rent-service, and a tenure thereby created.

(Dy. 146. b. Ant. 23. a.)

"*And if there were no reservation, &c. the feoffee held of the feoffor by the same service, &c.*" This is evident, and agreeth with our bookes [*], that in this case the law created the tenure; wherein it is to be observed, how the law regardeth equitie and equalitie, without any provision or reservation of the party.

[*] Britton, fol. 100. 2 E. 3. 33. 25 E. 3. Gard. 21. 49 E. 3. 10. 22 Ass pl. 53. 7 H. 4. 14. 23 E. 3. Avowrie, 255. 4 H. 6. Littl. cap. Taile, Sect. †.

Ipsæ etenim leges cupiunt, ut jure regantur.

☞ Sect. 217. [143. b.]

BUT if a man, by deed indented, at this day maketh such a gift in fee taile (1), *the remainder over in fee; or a lease for life, the remainder over in fee; or a feoffment in fee; and by the same indenture he reserveth to him and to his heires a certaine rent, and that if the rent be behind, it shall be lawfull for him and his heires to distreine, &c. such a rent is a rent charge; because such lands or tenements are charged with such distresse by force of the writing only, and not of common right. And if such a man, upon a deed indented, reserve to him and to his heires a certaine rent, without any such clause put in*

† *Probably Sect.* 19.

(2) See Fearne's Ess. on Conting. Rem. 3d ed. p. 5 to 11.
(1) *fee* not in L. and M. Roh. and Redm.

in the deed, that he may distreine, then such rent is rent secke; for that he cannot come to have the rent, if it be denied by way of distresse; and if in this case he were never seised of the rent, he is without remedie, as shall be said hereafter (2).

"*BY deed indented.*" It cannot be a deed indented unlesse it be actually indented; for albeit the words of the deed be *hæc indentura, &c.* yet if it be not indented indeed, it is no indenture. But if the deed be indented, albeit the words of the deed be not *hæc indentura*, yet it is an indenture (3).

Britton, fol. 100. Fleta, lib. 3. ca. 14. Vide. Sect. 370. Post. 229. a. (5 Co. 20. b. 2 Ro. Abr. 22. 3 Leon. 16. 2 Inst. 672.)

And it is holden that [*p*] if a feoffment in fee be made by deed poll reserving a rent, this reservation is good; for when the feoffee accepts the deed and livery of the land, he agreeth to the rent, and the rent is reserved by the words of the feoffor, and not by the grant of the feoffee. But of this more hereafter. In the mean time it is to be noted, that of ancient time a deed indented was called *charta cyrographata* (4); or *charta-communis*, because each party had a part. And a deed poll was called *charta de unâ parte.* [*q*] *Chartæ autem de purâ donatione et simplici penès donatorium et ejus hæredes debent remanere. Communes verò duplicari debent, ita quòd quilibet habeat partem suam; vel si una sit tantùm, tunc in æquâ manu communis amici utriusque ponatur, salvo custodienda, dum cuilibet partium necesse fuerit exhibendum.*

[p] 8 E. 4. 8. 11 H. 7. 22. 35 H. 6. 34. 20 E. 4. 13. 17 E. 3. 12 H. 4. 17. (2 Ro. Abr. 449.)

[q] Fleta, lib. 3. ca. 14. Britton, fol. 100.

"*Reserveth to him.*" [*r*] Note, it is a maxime in law, that the rent must be reserved to him from whom the state of the land

[r] 12 E. 2. Feoffments, 8. 18 E. 2. Ass. 381. (Ant. 47. a. 2 Ro. Abr. 447. Cro. Cha. 289.

moveth,

---

(2) See post. Sect. 341.

(3) The *indenting* or cutting *in modum dentium*, which is usually at the top, ever supposes two parts, being made in order that the parts when joined may be authenticated by the sameness of the cutting. See as to the use and origin of indenting charters in England, Mad. Formular. Anglican. p. 28, 29, of the dissertation prefixed.—[Note 233.]

(4) Mr. Madox objects to lord Coke's treating the *chirographum* as altogether the same thing with the *indenture*; because anciently many *chirographa* were not *indented*, but cut in rectilinear form. Mad. Formul. Anglic. Dissert. p. 29. In fact the name of *chirograph* properly belonged to those deeds, which were at first of two parts written on the same paper or parchment, with the word *chirographum* in capital letters between the two parts, and were afterwards divided by a cut through the middle of those letters; and thus whether the cutting was *indented* or in a straight line, such deeds were equally *chirographa*. Ibid 28, 29. Gangii Gloss. voce *chirographa*. Spelm. Gloss. voce *indentura*. Mabill. de Re Diplomat. lib. 1. c. 2. Some indeed apply this explanation to the *syngrapha*, and only describe the *chirographa* as deeds of one part, and so called from being written with the party's own hand. Lyndw. tit de Offic. Archidiac. c. 1. in not. But the same persons allow that *sometimes syngrapha*, and *chirographa* are used promiscuously; and in the opinion of others, they are more commonly so applied. Ibid. & Mad. ubi supra. Both the *chirograph* and the *indenture*, then, usually importing to be a deed of two parts, they are so far the same; and we do not apprehend that lord Coke meant to carry the resemblance farther. Consequently he is not affected by Mr. Madox's observation, which seems to suppose, though too hastily, that lord Coke had considered the *chirograph* and the *indenture* as wholly the same.—[Note 233.]

[s] 35 H. 6. 36. (2 Ro. Abr. 447. 425. Mo. 93. 168.)

moveth, and not to a stranger. [s] But some do hold, that otherwise it is in the case of the king.

Old Tenures. Britton, cap. 66. 164. F. N. B. 210. Bract. 86.

"*Such a rent is a rent charge.*" It is called a rent charge because the land for payment thereof is charged with a distresse. If it be to the whole value of the land, or to the fourth part of the value, then the rent is called a fee farme (5). Here *Littleton* putteth his case, and so did he in the next Section before, of a clause of distresse generally granted. [t] A man granted a rent out of certain land, *pro consilio impenso et impendendo*, to have and to hold to him and to his assignees for terme of his life, payable at four feasts in the yeare, and for default of payment upon demand it should be lawfull for him to distrayne; the grantee granted the rent over; the assignee after one of the dayes demanded the rent, and distreyned, and the distresse adjudged lawfull; for he needs not make a demand at any of the dayes, as in the case of re-entry, but

[144. a.]

[t] 7 Co. 28. b. Maund's case. H. 43 El. in Com. Banco, Rot. 1108. inter Maund. & Gregory. M. 40 & 41 El. in Com. Banco, inter Stanly & Read.

18 El. Dyer, 348. (Hut 23. 42. Post. 153. b. 2 Ro. Abr. 326. Dy. 2. Post. 202. a. 204. a. Dy. 51. Plowd. 7. Perk. s. 101. Mo. 5. March 149.) (Vide Sect. 221. Ant. 47. a.)

he

(5) The true meaning of *fee-farm* is a perpetual farm or rent; the name being founded on the *perpetuity* of the rent or service, not on the *quantum*. See Mad. Firm. Burg. 3. Here indeed lord Coke seems to intimate the contrary, by confining the denomination of *fee-farm* to rents at least equal to the fourth part of the value of the land; and the word is explained in a like manner by sir Henry Spelman, and the author of the book of *Old Tenures*, with this difference only, that the latter restricts the value to a *third*. See Spelm. Gloss. voce *Feodi-firma* and Old Ten. tit. *Fee-firme*. But it would be wrong to understand any of these writers, as intending *absolutely* and *universally* to exclude all rents of *less* value; for the word *fee-farm* most certainly imports every rent or service, whatever the *quantum* may be which is reserved on a grant in fee; and so lord Coke himself agrees in another work, citing Britton and other books or authorities. 2 Inst. 44. Britt. 164. b. The sometimes confining the term of *fee-farm* to rents of a certain value probably arose, partly from the statute of Gloucester which gives the *cessavit* only where the rent amounts to one fourth of the value of the land, and partly from its being most usual on grants in *fee-farm* not to reserve less than a third or fourth of such value. See 6 E. 1. c. 4. F. N. B. 210. C. Ant. 142. a. note 2.—After the statute of *quia emptores*, granting in fee-farm, except by the king, became impracticable; because the grantor parting with the fee is by operation of that statute without any reversion, and without a reversion there cannot be a rent service, as Littleton himself writes in Section 216. Yet I have seen a modern grant in fee of a large estate in Ireland reserving a perpetual rent of great value. But such rent, considered as a fee-farm rent, I thought clearly void. However, as in the case I allude to the conveyance contained a power for the grantor and his heirs and assigns to distrain for the rent when in arrear, and also a power to enter and receive the profits till all arrears should be paid, the rent might be good as a rent-charge; and so on being consulted I held it to be.—Since writing the preceding part of this note, a most valuable collection of new Reports has been published; and in one of the cases, the learned reporter has given a note relative to fee-farm rents, which well deserves attention. See the case of Bradbury *v.* Wright, in Mr. Douglas's Rep. of Ca. in. B. R. 602. However, I so far differ from the last-mentioned note, as to continue of opinion that the term of *fee-farm* is not properly applicable to any rents except *rents service*.—[Note 235.]

he may demand it when he will, for it is only to entitle him to his remedy for his meere duty (1).

"*Distreine, &c.*" Here by (*&c.*) is implyed what things are distreynable, which elsewhere is expressed at large. Also where the distresse is to be taken in the same land, and in some other, which with many differences is set downe in his proper place.

"*He is without remedie.*" Note, that upon a reservation of a rent upon a feoffment in fee by deed indented, [*w*] the feoffor shall not have a writ of annuity, because the words of reservation, as *reddendo, solvendo, faciendo, tenendo, reservando, &c.* are the words of the feoffor, and not of the feoffee, albeit the feoffee by acceptance of the estate is bound thereby. (Post. 204. a.) [w] 33 E. 3. Annuity, 52. 1 H. 4, 5. 26 Ass. pl. 66. 21 E. 4. (1 Ro. Abr. 226.)

And where *Littleton* putteth his case, when a reservation is made upon an estate that passeth by livery, the same law it is, if a man at this day doe bargaine and sell his land by deed indented and inrolled according to the statute, a rent may be reserved thereupon; for albeit an use had onely passed by the common law, yet now by the statute of 27 *H.* 8. cap. 10, the use and possession passe together, and so it was adjudged. 10 Co. 127. 2 Co. 54. a. 2 Roll. 448.

* And so it is of a grant of a reversion or remainder, and any other conveyance of lands or tenements, whereby any estate doth passe. * Mich. 39 & 40 El. in Com. Banco, inter Wicks & Tillard.

Sect. 218.

ALSO, if a man seised of certaine land grant, by a deed poll, or by indenture, a yearely rent to be issuing out of the same land, to another in fee, or in fee taile, or for terme of life, &c. with a clause of distresse, &c. then this is a rent charge; and if the grant be without clause of distress, then it is a rent secke. And note, that rent secke idem est quod redditus siccus; *for that no distresse is incident unto it.*

"*SEISED of land.*" [*x*] Note, that a rent cannot be granted out of a pischary, a common, an advowson, or such like incorporeal inheritances, but out of lands or tenements whereunto the grantee may have recourse to distreyne, or which may be put in view to the recognitors of an assize, as hath beene said before in this chapter. And though it be out of lands or tenements, [*z*] yet it must be out of an estate that passeth by the conveyance (as by all *Littleton's* examples appeareth), and not out of a right: as if the disseisee release to the disseisor of land, reserving a rent, the reservation is void, *et sic de similibus.* [x] 32 E. 3. tit. Scir. Fac. 100. 40 E. 3. Pl. Com. 139. (Ant. 47. a. 142. a. Vaugh. 202. 204.) Vide Sect. 213. [z] 10 E. 4. 3. b. 33 H. 6. 5. 50 E. 3. 9. 8 E. 4. 8. 5 E. 3. Fines, 1. 9 E. 3. 7. 46 E. 3. 27.

"*Grant by deed.*" * Also a man may have a rent by prescription. 21 H. 6. 8. Temp. E. 1. Ass. 42. * 19 E. 3. Title, 34.

"*Rent secke idem est quod redditus siccus.*" This needs no explanation, for *Littleton* expounds it himselfe. (Ant. 114. a. 6 Co. 58.)

Sect.

(1) See farther as to this difference between a re-entry to avoid an estate and an entry to distrain, the second point in Maund's case above cited, and Gilb. on Rents, 73.

☞ Sect. 219. [144. b.]

ALSO, if a man grant by his deed a rent charge to another, and the rent is behind, the grantee may chuse, whether he will sue a writ of annuity for this against the grantor, or distreine for the rent behinde, and the distresse detaine until he be payd. But he cannot do, or have, both together, &c. For if he recovers by a writ of annuity, then the land is discharged of the distress, &c. And if he doth not sue a writ of annuity, but distreine for the arrearages, and the tenant sueth his replevin, (son replegiare), *and then the grantee avow the taking of the distresse in the land in a court of record, then is the land charged, and the person of the grantor discharged of the action of annuity.*

(7 Co. 24. 1 Ro. Ab. 227.)

"*RENT charge.*" Here it appeareth by *Littleton*, that this *primâ facie* is a rent charge, whereof in this chapter shall be spoken more at large.

And so it is of a rent secke.

"*A man grant.*" Put case, that *A.* be seised of lands in fee, and he and *B.* grant a rent charge to one in fee, this *primâ facie* is the grant of *A.* and the confirmation of *B.* but yet the grantee may have a writ of annuity against both. [*a*] Two men grant an annuity of twenty pounds *per annum* to another, although the persons be severall, yet he shall have but one annuity. But if the grant be *obligamus nos, et utrumque nostrum*, the grantee may have a writ of annuity against either of them; but he shall have but one satisfaction.

[*b*] 16 E. 2. tit. Annuity, 47. Vide Sect. 314. (5 Co. 86. 1 Ro. Abr. 895. Hob. 59. Plowd. 439.)

"*A writ of annuity,*" is a writ for the recovery of an annuity. [*b*] An annuity is a yearly payment of a certaine summe of money granted to another in fee for life or yeares, charging the person of the grantor onely. [*c*] But not only the grantee, but his heire and his and their grantee (1), also shall have a writ of annuity. [*d*] But if a rent charge be granted to a man and his heires, he shall not have a writ of annuity against the heire of the grantor,

[*b*] Doct. & Stud. ca. 3. 17 El. Dyer, 344. b. 45 E. 3. Executor, 72. (Finch's Law, 301. F. N. B. 152. a.)

[*c*] 3 E. 6. Dyer, 65. And Sergeante Bendloes reporteth, that so was the opinion of the Court. [*d*] 2 H. 4. 13. Dyer, 17 Eliz. 344. b. (10 Co. 128. Hob. 58. Plowd. 457. a. 1 Ro. Abr. 226.)

(1) Formerly it was doubted, whether an annuity was assignable, though *assigns* were mentioned in the grant; the argument being, that it was a mere personal contract, and therefore a *chose in action*. See the cases in 2 Vin. Abr. 515. and 3 Vin. Abr. 151. But in a case in C. B. 3 Cha. 1. this objection, which in strictness of law carried force with it, was overruled. Gerrard v. Boden, Hetl. 80. It seems too, that naming *assigns* is not essential to the making an annuity assignable, the principle of the objection to its being so being the same whether *assigns* are mentioned or omitted. However, Perkins, in the special case of an annuity *pro consilio impendendo* requires naming of *assigns*. Perk. s. 101. Even then too he questions the annuity being assignable. But this was settled in Maund's case, 7 Co. 28. b. one point resolved being, that express words would make such annuity assignable.—[N. 236.]

grantor, albeit he hath assets, unless the grant be for him and his heires (2).

"May chuse." The grantee hath election to bring a writ of annuity, and charging the person onely to make it personall; or to distraine upon the land, and to make it reall.

But if a man grant a rent charge to a man and his heires, and *dieth, and his wife bring a writ of dower against the heire, the heire in barre of her dower claimes the same to be an annuity and no rent charge; yet the wife shall recover her dower; for he cannot determine his election by claime, but by suing of a writ of annuity (as *Littleton* saith), neither can the heir have after the endowment an annuity for the two parts; for that should not be according to the deed of grant, for either the whole must be a rent charge, or the whole an annuity. But *Littleton* is to be understood with some limitation: [e] for of a rent granted for owelty of partition, a writ of annuity doth not lie, because it is of the nature of the land descended. Also of such a rent as may be granted without a deed a writ of annuitie doth not lie, though it be granted by deed.

(1 Co. 86. and Mo. 83.)

[e] 29 Ass. p. 23.

[145. a.]

[f] And here it is to be noted, that there is no election given of two severall things, as if the grant were of an annuitie or a robe yearely, &c. for there the grantor hath election at the day to deliver which he would. But here are two remedies given for one yearly summe, and consequently the grantee shall at any time have election to take which of the remedies he will; for in all cases where severall remedies be given, the party to whom the law giveth the remedies, it giveth him withall election to take which of the remedies he will.

[f] Sir Rowland Heyward's case. 2 Co. 36. 28 E. 3. 98. 41 E. 3. 10. a. 2 H. 4. 12. 6 H. 4. 10. 36 H. 6. 10. 9 E. 4. 46. 21 E. 4. 55. b. 1 E. 5. 1. F. N. B. 121. (Plowd. 439. Post. 310. b. 1 Ro. Abr. 446, 447. 725. Hob. 58.)

"But he cannot do, or have, both together." For then he should recover one thing twice, which should be a double charge to the grantor.

Note, as to elections, these diversities following: (1)

2 Co. 36, 37. in Sir Rowland Heyward's case.

First, when nothing passeth to the feoffee or grantee before election to have the one thing or the other, there the election ought to be made in the life of the parties, and the heir or executor cannot make election. But when an estate or interest passes immediately to the feoffee, donee, or grantee, there election may be made by them, or by their heirs or executors.

Secondly, when one and the same thing passeth to the donee or

* *The words,* the grantee of the rent charge, *seem to be here requisite to the sense of the passage. See Mr. Ritso's Intr. p.* 115, 116.

(2) The reason is, because our law presumes, that it is not intended to include the heir in the obligation, where he is not named; and consequently, in the case supposed by lord Coke, it is too late to elect to make the rent-charge an annuity after the death of the grantor. See post. 383. b. 384. b. 386. a. 10 Co. 128. a. Vin. Abr. *Annuity*, B. But this reasoning fails in application, if the grantor of the annuity is a body politic, and as such hath perpetual continuance. Therefore an annuity granted by the king will bind his heirs and successors, though not named, his political capacity never dying, but having continuance in his successor; and so it was adjudged the 15th of Elizabeth in sir Thomas Wroth's case. Plowd. 455.—[Note 237.]

(1) Lord Coke extracts the six following rules concerning election *verbatim* from his own Reports. See 2 Co. 36. b.

or grantee, and the donee or grantee hath election in what manner or degree he will take this, there the interest passeth immediately, and the partie, his heires, or executors, may make election when they will.

Thirdly, when election is given to severall persons, there the first election made by any of the persons shall stand.

(1 Ro. Abr. 725. Ant. 46. b. Plowd. 6. Post. 146. a. Hob. 174.) *9 E. 4. 36. b. 13 E. 4. 4. b. L. 5. E. 4. 6. b. 11 E. 3. an. 27. 11 Ass. p. 8. 29 Ass. 55. 3 E. 3. tit. Ass. 175. 43 E. 3. tit. Barre, 194. (5 Co. 25. 41.) [g] 2 H. 7. 23. a.

Fourthly, in case an election be given of two severall things, alwaies he, which is the first agent, and which ought to do the first act, shall have the election. As if a man granteth a rent of twentie shillings or a robe to one and to his heires, the grantor shall have the election; for he is the first agent, by payment of the one, or deliverie of the other. So if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election *causâ qua supra*. And with this agree the bookes in the *margent. [g] But if I give unto you one of my horses in my stable, there you shall have the election; for you shall be the first agent by taking or seisure of one of them. And if one grant to another twentie loads of hasill or twentie loads of maple to be taken in his wood of *D.* there the grantee shall have election; for he ought to do the first act, *scil.* to fell and take the same.

Fifthly, when the thing granted is of things annuall, and are to have continuance, there the election remaineth to the grantor, (in case where the law giveth to him election) as well after the day, as before. Otherwise it is when the things are to be performed, *unicâ vice*. And therefore if I grant to another for life an annuitie or a robe at the feast of Easter, and both are behind, the grantee ought to bring his writ of annuitie in the disjunctive; for if he bring his writ of annuitie for the one onely, and recover, this judgment shall determine his† election for ever; for he shall never have a writ of annuitie afterwards, but a *scire facias* upon the said judgement. Which reason, *Fitzherbert*, in his *Natura Brevium* (2), not observing, held an opinion to the contrarie. But if I contract with you to pay unto you twentie shillings or a robe at the feast of Easter, after the feast you may bring an action of debt for the one or for the other.

(Ant. 90. b.) 6 Co. 45.)

9 E. 4. 36. 13 E. 4. 4. and the other above-said bookes.

Sixthly, the feoffee by his act and wrong may lose his election, and give the same to the feoffor. As if one infeoffe another of two acres, to have and to hold the one for life, and the other in taile, and he before election maketh a feoffment of both; in this case, the feoffor shall enter into which of them he will, for the act and wrong of the feoffee (3).

(Plowd. 6. 1 Ro. Abr. 726.)

"If he recovers by a writ of annuity, then the land is discharged of the distress." Here is to be observed, that this determination of the election of the grantee must be by action or suit in court of record; [h] for albeit the grantee distreine for the rent, yet he may bring a writ of annuitie and discharge the land. And *Littleton* putteth his case here surely upon a recoverie in a writ of annuitie. [i] But if the grantee doth bring a writ of annuitie, and

[h] 17 El. Dyer, 344. b.

[i] F. N. B. 152. A. 5 H. 7. 33. b.

† *Should it not be* my *instead of* his? *See Mr. Ritso's Intr. p.* 118.

(2) See F. N. B. 152. G.

(3) But if the grant be to hold one acre for life and the other in fee, and donee makes feoffment of *one* acre only, it is an election to have the fee of that; and this being lawful nothing is forfeited. Perk. s. 78. Plowd. 6. b. —[Note 238.]

and at the returne thereof appeare and count, this is a determination of his election in a court of record, albeit he never proceedeth any further. [k] As if a wife be endowed *ex assensu patris*, and the husband dieth, the wife hath election either to have her dower at the common law or *ex assensu patris* (4); if she bring a writ of dower at the common law, and count, albeit she recover not, yet shall she never after claime her dower *ex assensu patris*.

[k] 12 E. 2. Dower, 158.

[l] So if the grantee bring an assise for the rent, and make his plaint, he shall never after bring a writ of annuitie. But the purchasing of a writ of annuitie, and entrie of it in court of record, or of an assise, is no determination of the election; because an estranger may purchase a writ in the name of the grantee, and enter it of record: but if the grantee appeare thereunto, &c. then this doth amount to a determination of his election, as hath been said.

[l] 10 E. 4. 17.

[145. b.] ☞ "*His replevin* (son replegiare)." *Littleton* spake immediately before of *a writ of annuity*, but here he saith *his replevin*; because goods may be replevied two manner of wayes, viz. by writ, and that is by the common law, or by the pleint, and that is by the statutes for the more speedy having againe of the cattell and goods. A *replegiare* lyeth, as *Littleton* here teacheth us, where goods are distreined and impounded, the owner of the goods may have a writ *de replegiari facias*, whereby the sherife is commanded, taking sureties in that behalfe, to redeliver the goods distreined to the owner, or upon complaint made to the sherife he ought to make a replevy in the [county]. *Replegiare* is compounded of *re* and *plegiare*, as much as to say, as to redeliver upon pledges or sureties; and in the statute of *Marlebridge*, *deliberare* is used for *replegiare*. [m] And the sherife ought to take two kinde of pledges, one by the common law, and they be *plegii de prosequendo*, and another by the statute, viz. *plegii de retorno habendo*. *Vide* Sect. 58, what things may lawfully be distreyned, whereupon a *replegiare* may be sued. The formes of the writ you shall reade in the Register and F. N. B.*

(2 Inst. 139.) Glanvil. lib. 12. ca. 12. Marlbr. ca. 21. W. 1. ca. 16, 17. W. 2. ca. 39. Fleta, lib. 2. ca. 40.

Marlb. ca. 21. (Doctr. Plac. 314.) 21 H. 6. Returne de Vic. 17. (Post. 161. a.)

[m] W. 2. ca. 2. Fleta, lib. 4. ca. 5. 4 H. 6. 15.

*Reg. F. N. B 68.

[n] It is a generall rule, that the plaintife must have the property of the goods in him at the time of the taking. [o] But yet if the goods of a villeine be distrayned, the lord of the villeine shall have a replevy; because the bringing of the replevy amounts to a clayme in law, and vests the property in the plaintife. But in that case if the goods of the villeine be taken by a trespasse, the lord shall have no replevy; because the villeine had but a right.

[n] 3 E. 3. 74. 6 H. 4. 2. & 39. 9 H. 6. 39. 20 H. 6. 19.

[o] 33 E. 3. Replev. 43. 42 E. 3. 18. 9 H. 6. 25. F. N. B. 69. F. 6 H. 7. 9. 19 E. 3. Repl. 82.

[p] But there be two kinde of properties; a generall propertie, which every absolute owner hath; and a speciall propertie, as goods pledged or taken to manure his lands, or the like; and of both these a *replegiare* doth lye.

[p] 42 E. 3. 18. 11 H. 4. 17. 23. 47 E. 3. 12. 48 E. 3. 20. 7 H. 4. 17. (2 Ro. Abr. 430. Plowd. 524.) Marlbr. ca. 21.

And albeit it be provided by the statute of *Marlebridge*, [*cap.* 21,] *quod*

(4) See acc. before Sect. 41.

quòd vicecomes post querimoniam inde sibi factam ea, sine impedimento vel contradictione ejus qui dicta averia ceperit, deliberare possit, &c. [*q*] yet where the defendant claimes property, the sherife cannot proceed; for it is a rule in law, that property ought to be tryed by writ. And therefore in that case where the tryall is by pleint, the plaintife may have a writ *de proprietate probandâ* directed to the sherife to trie the propertie; and if thereupon it be found for the plaintife, then the sherife to make deliverance (for so be the words of the writ); and if for the defendant he can no further proceed. But that is but an enquest of office; and therefore if thereby it be found against the plaintife, yet he may have a writ of replevy to the sherife; and if he returne the claime of propertie, &c. yet shall it proceed in the court of common pleas where the propertie shall be put in issue and finally tried. And the sherife may take a pleint upon the said act out of the county, and make replevyn presently; for it should be inconvenient for the owner to forbeare his cattell till the county day.

[q] 30 E. 3. 22. 31 E. 3. Replev. 35, & 4. 7 H. 4. 26. 28. 31 H. 6. Prop. Prob. 5. 1 E. 4. 9. 21 E. 4. 64. 2 Eliz. Dyer, 173. 21 E. 4. 66. (2 Ro. Abr. 431.)

[*r*] It is to be noted, that a man cannot claime propertie by his bailife or servant; and the reason is, for that if the clayme fall out to be false he shall be fined for his contempt, which the lord cannot be unlesse he maketh clayme himself; for *nemo punitur pro alieno delicto* (1).

[r] 5 E. 3. 38. 11 H. 4. 4. 17 E. 2. Propr. Prob. 6.

In a speciall case a man may have a replevyn of goods not distreyned. As if the mesne put in his cattell in lieu of the cattell of the tenant paravaile, that he is bound to acquite, he shall have a replevyn of those cattell that never were distreyned.

34 H. 6. 47.

If a man by his deed grant a rent with clause of distresse, and grant further, that he shall keep the goods distreyned against gages and pledges, untill the rent be payd, yet shall the sherife replevy the goods distreyned; for it is against the nature of such a distresse to be irreplevisable, and by such an [invention] the currant of replevyns should be overthrown to the hindrance of the commonwealth; and therefore it was disallowed by the whole court, and awarded that the defendant should gage deliverance, or else go to prison. And *Bracton* is of the same opinion; for he saith, *Eodem modo de viâ obstructâ, per breve quòd justiciet propter communem utilitatem, ne transeuntes ire diù impediantur, quia hoc esset commune damnum; et in hoc vicecomes et justiciarii faciant sicut super detentionem averiorem contra vadium plegii, propter communem utilitatem, ne animalia diù inclusa pereant;* which in mine opinion is an excellent point of learning.

31 E. 3. Gage deliver, 5. (Post. 282. b. Doct. & Stud. 129. b.) Bracton, lib. 4. fo. 233. a. & b.

If the beasts of divers severall men be taken, they cannot joyne in a *repleg.* but every one must have a severall replevyn (2). And so in a replevyn it is a good plea to say, that the property is to the plaintife and to a stranger; and where there be two plaintifes, that the property is to one of them.

28 E. 3. 92. 8 H. 4. 12. 34 H. 6. 37. 2 E. 4. 23. (5 Co. 19. a.)

There

(1) This is explained to be intended only in respect to the county-court, for in the king's bench the bailiff is not liable to a fine; and therefore it has been held, that there one may make conusance and claim property by a bailiff. Adj. in Hamstead *v.* Oldham, 1 Lev. 90. and 2 Keb. 441.—[Note 239.]

(2) But in favour of liberty, the law permits two to join in suing the writ *de homine replegiando.* F. N. B. 66. F.—[Note 240.]

There is also a writ *de homine replegiando.* But *Littleton* is ready to give you further instruction: therefore heare him. Regist. fol. 133. Bract. fo. 121. & 154. W. 1. ca. 11. Fleta, lib. 2. ca. 2. F. N. B. 66. b.

"And avow the taking, &c. in a court of record." Here it appeareth, that an avowry in a court of record, which is in nature of an action, is a determination of his election before any judgment given (3). And this is a good proofe of that, which hath been formerly said of the writs of annuity and assise (4).

[146. a.] ☞ *Electio semel facta et placitum testatum non patitur regressum.* 21 H. 6. 24. per Newton. 27 H. 6. 4.
Quod semel placuit in electionibus amplius displicere non potest.

If a rent charge be granted to *A.* and *B.* and their heires; *A.* distreyneth the beasts of the grantor, and he sueth a replevin; *A.* avoweth for himselfe, and maketh conusance for *B.*; *A.* dyeth and B. surviveth: *B.* shall not have a writ of annuity; for in that case, the election and avowry for the rent of *A.* barreth *B.* of any election to make it an annuity, albeit he assented not to the avowry.

But here is another diversity to be observed betweene the case aforesaid of the grant of the rent where he (as hath beene said) may make it either reall or personall, and when a man may have election to have several remedies for a thing that is meerly personall or meerly reall from the beginning. As if a man may have an action of account or an action of debt at his pleasure and he bringeth an action of account and appeare to it, and after is nonsuite, yet may he have an action of debt afterwards; because both actions charge the person. The like law is of an assise, and of a writ of entry in the nature of an assise, and the like. (2 Co. 36. b.) 28 E. 3. 98. b. 27 E. 3. 89. b. (6 Co. 7. a. Ant. 139. a.)

Sect. 220.

ALSO, if a man would that another should have a rent charge issuing out of his land, but would not that his person be charged in any manner by a writ of annuity, then he may have such a clause in the end of his deed. Provided alwais, that this present writing, nor anything therein specified, shall any way extend to charge my person by a writ or an action of annuity, but only to charge my lands and tenements with the yearly rent aforesaid, &c. (1) [Proviso semper, quòd præsens scriptum, nec aliquid in eo specificatum, non aliqualiter se extendat, &c.*] *Then the land is charged, and the person of the grantor discharged.*

BY

* *In the original of Littleton the proviso is in Latin. See lord Coke's remark on the double negative, post.* 146. *b.*

---

(3) Acc. post. 268. a. F. N. B. 152. A.

(4) See ante 145. a.

(1) For the operation of this sort of *proviso*, see Dy. 222. a. and 2 Co. 72. a.

BY this Section it appeareth, that when in a generall grant the law doth give two remedies, that the grantor may provide that the grantee shall not use one of them and leave the party to the other (2). But where the grantee hath but one remedy, there that remedy cannot be barred by any proviso; for such a proviso should be repugnant to the grant.

28 H. 8. Dier, 9. b. (Hob. 72.)

(1 Ro. Abr. 227.) Hutt. 33.

"*With the yearely rent, &c.*" Here by (*&c.*) and the consequent of this Section be implyed divers excellent points of learning, viz. If a man by his deede granteth a rent charge out of the mannor of *Dale* (wherein the grantor hath nothing) with such a proviso that it shall not charge his person; albeit the repugnancie doth not appeare in the deed, yet the proviso taketh away the whole effect of the grant, and therefore is in judgement of law repugnant; for upon the matter it is but a grant of an annuity, provided that it shall not charge his person (3). For which cause our author putteth his case of a rent charge issuing truly out of land. But if a man by his deed grant a rent charge out of land, provided that it shall not charge the land, albeit the grantee hath a double remedy, as hath beene said, yet the proviso is repugnant; because the land is expressly charged with the rent, but the writ of annuity is but implyed in the grant, and therefore they may be restrained without any repugnancie, and sufficient remedy left for the grantee; for which cause our author putteth his case of the restraint of bringing a writ of annuity. And yet in some cases where there is a proviso ☞ in the deed that the grantee shall not in any sort charge the person of the grantor generally, notwithstanding the person of the grantor shall be charged. [146. b.]

So it was resolved by the justices in 11 H. 8. as justice Spilman reporteth. 9 H. 6. 53.

6 Eliz. Dier, 227. (4 Co. 49. a. 7 Co. 39. b. 6 Co. 41. b. Post. 162. a.)

As if a man grant a rent charge out of certaine lands to another for life, with such a *proviso;* the rent is behinde; the grantee dyeth; the executors of the grantee shall have an action of debt against the grantor, and charge his person for the arrearages in the life of the grantee; because the executors have no other remedy against the grantor for the arrearages; for distreine they cannot, because the estate in the rent is determined, and the proviso cannot leave the executors without remedy, as appeareth by that which hath beene said (1). And therefore our author putteth his case of a rent charge continuing. And here it is to be observed, that this word (*proviso*) hath divers operations. Sometime it worketh a qualification or limitation, and so it is taken here, and often in our bookes; sometime a condition; and sometime a covenant: whereof you shall reade more hereafter, Sect. 320.

(Post. 203. b. 2 Co. 72. a.)

"*In the end of his deed.*" Here *Littleton* putteth his case of one

32 Ass. p. 1. Vide sect. 334. (Cro. Eliz. 837. 1 Ro. Abr. 590. Mo. 811.)

(2) See post. 286. a. & b. 393. a.

(3) Acc. in Brediman's case, 6 Co. 58. b.

(1) At first this may seem contradicted by the statute of 32 H. 8. c. 37. according to the recital of which the executors of tenant for life of a rent-charge had no remedy at common law for arrears due to their testator. But lord Coke in another place observes, that the preamble of 32 H. 8. should be understood to apply not to tenant for his life only but to tenant *pur autre vie*, so long as *cestui que vie* lives. Post. 164. a.—[Note 241.]

one deed. But though the grant be generall, and want such a proviso, yet may the grantee by another deed by way of defeasance grant, that he shall not charge the person of the grantor, and that if he bring a writ of annuity, that the rent shall cease.

"Nec aliquid in eo specificatum, non aliqualiter se extendat, &c." Here is to be observed a double negative, *nec*, and *non*, which in grammaticall construction amounteth to an affirmative; for *Negatio destruit negationem, et ambo faciunt affirmativum.* Yet the law, that principally respecteth substance, doth judge the proviso to be a negative according to the intent of the parties, and not according to grammaticall construction, to the end the proviso may take effect; and the like you shall finde hereafter in *Littleton**. *Mala grammatica non vitiat cartam.* Here our author putteth his case of one grantor. Put then the case, that *A.* and *B.* being joyntenants of lands in fee, by their deed grant a rent charge out of those lands, provided that the grantee shall not charge the person of *A.* in this case if the grantee bringeth a writ of annuity, he must charge the person of *B.* only.

* Lib. 3. cap. de Condic. Sect. 362. (10 Co. 139. a. Hob. 191. Cro. Cha. 555.)

Sect. 221.

ALSO, if one make a deed in this manner, that if A. *of* B. *be not yearely payed at the feast of Christmasse for terme of his life xx. s. of lawfull money, that then it shall be lawfull for the said* A. *of* B. *to distreyne for this in the mannor of* F. *&c. this is a good rent charge; because the mannor is charged with the rent by way of distresse* (3)*; and yet the person of him, which makes such deed, is discharged in this case of an action of annuitie, because he doth not grant by his deed any annuitie to the said* A. *of* B. *but granteth only, that he may distreine for such annuitie, &c.*

"THAT if A. of B." Here [want] words to precede these, viz. *that he grants to A. of B. &c. that if A. of B. &c.* as it appeareth in the originall (2); and so it appeareth in the close of this Section, viz. *but granteth only, that he may distreine.* And without such a grant the clause should be imperfect. (2 Ro. Abr. 424.)

"Because the mannor is charged with the rent by way of distresse." And yet no rent is expressly granted out of the manor. But, by the grant that he shall distreine for such a yearely summe of money, in judgment of law the mannor is charged with the rent; but the person of the grantor cannot be charged, because he expressly granteth no rent, for that would charge his person; but that the grantee should distreine, &c. which only chargeth the land. (Plowd. 139.)

"That

---

(3) In L. and M. and in Roh. *&c.* is added.

(2) The words, here stated by lord Coke to be in the original, are not in L. and M. nor Roh.

"☞ *That he may distreine for such annuitie, &c.*"

18 Ass. p. 1.
18 E. 3. 32.
3 Ass. 7.
3 E. 3. 12.
10 Ass. 24.
31 Ass. p. 17.
33 Ass. (1).
Annuity, 52.
16 E. 3.
Grant, 64.

Here by (*&c.*) many points worthy of observation are implyed, viz. if a man seised of lands in fee bindeth his goods and lands to the payment of a yearly rent to *A. of B.* this is a good rent charge with power to distreine, albeit there be no expresse words of charge, nor to distreine. Or in these words, *Obligo manerium meum de* C. *et omnia bona in dicto manerio existent'* A. *de* B. *in annuo redditu de xx. s. ad distringend' par balivum domini regis pro reddita prædicto.* By this grant a rent charge issueth out of the mannor: and where the words be, *ad distringendum per balivum domini regis*, this is for the advantage of the grantee. And therefore the king's baily should be but his minister to distreine for his rent; and that which he may do by his servant, he may do by himselfe or by any other of his servants (2).

[147. a.]

7 Co. 23, 24, in Butts his case.

If a man by deed grant a rent of forty shillings to another out of his mannor of *Dale*, to have and to perceive to him and his heirs, and grant over by the same deed, that if the rent be behind, that the grantee shall distreine in the mannor of *Sale* (be the mannor of *Sale* in the same county or in another county, and be this grant by one deed or divers deeds), the rent is onely issuing out of the mannor of *D.* and it is but a paine that he shall distreine in the mannor of *S.*; but both the mannors are charged, the one with the rent, and the other with a distresse for the rent; the one issuing out of the land, and the other to be taken upon the land. And whereas our author puts his case of a grant for life; so it is if I grant to you, that you and your heires, or the heires of your body, shall distreine for a rent of forty shillings within my mannor of *S.* this by construction in law shall amount to a grant of a rent out of my mannor of *S.* in fee simple or fee taile; for if this shall not amount to a grant of a rent, the grant shall be of little force or effect, if the grantee shall have but a bare distresse and no rent in him; for then he shall never have an assise of this, &c. And this is the reason that it is so often ruled and resolved*, that this amounts to a grant of a rent *per* construction of law, *ut res magis valeat.* And all this is necessarily implyed in the (*&c.*) and in this case the grantee shall not have a writ of annuity, as our author saith. And whereas our author putteth his case where the distresse is to be taken in the same land out of which the rent by construction of law is issuing, hereby is implyed, that if a rent be granted out of the mannor of *D.* and the grantor grant over, that if the rent be behinde, the grantee shall distreine for the same rent in the mannor of *S.* this is but a penalty in the mannor of *S.* for three causes.

* 3 E. 3. 12.
3 Ass. p. 7.
14 Ass. p. 14.
16 E. 3.
tit. Grants, 64.
18 E. 3. 32.
26 Ass. 38.
30 Ass. 12.
46 E. 3. 18. 32.
8 H. 4. 19.
9 H. 6. 9.
22 H. 6. 11.
(5 Co. 55.
Post. 218.)

First, the law needs not to make construction that this shall amount to a grant of a rent, for here a rent is expressly granted to be issuing out of the mannor of *D.* and the parties have expresly limited out of what land the rent shall issue, and upon what land the distresse shall be taken, and the law will not make an exposition against the expresse words and intention of the parties, which this way stands with the rule of the law. *Quoties*

in

(1) Instead of *Ass.* it should be *E.* 3.

(2) What follows on this side of the folio is taken almost verbatim from Butt's case, in 7 Co. 23. a.

in verbis nulla est ambiguitas ibi nulla expositio contra verba expressa fienda est.

Secondly, if in this case this shall amount to a grant of a rent out of the mannor of *S.* then the grantor shall be twice charged. For if the grantee bringeth a writ of annuity, this shall extend onely to the mannor of *D.*; for upon the grant of a distresse in the mannor of *S.* no writ of annuity lyeth, because the mannor of *S.* is only charged, and not the person of the grantor as to this (3); and for this cause the bringing of the writ of annuity cannot discharge the mannor of *S.* of any rent; and so the law by construction against the words and the intention of the parties shall do injury to the grantor to charge him twice.

Thirdly, if in such case the mannor of *S.* in which the distresse is only limited, shall be in another county, then it hath beene often adjudged that the rent shall not issue out of the same, but the distresse shall be as a meane and remedy to compell the tenant of the land to pay the rent. And it was said, that there was no diversity of reason, that the law in construction shall make the rent to be issuing out of this, when it lyeth in the same county, and not when it lyeth in severall counties; for the words in both cases are all one, and there is no reason to say that he shall faile of a recovery by assise (4). And the bookes in 1 *Ass. p.* 10. and 1 E. 3. 21. and other bookes do not say that the rent issueth in this case out of both, but that the land in which the distresse shall be taken is charged; and this is true, for it is charged with the distresse. And inasmuch as it was charged with the distresse, their opinion was, that the tenants of both of them shall be named in the assise. And the opinion of *Finchden*, in 41 E. 3. 13. was affirmed to be good law, that if the mannor of *D.* out of which the rent is granted, be recovered by an elder title, that all the rent is extinct (5); but if the mannor of *S.* in which the distresse is limited, be evicted, yet all the rent remains*. So if the grantee purchase parcell of the mannor of *S.* the rent is not extinct, for that the rent issueth onely out of the ☞ mannor of *D.* (1). And it is said, that if a man grant a rent out of three acres, and grant over, that if the rent be behind, that he shall distreine for the rent in one of the acres, this rent is entire, and cannot be a rent secke out of two acres, and a rent charge out of the third acre, and therefore it is a rent secke for the whole; and yet hee shall distreine for this in the third acre. So if a rent be granted to two and to their heires out of an acre of land, and that it shall be lawfull for one of them and his heires to distreine for this in the same acre, this is a rent secke; for insomuch as they stand joyntly seised of one intire rent, it cannot be as to the one a rent secke, and as to the other a rent charge, and this distress is as an appurtenant to the rent: and therefore if he which hath the rent † dieth, the survivor

[147. b.]

Vide Bulwer's case, 7 Co. 3. 1 Ass. p. 10. 1 E. 3. 21. Vide 9 E. 3. 13. 31 Ass. 27. 17 E. 4. 6. 10 Ass. 4. 10 E. 3. 18. 2 E. 2 Ass. 360. 1 Ass. 10. 3 Ass. 7. 32 H. 6. 27. 22 Ass. 66. 31 Ass. 27. 29 E. 3. Assise, 366. 41 E. 3. 13. per Finchden.

*Vid. 17 E. 4. 6. semblable case. Vide Sect. prox. sequen.

† *Instead of* "rent" *the word* "distress" *should be here inserted, as it seems. See Mr. Ritso's Intr. p.* 118.

(3) Acc. ant. 156. b.

(4) How the remedy by assise is affected where the rent issues out of the land in several counties, is explained by lord Coke, post. fol. 153. b. 154. a.—[N. 242.]

(5) See post. 148. a. and 349. a. where the same doctrine is expressed; but it is added, that the grantee shall have a writ of annuity.—[Note 248.]

(1) See further as to extinguishment of rent, infra.

survivor shall distreine; and if both grant over the rent to another, he shall distreine for this. But if a man grant a rent out of Blacke Acre to one and to his heires, and grant to him that he may distreine for this in the same acre for terme of his life, this is a rent charge for his life, and a rent secke after, *diversis temporibus*. Otherwise it is if the distresse be limited for certaine years in the same land, there this remaines a rent secke intirely, for that the fee and the freehold is secke in such case.

(7 Co. 23.) If a man seised of lands in fee (2), and possessed of a terme for many yeares, grant a rent out of both for life in taile or in fee, with clause of distresse out of both, this rent being a freehold doth issue onely out of the freehold, and the lands in lease are only charged with a distresse (3). But if he had granted the rent only out of the lands in lease for terme of the life of the grantee, this had issued out of the terme, and the land had been charged during the terme, if the grantee lived so long.

(Plowd. 524. b. 525. a.)

22 H. 6. 10. b. If a man be seised of twenty acres of land, and grant a rent of twenty shillings *percipiend' de quâlibet acrâ terræ meæ*, (that is) out of every one acre of my land, this is a severall grant out of every severall acre, and the grantee shall have twenty pounds in all.

A. doth bargaine and sell land to *B.* by indenture, and before inrolment they both grant a rent charge by deed to *C.* and after the indenture is inrolled: some have said, that this rent charge is avoided; for, say they, it was the grant of *A.* and by the inrolment it hath relation to the delivery, which (say they) shall avoid the grant, notwithstanding the confirmation of the other which had nothing in the land at that time. But the grant is good, and after the inrolment by the operation of the statute (4), it shall be the grant of B. and the confirmation of *A.* But if the deed had not beene inrolled, it had beene the grant of *A.* and the confirmation of *B.* and so *quâcunque viâ datâ* the grant is good (5).

(Cro. Cha. 110. 217. Cro. Jam. 52, 62.)

Sect. 222.

ALSO, if a man hath a rent charge to him and to his heires issuing out of certaine land, if he purchase any parcell of this to him and to his heires, all the rent charge is extinct, and the annuitie also [tout le rent charge est extinct et l'annuitie auxy (6)]; *because the rent charge cannot by such manner be apportioned. But if a man, which hath a rent service, purchase parcell of the land out of which the rent is issuing, this shall not extinguish all, but for the parcel. For a rent service in such case may be apportioned according to the value of the land. But if one holdeth his*

---

(2) The case here stated is Butt's case, 5 Co. 23.

(3) See post. 196. b. & 197. a.

(4) 27 H. 8. c. 16.

(5) See 1 Com. Dig. 544, where most of the authorities on the relation of the enrolment of a bargain and sale to its execution are referred to. See also post. a. 186. a. and Hynde's case, 4 Co. 71. a.

(6) *In L. and M. and also in Roh. it is* anyenty *instead* of annuitie aussi; *and so the sense requires.*

his land of his lord by the service to render to his lord yearely at such a feast a horse, a golden speare or a clove, gilliflower, and such like; if in this case the lord purchase parcell of the land, sach service is taken away; because such service cannot be severed nor apportioned.

"EXTINCT" commeth of the verbe *extinguere*, to destroy or put out; and a rent is said to be extinguished, when it is destroied and put out.

"*Apportioned.*" This commeth of the word *portio, quasi partio*, which signifieth a part of the whole; and apportion signifieth a division or partition of a rent, common, &c. or a making of it into parts. (2 Inst. 503, 504.)

[a] The reason of this extinguishment is, because the rent is intire, and against common right, and issuing out of every part of the land, and therefore by purchase of part it is extinct in the whole, and cannot be [b] apportioned (7). But by act in law it may as hereafter (8) shall be said. [c] If the grantee of a rent charge (*) purchase parcell of the land, and the grantor [148. a.] by his deed ☞ reciting the said purchase of part granteth that he may distreyne for the same rent in the residue of the land, this amounteth to a new grant, and the same rent shall be taken for the like rent or the same in quantity. And so it is [d] if a man by deed granteth a rent charge out of his land to a man for life, and granteth further by the same deed that he and his heires may distreyne in the land for the same rent, this amounteth to a new grant of a rent in fee simple (1).

[a] Doct. & Stud. lib. 2. cap. 16. 22 H. 7. 2. 21 E. 3. 58. [b] 30 Ass. 12. 9 Ass. 22. (1 Ro. Abr. 234.) [c] 46 E. 3. 32. 14 Ass. p. 14. 26 Ass. 38. (Ante 146. b.) [d] 8 H. 4. 19. (Post. 308. b.)

But yet a rent charge by the act of the partie may in some case be apportioned. As if a man hath a rent charge of 20 shillings, he may release to the tenant of the land 10 shillings or more or lesse, and reserve part (2); for the grantee dealeth onely with that which is his owne, viz. the rent, and dealeth not with the land, as in case of purchase of part. And so was it holden in the common place, *Hill.* 14 Eliz. which I myselfe heard and observed. So [e] if the grantee of an annuity or rent charge of 20 pound grant 10 pound parcell of the same annuity or rent charge (1 Ro. Abr. 235.) Hill. 14 Eliz. [e] 9 H. 6. 12. 55. F. N. B. 152. D. E.

---

(7) Acc. Sav. 69. Noy. 5. the same doctrine prevails as to conditions and common appurtenant, and for a like reason. Post. 215. a. Ante 122. a.

(8) See post. Sect. 224. and fol. 164. a.

(*) This doctrine causes a difficulty where one has a rent-charge, and it is wished to discharge part of the land from the payment; in order to enable a sale or mortgage of such part, one practised mode of preserving the rent-charge in the other parts, is agreeing that the rent-charge shall not be prejudiced in such other parts, but shall be wholly payable thereout. But this seems to be rather a new grant of the rent-charge by implication than a preservation of the old rent-charge: another mode sometimes adopted is, having a covenant from the owner of the rent-charge, not to claim the rent-charge out of the land intended to be exonerated. But even this mode is not quite free from exception; for according to some books it seems that such a covenant amounts to a release. See Noy's R. 5. 4 New Abr. *Release*, A. 2.

(1) Acc. Dy. 253. a. for there is a case, in which it was held, that a rent-charge should go to the heir, though heirs were not mentioned, except in the clause of distress.—[Note 244.]

(2) See acc. in the comment on Sect. 557. post. fol. 305. a.

charge, and the tenant attorne, hereby the annuity or rent charge is divided (3).

[f] 14 E. 4. 4. 22 E. 4. le darrein case, 51. 7 H. 6. 9 H. 6. 1. 5 H. 7. 33.

And (f) when the rent charge is extinguished by his purchase of part of the land, he shall never have a writ of annuitie; because it was by the grant a rent charge, and he hath discharged the land of the rent charge by his owne act of purchase of part. And therefore he cannot by writ of annuity discharge the land of the distresse, as *Littleton* hath before (4) said. But if the rent charge be determined by the act of God or of the law, yet the grantee may have a writ of annuity. As if tenant for another man's life by his deed grant a rent charge to one for 21 years, *cesty que vie* dieth, the rent charge is determined; and yet the grantee may have during the yeares a writ of annuity for the arrerages incurred after the death of *cesty que vie*, because the rent charge did determine by the act of God and by the course of law. *Actus legis nulli facit injuriam.* The like law is, if the land out of which the rent charge is granted be recovered by an elder title, and thereby the rent charge is voyded, yet the grantee shall have a writ of annuity, for that the rent charge is avoyded by the course of law; and so it was holden in *Ward's* case above remembered against an opinion *obiter* in 9 H. 6. 42. a.

Ward's case, cited in 2 Co. in Hayward's case, fo. 36.

9 H. 6. 42.

"*For a rent service in such case may be apportioned.*" Whether this apportionment was at the common law, or by force of the statute of *quia emptores terrarum*, hath beene a question in our bookes*. And it appeareth by *Littleton*, that it was so at the common law; for when he citeth any thing provided by any statute, he citeth the statute, as he hath done this very act before (5). *Littleton* speaketh here indefinitely of rent service, and there be divers kindes of rent services which are not within that statute; and yet such rent services are apportionable by the common law. As if a man maketh a lease for life or years reserving a rent, and the lessee surrender part to the lessor, the rent shall be apportioned. So if the lessor recovereth part of the land in an action of waste, or entereth for a forfeiture in part, the rent shall be apportioned.

* Brookes, tit. Apportionment, 28. 16 E. 3. 49. 22 Ass. 52. 3 Ass. 18. 18 E. 2. Avowrie, 218. Vid. 6 Co. 1, 2, in Bruerton's case. Vid. 8 Co. 105, 106, in Talbot's case. (1 Ro. Abr. 234. Post. 215.)

[g] 14 H. 8. 12. Vid. 8 Co. 79, in Wilde's case. Pasch. 39 Eliz. Rot. 233. So it was adjudged inter Collins and Harding. (13 Co. 57.)

[g] So likewise if the lessor granteth part of the reversion to a stranger, the rent shall be apportioned; for the rent is incident to the reversion. [h] So it is if tenant by knights service by his last will and testament in writing deviseth the reversion of two parts of the lands, the devisee shall have two parts of the rent.

[h] Tr. 43 Eliz. Rot. 243, inter West & Lassels; & Hill. 42 Eliz. Rot. 108, in communi banco, inter Ewer & Moyle.

And these cases are in mine opinion rightly adjudged against a sudden opinion in *Hill.* 6 and 7 E. 6, reported by serjeant *Bendloe* to the contrary. Note, what inconvenience should follow,

---

(3) But Hobart, who *arguendo* puts the like case, observes, that the tenant is not compellable to attorn. Hob. 25.—[Note 245.]

Now however, under 4 Anne, c. 16. s. 9, grants of rents are good without attornment, and therefore now grantee of a rent may grant part without attornment of the tenant; unless the statute is to be restricted to those cases in which attornment was before compellable.

(4) This seems a mistake: at least I cannot find any passage of the kind in Littleton. In one copy which I have of the Coke upon Littleton, the *whole* of this passage is struck through with a pen; and in another it is scored under as doubtful.—[Note 246.]

(5) Ant. Sect. 216.

follow, if the severance of the reversion of the rent should be extinct.

[148. b.] *"Purchase parcell of the land."* This is intended of a fee simple, ☞ for if there be a lord and tenant of 40 acres of land by fealty and twenty shillings rent [i] if the tenant maketh a gift in taile, or a lease for life or yeares, of parcell thereof to the lord, in this case the rent shall not be apportioned for any part, but the rent shall be suspended for the whole; for a rent service (saith *Littleton*) may be extinct for part, and apportioned for the rest; but a rent service cannot be suspended in part by the act of the partie, and in *esse* for other (1) part. So it is if the lessor enter upon the lessee for life or yeares into part, and thereof disseise or put out the lessee, the rent is suspended in the whole, and shall not be apportioned for any part. And where our bookes* speak of an apportionment in case where the lessor enters upon the lessee in part, they are to be understood where the lessor enters lawfully, as upon a surrender, forfeiture, or such like, where the rent is lawfully extinct in part. And yet by act in law a rent service may be suspended in part and in *esse* for part. † As when the gardian in chivalrie entreth into the land of his ward within age, now is the seigniorie suspended; but if the wife of the tenant be endowed of a third part of the tenancie, now shall she pay to the lord the third part of the rent. ‡ And so it is if the tenant give a part of the tenancie to the father of the lord in taile, the father dieth, and this descends to the lord; in this case by act in law the seigniorie is suspended in part and in *esse* for part, and the same law is of a rent charge (2).

Likewise a seigniorie may be suspended in part by the act of a stranger. § As if two joyntenants or coparceners be of a seigniorie, and one of them disseise the tenant of the land, the other joyntenant or coparcener shall distreine for his or her moitie.

Concerning the apportionment of rents, there is a difference betweene a grant of a rent and a reservation of a rent: for [k] if a man be seised of two acres of land, of one in fee simple, and of another in taile, and by his deed grant a rent out of both in fee, in taile, for life, &c. and dieth, the land intailed is discharged, and the land in fee simple remaines charged with the whole rent; for against his own grant he shall not take advantage of the weaknesse of his owne estate in part. [l] But if he make a gift in taile, a lease for life or for yeares of both acres, reserving a rent, the donor or lessor dieth, the issue in taile avoydeth the gift or lease, the rent shall be apportioned; for seeing the rent is reserved out of and for the whole land, it is reason that when part is evicted by an elder title, that the donee or lessee should not be charged with the whole rent, but that it should be apportioned ratably according to the value of the land, as *Littleton* here saith.

[m] If a man grant a rent charge out of two acres, and after the

[i] 32 H. 8. tit. Extinguishment. Br. 48. 11 E. 3. Cessavit, 21. 17 E. 3. 57. a. (Goldsb. 44. 1 Ro. Abr. 938. 9 Co. 135. 1 Ro. Abr. 235.)

* 21 E. 4. 29. 9 E. 4. 1. 7 H. 6. 26. 4 H. 7. 6. b. 11 E. 3. Cessavit, 21. (1 Ro. Abr. 235.)

† 33 E. 3. Dower, 138.

‡ 30 Ass. p. 12.

§ 27 E. 3. 88.

[k] 12 H. 4. 17. 17 E. 2. Dower, 164. 30 Ass. p. 12.

[l] 20 H. 6. 3. 9 E. 4. 1. 2. 35 H. 8. Dyer, 56. 7 E. 6. Dyer, 82. 9 E. 3. 6 H. 4. 17. (1 Ro. Abr. 235.)

[m] Doct. & Stud. li. 2. c. 17.

(1) This position is denied by lord Hale and the court of king's bench in the case of Hodgkins *v.* Robson and Thornborow, Mich. 27 Cha. 2. See the report of that case in 1 Vent. 277. 2 Lev. 143. and Pollexf. 141.—[Note 247.]

(2) Acc. in Ascough's case, 9 Co. 135. b. and there the reason is expressed, namely, that one coparcener shall not be prejudiced by the tortious act of the other. See also acc. post. 188. a.—[Note 248.]

the grantee recovereth one of the acres against the grantor by a title paramount, the whole rent shall issue out of the other acre: but if the recoverie be by a faint title by covine, then the rent is extinct for the whole, because he claimeth under the grantor.

If a man infeoffeth *B.* of one acre in fee upon condition, and *B.* being seised of another acre in fee granteth a rent out of both acres to the feoffor, who entreth into the one acre for the condition broken, the whole rent shall issue out of the other acre; because his title is paramount the (3) grant. But if a man maketh a lease for life of Black Acre and White Acre, reserving two shillings rent, upon condition that if the lessee doth such an act, &c. that then he shall have fee in Black Acre, the lessee performes the condition, albeit now by relation he hath the fee simple *ab initio*, yet shall the rent be apportioned, for that the reversion of one acre whereunto the rent was incident is gone from the lessor; and so note a diversitie betweene a rent in grosse and a rent incident to a reversion, concerning the apportionment thereof. And yet in some cases a rent charge shall not be wholly extinct, where the grantee claimeth from and under the grantor. As if *B.* maketh a lease of one acre for life to *A.* and *A.* is seised of another acre in fee, *A.* granteth a rent charge to *B.* out of both acres, and doth wast in the acre which he holdeth for life, *B.* recovereth in wast; the whole rent is not extinct, but shall be apportioned; and yet *B.* claimeth the one acre under *A.* And so it is if *A.* had made a feoffment in fee, and *B.* had entred for the forfeiture, the rent is to be apportioned, and is not wholly extinct; and the reason hereof is, for that it is a maxime of law, that no man shall take advantage of his owne wrong, *nullus commodum capere potest de injuriâ suâ propriâ;* (4) and therefore seeing the wast and forfeiture were committed by the act and wrong of the lessee, he shall not take advantage thereof to extinguish the whole rent: and the whole rent cannot issue onely out of the other acre, because the lessor hath the one acre under the estate of the lessee, and therefore it shall be apportioned. *If the king give two acres of land of equall value to another in fee, fee taile, for life or yeares, reserving a rent of two shillings, and the one acre is evicted by a title paramount, the rent shall be apportioned.

* Dyer, Mich. 7 & 8 Eliz. Manuscript. The earle of Huntingdon's case.

Vid. F. N. B. 234. B. Briefe de onerando pro rata port.

"But if a man holdeth his land, &c. by service to render yearely, &c. a horse, a golden speare, &c. if in this case the lord purchase parcell of the land, such service is taken away (5)."

☞ *"Horse." Nota*, in Latine *destrarius* is a great horse, or a horse of service, of the French word *destrier; palfridus* a horse to travell on (1), of the [149. a.]

French

(3) See the case of dower, post. 150. a.

(4) So also by the tortious act of the lessee a condition may be apportioned; though in general it is not divisible by act of the parties. Post. 275. a. & 4 Co. 120. a. 8 Co. 79. b.—[Note 249.]

(5) What services shall be extinguished by the lord's purchase of part of the land, and what shall be apportioned or remain, is explained much at large in Talbot's case, 8 Co. 105. and in Bruerton's case, 6 Co. 1.—[Note 250.]

(1) It is used in this sense in writ F. N. B. 93. I.

French word *palfray;* and *runcinus* a nagge (you shall often read of them in records,) it commeth of the Italian word *roncino.* But admit that parcell of the land holden by such entire service come to the lord by descent,, whether shall the entire service wholly remaine, or be extinct? And it is holden, that in some cases it shall be extinct for the whole, as suit service, and such other entire annuall suit service. But if the service be to render yearly at such a feast a horse, or the like, and the tenant infeoffe the father of the lord of part, which descends, yet the feoffor shall hold by a horse, because the service was multiplied, and each of them, viz. the feoffor and the feoffee, held by a horse.

Anno 6. R. 1. Rot. 5. War. Bruerton's case, 6 Co. 1. 34 Ass. 15. 35 H. 6. Exec. 21. Pl. Com. 72. 40 E. 3. 40. 5 E. 2. tit. Avowrie, 206. (2 Inst. 503. 8 Co. 105.)

A. hath common of pasture *sauns nombre,* in twenty acres of land, and ten of those acres descend to *A.*: the common *sauns nombre* is entire and incertain, and cannot be apportioned, but shall remaine. But if it had been a common certaine (as for ten beasts), in that case the common should be apportioned. And so it is of common of estovers, of turbarie, of pischarie, &c. And yet in none of these cases, the descent, which is an act in law, shall worke any wrong to the *terre-tenant;* for he shall have that which belongeth to him, for the act in law shall worke no wrong (2).

If three joyntenant hold by an entire yearly rent, as of a horse, or of a graine of wheat, and the tenants cesse by two yeares, and the lord recover two parts of the land against two of them, and the third saves his part by tendering of the rent, &c. and finding suretie; albeit the lord come to the two parts by lawfull recovery, grounded upon the default and wrong of the two joyntenants yet shall the entire annuall rent be extinct (3).

F. N. B. 209. 40 E. 4. 40.

If the tenant holdeth by fealty and a bushell of wheat, or a pound of comyn, or of pepper, or such like, and the lord purchaseth part of the land, there shall be an apportionment as well as if the rent were in money; and yet if the rent were by one graine of wheat, or one seed or comyn, or one pepper corne, by the purchase of part, the whole should be extinct. But if an entire service be *pro bono publico,* as knights service, castle gard, cornage, &c. for the defence of the realme, or to repaire a bridge or a way, to keepe a beacon, or to keepe the king's records, or for advancement of justice and peace, as to ayd the sherife, or to be constable of *England* (4), though the lord purchaseth part, the service (5) remains. So it is if the tenure be *pro opere devotionis sive pietatis,* as to find a preacher or to provide the ornaments of such church; or *pro opere charitatis,* as to marry a poore virgin, or to bind a poore boy apprentice, or to feed a poore man. And so note a diversity between these cases and entire services for the private benefit of the lord.

Vid. Litt. cap. Tenant in common, 71. b. 6 Co. 1, 2. in Bruerton's case, Litt. f. 49. 11 H. 7. 12. b. 24 H. 8. Tenures, 53. Brookes. 35 H. 6. 6. 11 El. Dy. 285. 16 E. 3. Avowrie, 93.

Sect.

---

(2) This same maxim is cited and applied ant. fol. 148. a.

(3) A learned observer on the Coke upon Littleton, whose MS. notes I have, objects to it, as against reason, that the lord should lose his service from the third jointenant. However, the Year-Book of E. 4, cited by lord Coke, is an authority for the position; and further, it should be considered that the case supposed is of an *entire* rent, that is, of one incapable of division.—[Note 251.]

(4) See post. 165. a.

(5) Acc. post. 149. b.

Sect. 223.

BUT if a man hold his land of another, by homage fealty and escuage, and certaine rent, if the lord purchase part of the land, &c. in this case the rent shall be apportioned, as is aforesaid; but yet in this case the homage and fealty abide entire to the lord; for the lord shall have the homage and fealty of his tenant for the rest of the lands and tenements holden of him, as he had before (1), *because that such services are not yearly services, and cannot be apportioned, but the escuage may and shall be apportioned according to the quantitie and rate of the land, &c.*

Bruerton's case, ubi supra. (6 Co. 10.)

"*PURCHASE part of the land, &c.*" Here by this (*&c.*) is implyed that the reasons, wherefore homage and fealty remaine, and are not extinct in this case, are: First, because it can be no losse to the tenant, as it might in the case of an horse or other entire service; for there it may be the remnant is not sufficient in value to pay it. Secondly, there is no land, but it must be holden by some service or other; and homage and fealty are the freest and least chargeable services to the tenant.

5 E. 2. Avowrie, 206.

"*Because that such services are not yearly services, &c.*" This is *ratio una* but not *unica* as it appeareth by that which hath beene said. If there be lord and tenant by fealtie and herriot service, and the lord purchase part of the land, the herriot service is extinct, (and yet it is not annuall, but to be paid at the death of the tenant) because it is entire and valuable! [149. b.]

(Plowd. 96. a.) Bruerton's case, 6 Co. 1. Talbot's case, 8 Co. 104. 8 H. 7. 11. (Post. 176. b.) 185. b.)

"*According to the quantitie and rate of the land, &c.*" Here is by this (*&c.*) implyed, that in some cases where it is entire and valuable. and not annuall, it shall not (as hath beene sayd) be extinguished by purchase of part: * as knights service, which is to be performed by the body of a man, if the lord purchase part, yet the tenure by knights service remaines for the residue, *quia pro bono publico & and pro defensione regni* (2); but the escuage shall be apportioned, as here *Littleton* saith, because that is for the benefit of the lord, and yet it is casuall, and not annuall. And where our author speaketh of services, it is implied that a herriot custome, though it be entire, valuable, and not annuall by the purchase of part shall not be extinct. On the other part, when the tenure is by an entire service, and the tenant aliens part of the tenancie, in what cases the rent shall be multiplyed, (that is) where the feoffor and the alienee shall pay the entire rent severally (3), (for regularly it holdeth, that *quæ in partes dividi nequeunt solida à singulis præstantur*) and where not, you may read at large in my * Reports.

* 7 E. 3. 29. Talbot's case, 8 Co. 104.

* Bruerton's case, 6 Co. 1, 2. Talbot's case. 8 Co. 104.

And by this (*&c.*) is also implyed, that the apportionment shall not be according to the quantity of the land, but according to the quality of value thereof (4), as by that which hath beene said appeareth.

Sect.

(1) In L. & M. *&c.* is here added.
(2) Acc. ant. 149. a.
(3) Ant. 67. b.
(4) Acc. infra, Sect. 224.

Sect. 224.

ALSO, if a man hath a rent charge, and his father purchase parcell of the tenements charged in fee, and dieth, and this parcell descends to his son who hath the rent charge, now this (5) *charge shall be apportioned according to the value of the land, as is aforesaid of rent service; because such portion of the land purchased by the father commeth not to the son by his owne fact, but by descent and by course of law.*

NOTE here a diversity, when the grantee of a rent charge commeth to a part of the land charged by his owne act, and when by the course of law (6). 5 E. 2. Avowrie, 200. 21 E. 3. 58. b. 34 Ass. 15. tit. Apportionment, b. 28. 9 Ass. 22 30 Ass. pl. 12.

"*Purchase parcell of the tenements charged in fee.*" And so it is if the tenant giveth to the father of the grantee part of the land in taile, and this descend to the grantee, the rent shall be apportioned; and so by act in law a rent charge may be suspended for one part, and in *esse* for another. (Ant. 148. b.)

And so it is, if the father be grantee of a rent, and the son purchase part of the land charged, and the father dieth, after whose death the rent descends to the son, the rent shall be apportioned; and so it is if the grantee grant the rent to the tenant of the land, and to a stranger, the rent is extinct but for a moitie. 34 H. 6. 41. b.

[150. a.] ☞ If a man hath issue two daughters, and grant a rent charge out of his land to one of them, and dieth, the rent shall be apportioned; and if the grantee in this case enfeoffeth another of her part of the land, yet the moiety of the rent remaineth issuing out of her sister's part, because the part of the grantee in the land by the descent was discharged of the rent. But in all these cases where the rent charge is apportioned by act in law, yet the writ of annuity faileth; for if the grantee should bring a writ of annuity, he must ground it upon the grant by deed, and then must he, as it hath beene said, (1) bring it for the whole. 9 Ass. 92.

Annua nec debitum judex non separat ipsum. 5 R. 2. Annuity, 21.

Also in respect of the realty the rent is apportioned. But the personalty is indivisible, and by act in law shall not be divided. If execution be sued of body and lands upon a statute merchant or staple, and after the inheritance of part of those lands descend to the conusee, all the execution is avoided; for the duty is personall, and cannot be divided by act in law (2). Pl. Com. 72. 35 H. 6. tit. Execut. 21. 15 E. 4. 5.

"*Commeth*

---

(5) The word *rent* is here inserted in L. & M.

(6) Acc. ant. 147. b.

(1) Ant. 144. b. near the end.

(2) Acc. 2 Ventr. 327. For other instances of the indivisibility of debts and personal duties, see F. N. B. 46. a. Kielw. 106. a. Bro. Nov. Cas. pl. 52. 135. Hetl. 53. March, 56. 61.

"*Commeth not to the sonne by his owne fact, but by descent and by course of law.*" If the father within age purchase part of the land charged, and alieneth within age and dyeth, the son recovereth in a writ of *dum fuit infra ætatem*, or entereth; in this case the act of law is mixt with the act of the party, and yet the rent shall be apportioned; for after the recovery or entry the son hath the land by discent.

So it is in case the son recovereth part of the land upon an alienation by his father *dum non fuit compos mentis*, the rent shall be apportioned for the cause aforesaid.

5 E. 2. Avowry, 206. A man seised of lands in fee taketh a wife, and maketh a feoffment in fee, the feoffee grants a rent charge of x. pound out of the land to the feoffor and his wife and to the heires of the husband, the husband dieth, the wife recovereth the moiety for her dower by the custome; the rent charge shall be apportioned, and she may distreine for five pound, which is the moiety of the rent (3). In which case two notable things are to be observed. First, albeit the dower be by relation or fiction of law above the rent (4), yet when the wife recovereth her dower, she shall not have her entire rent out of the residue; for a relation or fiction of law shall never worke a wrong or charge to a third person, but *in fictione juris semper est æquitas*. Secondly, that albeit her owne act do concurre with the act in law, yet the rent shall be apportioned.

8 Co. 29, in Butler and Baker's case.

Sect. 225.

ALSO, if there be lord and tenant, and the tenant holds of his lord by fealty and certaine rent, and the lord grant the rent by his deed, to another, &c. reserving the fealty to himself, and the tenant atturnes to the grantee of the rent, now this rent is rent seck to the grantee; because the tenements are not holden of the grantor (5) *of the rent, but are holden of the lord who reserved to him the fealtie.*

"*AND the lord grant the rent, &c.*" So it is if the lord release the rent of the tenant saving the fealty, the rent is extinct. But if there be lord and tenant by fealty and rent, and the lord by his deed reciting the tenure release all his right in the land saving his said rent, the seigniory remaines, and he shall have the rent as a rent service, and the fealty incident to it; for the said rent is as much as to say the rent service whereunto fealty is incident.

12 E. 4. 11. 9 E. 3. 1. 40 E. 3. 22. b. 18 E. 3. tit. Releases, 36. (Post. 151. a.)

17 E. 3. 72. b. And if the lord hath issue two daughters and dieth, and upon partition the fealtie is allotted to the one and the rent to the other, she shall have the rent as a rent secke.

17 E. 3. 72. b. If there be lord of a mannor and tenant by fealty, suit of court and

(3) This same case is cited and approved of in Ascough's case, 8 Co. 135. b.
(4) See the case of condition, ant. 148. b.
(5) *Grantee* instead of *grantor* in L. and M. and Roh. which is agreeable to the sense of the passage.

and rent, the lord grants the fealty saving to him the suit of court and rent, the saving is good for the rent, but not for the suit of court; because the ☞ grantee can keepe no court, and there is no tenure of the grantor, and therefore the suit of court is lost and perished in that case. [150. b.]

If the donee hold of the donor by fealty and certaine rent, and the donor grant the services to another, and the tenant atturne, some have said the rent shall not passe, because the rent cannot passe but as a rent service, being granted by the name of services; and the fealty cannot passe, because as hath been saide (1) the fealty is an incident inseparable to the reversion. But it seemeth, that the rent shall passe as a rent seeke (2); because at the time of the grant it was a rent service in the grantor, and therefore there be words sufficient to passe it to the grantee, and it is not of necessity that it shall be a rent service in the hands of the grantee.

If there be lord and tenant by fealty and certaine rent, and the lord by deed grant the rent in fee saving the fealty, and grant further by the same deed that the grantee may distreine for the same rent in the tenancy, albeit a distresse were incident to the rent in the hands of the grantor, and although a tenant attorne to the grant, yet cannot the grantee distreine; for the distresse remaines as an incident inseparable to the seigniory, for then the tenant should be subject to two severall distresses of two severall men (3). And so it is if the lord in that case grant the rent in tayle or for [his] life, saving the fealty, and further grant that the grantee may distreine for it, albeit the reversion of the rent be a rent service, yet the donee or grantee shall have it but as a rent seeke, and shall not distreine for it.

7 E. 3. b. Fitz Warren's case.

7 E. 3. 2, 3. Adjudged.

It is to be observed, that where a rent service is become a rent seeke by severance of the same from the seigniory, that now the nature of the rent is changed; for if the grantee purchase part of the land, the whole rent shall be extinct. And whereas in an assise for a rent service, all the tenants of the land need not be named, but such as did the disseisin; yet in assise for the rent seek, which sometimes was a rent service, all the tenants must be named, as in case of a rent charge, albeit he were disseised but by one sole tenant. * But if the lord of a mannor release the fealty to his tenant saving the rent, or that a mesnalty become a rent by surplusage (4), those that are now seeke

31 Ass. 31. 17 Ass. 10. 32 Ass. pl. 10. F. N. B. 178. D. 22 H. 6. 3. b. 4 E. 2. Ass. 449. 28 H. 8. Dier, 31.

* 31 Ass. 23. 22 Ass. 53. (Mo. 109. 1 Leon. 14.)

(1) Ant. 143. a.

(2) See post. 152. a. the comment on Sect. 230. and note 6 there.

(3) This only shows, that the tenant cannot be made liable to two several distresses by *act of his lord*. But on *act of law* it is otherwise, of which lord Coke gives an instance post. 164. b.—[Note 252.]

(4) This passage being shortly expressed may to some be obscure. The case intended is that of lord mesne and tenant, where the rent from the tenant to the mesne is greater than the latter pays to the lord, and the lord purchases of the tenant; the consequence of which is, that the mesne becomes entitled to the surplusage rent from the lord, namely, to so much as the rent from the tenant to the mesne exceeds the rent to the lord from the mesne. See W. Jo. 234. and post. Sect. 234,† and fol. 154. b. and 309. b.—[Note 253.]

† *Sect. 234 is irrelevant to the subject. See sections 231, and 232, which are probably those meant to be referred to, and the commentary thereon, 152. b. and 153. a.*

secke (and sometimes were service) are part of the mannor; but a rent charge cannot be part of a mannor.

"*Atturnes, &c.*" Of attornement shall be hereafter said in his proper chapter and place.

Sect. 226.

IN the same manner, where a man holds his land by homage fealty and certaine rent, if the lord grant the rent, saving to him the homage, such rent after such grant is rent seck. But there where lands are holden by homage fealty and certaine rent, if the lord will grant by his deed the homage of his tenant to another, saving to him the remnant of his services, and the tenant atturne to him according to the forme of the grant; in this case the tenant shall hold his land of the grantee, and the lord who granted the homage shall have but the rent as a rent seck, and shall never distrain for the rent (1), *because that homage nor fealty nor escuage cannot be said secke, for no such service may be said secke. For he, which hath or ought to have homage fealty or escuage of his land, may by common right distreine for it, if it be behind; for homage fealtie and escuage are services, by which lands or tenements are holden, &c. and are such services as in no manner can be taken but as services, &c.*

"*IF the lord will grant by his deed the homage, &c.*" It is to be observed, that where the seigniory is by homage fealty and rent, [*a*] if the lord grant away the homage, the fealty shall passe; for fealty is an incident inseparable to homage [*b*], and cannot by any saving in any grant be separated from it, for homage cannot be sole or alone.* But the rent (tho' it be not saved) shall not passe in that case; because the rent is not incident to homage; and so it is if there be lord and tenant by fealty and rent, and the lord grant over the fealty without any savings, the rent passeth not. But fealty hath an incident inseparable belonging to it, which by no saving can be separated, and that is a distresse; for, as *Littleton* saith here, a service cannot be seck, (that is) without some ☞ distresse belonging to it, for then it were not a service, and so of homage and escuage. [151. a.]

[a] 40 E. 3. 22. per Curiam.
[b] 44 E. 3. 19, 20. 39 H. 6. 25. 29 Ass. p. 20. 26 Ass. p. 38.

"*Lands or tenements are holden, &c.*" By this (*&c.*) and out of this Section it may be collected, that if [*c*] there be lord and tenant by fealty and rent, the annuall rent, which is a profitable service, is of higher and more respect in law than the fealty; and therefore by the grant of the rent the fealty shall passe as an incident thereunto; but it is an incident separable, and therefore may be by a saving, as *Littleton* hath (2) said, separated from it. And so when the tenure is by fealty and rent, and the rent be recovered,

[c] 44 E. 3. 19. 26 Ass. 38. 29 Ass. p. 20. 9 E. 3. 2. 39 H. 6. 24, 25. 27 H. 8. 20. 8 E. 4. 28.

* *See ante* 68. a. n. 1. *and the note under the* * *there.*

(1) In L. and M. here follow these words, viz. "*because that fealty cannot be severed from homage, and.*" But they are not in the Roh. edition.
(2) Sect. 225. fo. 150. a.

recovered, the fealty shall includedly be recovered. [d] And where the tenure is by homage fealty and rent, by the recovery of the rent with the appurtenances upon a former right, the homage and fealty also shall be restored by necessity and indulgence of the law; for seeing the law giveth no *præcipe* for the homage and fealty, but for the rent only, reason would, that by the recovery of the rent, the whole entire seigniory shall be inclusively restored (3) in that case. But if the recovery be without title (4) there the rent is recovered as a rent seck, for that worketh no more than a grant *; but by the recovery of a mannor, whether it be by title or without title, homage fealty and all other services parcell of the mannor are recovered. And albeit fealty cannot be divided from homage by grant (as hath beene said) yet by extinguishment it may [e]. As if there be lord and tenant by homage fealty and rent, and the lord release the seigniory and services, or all his right in the land saving the fealty and rent, or saving the said rent, or if he by expresse words release the homage saving the fealty and rent, there the fealty and rent remaine, for the homage is extinct. And so note a diversity betweene a grant and a release in that case. But so long as homage continues, the fealty cannot be divided from it.

[d] Temps H. 8. Br. tit. Incidents, 24. 44 E. 3. 19. 29 Ass. 20. 39 H. 6. 24, 25.

(Ant. 148. b.)

* Vid. Sect. 149.

[e] 9 E. 3. 1. (Ant. 150. a.)

"But as to services, &c." Here is implyed a diversity betweene these corporall services of homage fealty and escuage, which cannot become seck or dry, but make tenure whereunto distresses escheats and other profits be incident, and other corporall services, as to plough, repaire, attend, and the like, and all rents whatsoever, for they may become seck or dry and make no tenure.

Sect. 227.

BUT otherwise it is of a rent, which was once rent service; because when it is severed by the grant of the lord from the other services, it cannot be said rent service, for that it hath not fealty unto it, which is incident to every manner of rent service; and therefore it is called rent seck (1). *And the lord cannot grant such a rent with a distresse, as it is said.*

"AND

---

(3) So if land, to which common is appendant or appurtenant, be recovered in assise of novel disseisin, it is a tacit recovery of the common also. Post. 154. b. It is the same on recovery of a manor, to which a villein is regardant. Post. 306. b. So remitter to the principal is remitter to the accessary. Post. 349. b. All this is agreeable to the rule, that *accessorium sequitur suum principale* which is cited in the next folio. See 152. a. and the case of trees in 11 Co. 49. b.—[Note 254.]

(4) Of recovery *without title*, where used to make a *common* recovery, see ant. 104. a. Of recovery *without title*, as distinguished from a *common* recovery, read post. 362. a.—[Note 255.]

(1) The words which follow in this Section are not in L. and M. nor in the Roh. edition; nor in the two MSS.

"*AND the lord cannot grant such a rent with a distresse, as it is said.*" [*f*] For ☞ the distresse is an incident inseparable to the fealty, as hath been said [*g*], and therefore a release of distresse is void. [151. b.]

[*f*] 7 E. 3. 2, 3.

[*g*] 7 E. 4. 11. 3 H. 7. 4, 5.

"*Incident,*" *Incidens*, a thing appertaining to or following another as a more worthy or principall; whereof you see here, and in divers other places of *Littleton*, examples. And of incidents, some are separable, and some inseparable (2), as hath beene said.

Sect. 228.

*ALSO, if a man lett to another lands for tearme of life, reserving to him certaine rent, if he grant the rent to another by his deed, saving to him the reversion of the land so letten, &c. such rent is but a rent seck; because that the grantee had * nothing in the reversion of the land, &c. But if he grant the reversion of the land to another for tearme of life, and the tenant attorne, &c. then hath the grantee the rent as a rent service; for that he hath the reversion for tearme of life.*

"*SAVING to him the reversion, &c.*" By this word (*&c.*) is to be observed, [*h*] that this rent reserved is a rent service, and hath fealty incident to it; and both rent and fealty are incident to the reversion, viz. [*i*] the rent incident to the reversion separably, but the fealty incident to the reversion inseparably; but by the grant of the rent, the fealty in this case shall not passe, because the fealty is inseparably incident to the reversion, but the grantee shall have the rent as a rent secke. Also by this (*&c.*) is implyed an attornement of the tenant; for without that, although by the grant the rent is turned to a rent secke, so as the tenant cannot be charged with any distresse, yet to the passing thereof there must be an attornment †.

[*h*] 41 E. 3. 16.

[*i*] 12 E. 4. 3. 32 H. 8. tit. Patents. Br. 26 Ass. 66. 48 E. 3. 9. b. Doct. & Stud. lib. 2. ca. 9.

"*Attorne, &c.*" Here is implyed by this (*&c.*) an attornment in the life of the grantee, and other incidents to an attornment, whereof you shall reade at large in the Chapter of Attornment.

"*Then hath the grantee the rent as a rent service; for that he hath the reversion for tearme of life.*" And the reason hereof is, because the rent is incident to the reversion, as hath beene said, and (as *Littleton* saith here) passeth away by the grant of the reversion as with the superior, without saying *cum pertinentiis* (4), *&c.*

* *The word "had" appeare to be here inserted for "hath;" see Mr. Ritso's Intr. p. 111.*

† *As to the effect of modern statutes upon the doctrine of attornment, see post. Mr. Butler's n. fol. 309. a.*

---

(2) This distinction of incidents is made before, fol. 93. a. For examples of incidents inseparable, see infra, and also ant. 99. a. b. 113. b. 150. b. 151. a. Bro. Nouv. Cas. pl. 7.—[Note 256.]

(3) Post. 309. a.

(4) Acc. ant. 121. b. post. 307. a.

&c. for the reversion cannot be seck (5). But by the grant of the reversion doth not passe (6).

[152. a.] ☞ Sect. 229.

ET issint est a entendue, &c. (1) † *And so it is to be intended, that if a man give lands or tenements in taile yielding to him and to his heires a certaine rent, or letteth land for tearme of life rendering a certaine rent,* (Post 324. a. b.) *if he grant the reversion to another, &c. and the tenant attorne, all the rent and service passe by this record* (*reversion*) (2) *because that such rent and service in such case are incident to reversion, and passe by the grant of the reversion. But albeit that he granteth the rent to another, the reversion doth not passe by such grant, &c.* (3)

THIS needs no explication, but is evident by that which hath formerly beene said, saving by this (*&c.*) in the end is implied the old rule, That the incident shall passe by the grant of the principall, but not the principall by the grant of the incident. *Accessorium non ducit, sed sequitur suum principale* (4).

Sect. 230. (5).

SO note the diversity. And so it is holden P. 21 E. 4. *But it is adjudged* 26 *of the book of assises, where the service of tenant in taile were granted, that this was a good grant, notwithstanding that the reversion remaine.*

THIS is added to *Littleton*. And therefore as I have done heretofore, and shall do hereafter in like cases, I passe it over.

† *In the four preceding editions, in which the sections of Littleton are given in the original French, with Lord Coke's translation, note* 1 *of* 152. *a. is referred to at the end of the part in French, and notes* 2 *&* 3, *are referred to in the translation.*

---

(5) Lord Coke only means, that a reversion cannot be without fealty, and its inseparable concomitant the remedy of distress. In respect to present profit, a reversion may be dry and fruitless during the particular estates, and until it comes into possession. To a reversion of this latter kind lord Coke himself gives the description of dry and fruitless, ant. 111. b. Hence it appears that the word *seck* is used by our lawyers in two senses. According to one, it signifies *want of remedy by distress*, as Littleton expounds the word in Section 218. In another, it imports *want of present fruit and profit*, as in the cases of the reversion without rent or other service except fealty.—[Note 257.]

(6) See acc. from Littleton himself at the end of Sect. 229.

(1) The same distinction between granting a *reversion* and granting the rent is taken post. Sect 572.

(2) According to Bro. Nouv. Cas. pl. 192, this holds in the case of the king as well as in the case of a common person.

(3) See ant. 150. b. 2 Ro. Abr. 59. infra. note 6.

(4) See ant. 151. a. note 3, and post. 349. b.

(5) No part of this section is in L. & M. Roh. or P.

over. And the case here cited in 26 *Ass. p.* 66, was *contra opinionem multorem;* and afterwards that judgement was reversed by writ of error, for that the services remained with the reversion as incidents (6) inseparable.

Sect. 231.

ALSO, if there be lord mesne and tenant, and the tenant holdeth of the mesne by the service of five shillings, and the mesne holdeth over by the service of 12 *pence, if the lord paramont purchase the tenancie in fee, then the service of the mesnalty is extinct; because that when the lord paramount hath the tenancie, he holdeth of his lord next paramount to him, and if he should hold this of him which was mesne, then he should hold the same tenancie immediately of divers lords by divers services, which should be inconvenient, and the law will sooner suffer a mischief than an inconvenience* (A), *and therefore the seigniorie of the mesnalty is extinct.*

"*IF there be lord mesne and tenant, &c. if the lord paramont purchase the tenancie in fee, &c.*"

[*k*] 20 E. 3. Avowrie, 126. 2 E. 2. tit. Exting. 6. 26 H. 6. ibid. 7.

[*k*] Some have said, that ☞ in this case it were reason, that by the purchase of the lord paramount his seigniory should be only extinct, and that he should become tenant to the mesne, and the mesne to hold over as the lord paramount held. But that cannot be; for that one man cannot be both lord and tenant, nor one land immediately holden of divers lords. [*l*] If the tenant infeoffe the lord paramount and his wife and their heires, in this case the mesnalty is but suspended; for if the wife survive, both mesnalty and seigniory are revived. [152. b.]

[*l*] 7 Ass. 2. 7 E. 320.

It is said, that if there be lord mesne and tenant, each of them by fealty and sixe pence, the lord confirme the state of the tenant, to hold of him by fealty and three pence, that the mesnalty is extinct (1). [*m*] And so in the same case, if the tenant be an abbot, and the lord confirme his estate to hold of him in frank-almoigne,

[*m*] 4 E. 3. 19. See for this hereafter in the chapter of Confirmation, Sect. (538).

---

(2) This reason is unexceptionable in respect to services, which in their nature are inseparable from the reversion, such as fealty. But it fails in respect to the rent, which lord Coke has before represented to be a separable incident, ant. 151. b. The true construction of the grant supposed, seems to be, that it is sufficient to pass the rent as a rent seck, but that for the other services it is void. It should be recollected too, that this construction is conformable to one by lord Coke on a similar case, which he states and explains in fol. 150. b. See the top of the page there. [Note 258.]

(A) Query contradiction or inconsistence. See ante 97. b. and Sections 87. 139. 269, 349. 440. 478. 488. 665. 722. 730.

(1) In the preceding case lord Coke states the doctrine upon it as a mere *dictum;* and by his marginal reference to the chapter of Confirmation, he apparently reserves his own opinion for a future occasion. Afterwards, when he resumes the subject; he holds, that, on account of *want of privity* between the lord paramount and the tenant paravail, *confirmation* from the former to the latter cannot abridge the services due to the mesne, and so alter the tenure between the mesne and the tenant paravail. Post. 305. b.—[Note 259.]

almoigne, the mesnalty is (2) extinct. [n] So it is if the lord release to the tenant (3). For whether the lord purchase the tenancie, or the tenant the seigniory, the mesnalty is extinct. And albeit the mesne grant the mesnalty for life, and then the lord release to the tenant, both the reversion and the estate for life are drowned [o]. So if there be a lord and tenant, and the tenant make a gift in taile, the remainder to the king, the seigniory is extinct (4).

[n] 8 H. 6. 24. (Post. 280. a.)

[o] 4 & 5 P. & M. Dy. 145. (2 Co. 92 b.)

"Which should be inconvenient." Here it appeareth, that *argumentum ab inconvenienti* is forcible in law*, as hath been said before (5), and shall be often observed hereafter.

Vid. Sect. 138, 139.

[p] *"The law will sooner suffer a mischief than an inconvenience* (6)." *Lex citiùs tolerare vult privatum damnum, quàm publicum malum.* Here be two maximes of the common law.

[p] 13 H. 4. 3. 40 Ass. p. 27. 12 R. 2. Vouch. 81.

First, that no man can hold one and the same land immediately of two severall lords.

Secondly, that one man cannot of the same land be both lord and tenant. And it is to be observed, that it is holden for an inconvenience, that any of the maximes of the law should be broken, though a private man suffer losse; for that by infringing of a maxime, not onely a generall prejudice to many, but in the end a publike incertainty and confusion to all would follow. And the rule of law is regularly true, *res inter alios acta alteri nocere non* (7) *debet, et factum unius alteri nocere non debet;* which are true with this exception, unlesse an inconvenience should follow, as our author here teacheth us.

* *See ante* Mr. *Hargrave's note* 1. *fol.* 66. *a.*

Sect.

---

(2) Lord Coke, in a subsequent part of his Commentary gives a different decision of this case; for there he holds, that the lord cannot extinguish the mesnalty by *confirmation* to the tenant paravail, there being *no privity* between them. Post. 305. b. But this is not any contradiction of himself; because here he is apparently giving the *dictum* of others.—[Note 260.]

(3) It deserves consideration, whether the *release* of the lord paramount is not as insufficient to pass the seigniory to the tenant paravail, as a *confirmation*, both being conveyances in which *privity* is required. See post. Sect. 461.—[Note 261.]

(4) The reason of this is elsewhere explained to be, that the seigniory being extinct for the fee-simple, it cannot remain for the particular estate either for life or in tail. See post. 312. b. Quick's case, 9 Co. 129. b. a case in Gouldsb. 149. and in Bingham's case, 2 Co. 92. [See Maule & Sel. 261.]—[Note 262.]

(5) Ante, 97. b.

(6) It sounds harshly to prefer a mischief to an inconvenience, the greater evil to the lesser. But the true construction of the rule obviates this objection; for it certainly means, as Lord Coke's addition explains, that the law prefers a *private* mischief to a *public* inconvenience.—[Note 263.]

(7) The same maxim is cited post. 319. a. In Wingate's Maxims, 327, there is a great variety of cases for illustration of the rule.—[Note 264.]

Sect. 232.

BUT in as much as the tenant holds of the mesne by five shillings, and the mesne holds but by twelve pence, so as he hath more in advantage by four shillings, than he paies to his lord, he shall have the said four shillings as a rent secke yearely of the lord which purchased the tenancie.

"HE shall have four shillings as a rent secke."

☞ And yet he shall distreyne for it; for, seeing the fealty is extinct, the law reserves the distresse to the rent; for as it hath been said in the like case, seeing the fealtie is extinct, the distresse by act in law may be preserved, *Quia quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest* (2). [r] And therefore if a man maketh a lease for life, reserving a rent, and bind himselfe in a statute, and [the conusee] (3) hath the rent extended and delivered to him, he shall distreyne for the rent (4), because he commeth to it by course of law. [153. a.]

[r] 13 H. 4. Avowrie, 237. (Post. 225. b. Mo. 36.)

[s] But if a rent service be made a rent secke by the grant of the lord, the grantee shall not distreyne for it, for that the distresse remaines with the fealtie. [t] If there be lord mesne and tenant, and the mesnaltie is a mannor having divers freeholders, and the lord purchase one of the tenancies, and there is a rent by surplusage, this rent albeit it be changed into another nature (as hath beene said) is parcell of the mannor. But yet by purchase of part of the land, the whole rent is extinct, albeit the law did preserve it.

[s] 28 E. 3. 93. (Ant. 150. b. 151. b. 309. b.) [t] 31 Ass. 28. 22 Ass. 53. 2 H. 6. 14.

Sect.

---

(1) If the rent may be distrained for, can it be properly called seck? Littleton in Sect. 218, describes a rent to be seck because distress is not incident to it. But if lord Coke is right here, a rent may be seck, and yet be distrained for. According to the resolution of the king's bench in W. Jo. 234, the rent, in a case such as is supposed by Littleton, is *quasi* a rent-service distrainable of common right. In other words, the distress is given, or rather saved, by the law, to prevent the mesne from being prejudiced by acts between lord and tenant to which the mesne is no party. This brings the case to a resemblance of a rent reserved for equality on a partition between coparceners; which by the implication of law is a rent-charge without aid of any clause of distress, and therefore called by Littleton a rent-charge distrainable of common right. See post. Sect. 258.—[Note 265.]

(2) See same maxim ant. fol. 56. a. See also 11 Co. 52. a Cro. Jam. 170. 189. and Oldfield's case, Noy. 123.

(3) The words [the conusee] are not in the original, but are added by the editor as essential to the sense of the passage.

(4) Acc. Bro. Abr. *Executions*, 143. Yet it has been said that the reversion itself is not extendable. Bro. Nouv. Cas. pl. 227. See as to this 1 Ro. Abr. 888. pl. 6 and 7. Mod. 40. and Carth. 126.—[Note 266.]

Sect. 233.

ALSO, if a man which hath a rent secke, be once seised of any parcell of the rent, and after the tenant will not pay the rent behind, this is his remedie. He ought to go by himselfe or by others to the lands or tenements out of which the rent is issuing, and there demand the arrerages of the rent; and if the tenant deny to pay it, this deniall is a disseisin of the rent. Also, if the tenant be not then readie to pay it, this is a deniall, which is a disseisin of the rent (5). *Also, if the tenant, nor any other man, be remaining upon the lands or tenements to pay the rent when he demandeth the arrearages, this is a deniall in law, and a disseisin in deed, and of such disseisins he may have an assise of* novel disseisin *against the tenant, and shall recover the seisin of the rent, and his arrerages and his dammages, and the costs of his writ and of his plea, &c. And if after such recovery* [*and execution had*] (1) † *the rent be againe denied unto him, then he shall have a redisseisin, and shall recover his double damages, &c.*

"*SEISIN,*" or *seison*, is common aswel to the English, as to the French, and signifies in the common law possession, whereof *seisina* a Latin word is made, and *seisire* a verbe. (Ant. 29. a.)

"*Of any parcell.*" [*u*] A seisin of parcel is a sufficient seisin in law, to have an assise of the whole rent. [*u*] 5 E. 4. 2. (Post. 315. a. Cro. Cha. 507.)

Concerning the generall learning of seisins, you may reade *lib.* 4. *Bevil's case, fol.* 8. *lib.* 5. *fol.* 98. *lib.* 6. *fol.* 57. *lib.* 7. *fol.* 24. 29. *lib.* 9. *fol.* 33. and many authorities of law there cited, but sufficient is said here to explaine *Littleton.* [9 Co. 23.) T. 18 E. 1. coram rege Nott. in Thesaur.

"*To the lands,*" *&c.* [*w*] For a demand of the tenant out of the land is not sufficient; but if there be a house and land a demand on the land is sufficient: but for a condition broken, it ought to be at the house (6), as hath been said before (7). [*w*] 49 E. 3. 14. b. 14 E. 4. 4. Pl. Com. 71.

"*Behind,*" *arere.* This word *arere* is to be observed, for it is not necessary, that ☞ the grantee of the rent should demand it at the very time when it becommeth due, but at any time after it is sufficient. For this is not like a demand of a rent upon a condition; because that is penall and overthroweth the whole state; and [*x*] therefore the time of demand must be certaine, to the end the lessee, donee, or feoffee may be there to pay the rent (2). But a demand of a rent [153. b.] (Ant. 144. a.) [*x*] 29 Ass. 51. 8 H. 6. 11. Lib. de Entries 79. b. (5 Co. 56. 7 Co. 28. 1 Leon. 305. Cro. Jam. 9, 10. 145.)

† *This is note* 1, *of* 153. *b. in the* 13*th and* 14*th editions.*

---

(5) The words *of the rent* not in L. and M. nor Roh.

(6) Acc. F. N. B. 179. A.

(7) Acc. post. 201. b.

(1) † The words between brackets not in L. and M. Roh. nor P.

(2) Acc. as to condition of re-entry, post. 301. a. acc. whether the condition be for re-entry or a sum *nomine pœnæ.* 7 Co. 28. b. Hob. 82. 207.

But

a rent secke or rent charge is but onely a formal meane to recover that which is due; [y] and therefore in that case it may be demanded after it is behind at any time, whether the tenant be present or no, for remedies for rights are ever favourably extended.

[y] Mich. 41 E. coram rege, adjudg. accordingly.

"*This is a deniall in law.*" For wheresoever there is a lawfull demand of a rent, and the same is not paid, whether the tenant be present or absent, yet this is a deniall in law (3), albeit there be no words of denyall. It appeareth here that the demand must be made upon the land, and albeit the tenant nor any for him be there, yet must the grantee demand it, because without a demand there be no denier in deed, or in law.

(Post. 201. b.)

"*Disseisin.*" (4) [z] *Disseisina* is a putting out of a man out of seisin, and ever implyeth a wrong (5). But dispossessing or ejectment is a putting out of possession, and may be by right or by wrong. **Omnis disseisina est transgressio, sed non omnis transgressio est disseisina. Si eo animo fortè ingrediatur fundum alienum, non quod sibi usurpet tenementum vel jura, non facit disseisinam sed transgressionem, &c. Quærendum est à judice quo animo hoc fecerit, &c.* (6). And of ancient time a disseisin was defined thus: *Disseisin est un personel trespasse de tortious ouster del seisin* (7).

[z] Vid. Bract. lib. 4. fol. 161, 162. 204. Brit. ca. 42, 43, &c. f. 83. 106. 114, 115. 118. Mir. ca. 2. sect. 1. *Fleta, lib. 4. ca. 1. Bra. ubi supra †. (4 Leon. 48. a. Cro. Cha. 303.

"*An assise of novel disseisin.*" *Assisa novæ disseisinæ. Assisa* properly commeth of the Latin word *assideo*, which is to associate or set together; so as properly assise is an association or sitting together. And the writ, whereby certain persons are authorised

Mirr. ca. 2. sec. 25. Bract. lib. 4. ca. 4. Britton, ca. 44. 45, &c. Fleta, lib. 4. ca. 5, & 2, & 3.

† *See note 6 infra.*

But the case of Thyn v. Cholmley, Mo. 347, is *contra* as to a sum *nomine pœnæ*.—[Note 267.]

(3) For disseisin of rent by denial, see post. Sect. 238.

(4) See Littleton's description of disseisin, post. Sect. 279.

(5) It also implieth force. Post. 257. b.

(6) The preceding passages in Latin are not from Bracton or Fleta in the places cited by lord Coke, but from Bract. 216. b.

(7) For other descriptions of disseisin besides those given or referred to by lord Coke, see post. 377. a, 6 Co. 58. The ancient authors cited by lord Coke, particularly Bracton and Fleta, are very full in explaining the various modes of disseisin. The additional marginal references to 4 Leon. and Cro. Cha. are to cases about disseisin by *election*, as to which see post. 306. b. and 323. a. See also the case of Taylor on demise of Atkyns *v.* Horde, 1 Burr. 60. In this last case it was attempted to support a common recovery by supposing the tenant to the præcipe to have gained a freehold by disseisin. The nature of a disseisin was therefore elaborately investigated by the counsel. Lord Mansfield, also, who had been recently made chief justice of the king's bench, and delivered the court's opinion in a very distinguished argument, expatiated on the same subject, in order to repel the arguments for a freehold by disseisin in the case before the court, by showing that the doctrine in our books about disseisins chiefly applies to disseisin by a person electing, for the sake of certain remedies, to suppose himself disseised. There will probably be occasion to refer to some points of the learning displayed in the course of this famous case in a subsequent part of the present work; especially where Littleton writes concerning disseisins by *election*. See post. Sect. 588.—[Note 268.]

authorised and called together, it is called *assisa novæ disseisinæ;* so as *assisa* is but *cessio* (8). But because *cessio* is but a generall word, therefore in this sense *assisa* is used in law for a particular cession by force of the writ *de assisâ novæ disseisinæ;* and accordingly it was anciently said, *assise in un case n'est auter chose que session des justices.* And it is called *assisa novæ disseisinæ,* for that the justices of eire, before whom these assises were taken in their proper counties did ride their circuits from 7 years to 7 years, and no disseisin before the eire if it were not complained of in the eire could be questioned after the eire; and therefore a diseisin committed before the last eire was called an ancient disseisin, and a disseisin after the last eire was called a new disseisin, or *novæ disseisinæ. Assisa* also signifyeth a jury, of their sitting together, and also a session of parliament, as *Littleton* hereafter in this Chapter sheweth. Mirror, ca 2. sect, 25.

"*And shall discover the seisin of the rent.*" Here, and by the (*&c.*) in the end of this Section is implyed, that our author intendeth his case where the rent issueth out of the lands in one county. For if a man be seised of two acres of land in two severall counties, and maketh a lease of both of them reserving two shillings rent; in this case albeit several liveries (9) be made at severall times, yet is it but one entire rent in respect of the necessitie of the case, and he shall distreyne in one county for the whole, and make one avowrie for the whole. But he shall have severall assises *in confinio comitatûs,* and in either countie shall make his plaint of the whole rent; but there shall be but one patent to the justices. (7 Co. 3. b.)

[154. a.]

[*a*] And this assise in *confinio comitatûs* is given by the statute of 7 R. 2. cap. 10. for no assise lay in that case at the common law, but the party might distreine. [*b*] But for a common of pasture, of turbary, of pischary, of estovers, and the like, in one county, appendant or appurtenant to land in another county, an assise *in confinio comitatûs* did lye at the common law; [*c*] and so it is of a nusans done in one county to lands, lying in another county, the like assise did lye at the common law. [*a*] 10 Ass. pl. 4. 18 Ass. pl. 1. & 18 E. 3. 32. 22 H. 6. 9, 10. [*b*] F. N. B. 180. A. (7 Co. 2, 3, 4.) [*c*] F. N. B. 183. K.

[*d*] And albeit the counties do not adjoyne, but there be 20 counties meane betweene them, yet the assise *in confinio comitatûs* doth lye (1), and the justices shall sit betweene the said counties. [*e*] And where it is said before of two counties, the like law it is if the same extend into more counties (2). [*d*] 5 E. 4. 2. [*e*] F. N. B. 180. A.

[*f*] If a man hold divers mannors or lands in divers severall counties by one tenure, and the lord is deforced of his services, he shall have severall writs of customes and services; for every county one writ returnable at one day in the court of common pleas, [*f*] 30 E. 1. tit. Droit, F. N. B. 151. M.

---

(8) It should be *sessio,* the word as Coke spells it tending to a wrong derivation.

(9) As to livery of lands situate in several counties, see ant. Sect. 61, 62.

(1) Acc. Finc. Descript. del Com. L. 59. a. & 49 Ass. pl. 1. & 21 Hen. 6. 3. there cited.

(2) Fitzherbert in the place cited in the margin is a direct authority for this. But according to Finch, more than two counties cannot join. Finc. Descript. del. Com. L. 59. a. See further on trial by two, or more counties. 21 Vin. Abr. 103.—[Note 269.

pleas, and thereupon count according to his case by the common law.

[g] 18 Ass. pl. 1. [g] But if the tenant in that case do cease, the lord shall not have severall writs of *cessavit ut supra;* for the writ of *cessavit* * W. 2. cap. 21. is given by statute *, and the forme and manner of the writ therein prescribed; and thereupon it is holden in our bookes that in that case a *cessavit* doth not lye (3).

[h] Bracton, fol. 236. Britton, 133. 246. Flet. l. 4. c. 29. Merton, c. 3. Regist. 206, 207. * Mirror, c. 3. W. 2. c. 46. Vid. Sect. 234. [h] "*He shall have redisseisin and shall recover his double damages, &c.*" Here by this (*&c.*) is also to be understood, that a writ of redisseisin is given by the statute of *Merton* *, (so called because the parliament was holden at *Merton in Anno* 20 *H.* 3.) the letter whereof is, *Item si quis fuerit disseisitus de libero tenemento, & coram justiciariis itinerantibus seisinam suam recuperaverit per assisam novæ disseisinæ, vel per recognitionem eorum qui fecerint disseisinam, et ipse disseisitus per vicecomitem seisinam suam habuerit, si iidem disseisitores, postea post iter justiciariorum, vel infra, de eodem tenemento iterum eundem conquerentem, disseisiverint, & inde convicti fuerint, statim capiantur, &c.* (4). But the double damages are given by the statute of W. 2. cap. 26. (5).

Vid. Regist. 206. b. (1 Ro. Abr. 571.)

And *Littleton* in few words hath made a good exposition of this statute; for where the statute saith, *disseisitus de libero tenemento*, *Littleton* expounds it [i] to extend to a rent secke or rent charge (6). Albeit, as hath beene said, they be against common right, yet a man hath a freehold in them, [k] and he that granteth *omnia tenementa sua*, a rent charge or a rent secke doth passe (7).

[i] 40 Ass. 23. ac. [k] 14 E. 4. 4. 11 H. 6. 22. (Ant. 6. a. 10. b.)

Coram justiciariis itinerantibus, &c. saith the statute. But *Littleton* speaketh generally, and so is the statute to be intended before any other justices that have authority to take assises, and justices itinerant are set downe but for an example, which is worthy of the observation, [l] being a penall law.

[l] Fitz. N. B. 180. H.

Recuperaverit per assisam, &c, saith the statute. Here *assisa* is taken for the verdict of the assise, as *Littleton* hereafter in this Chapter expoundeth the same. *Vel per recognitionem, &c.* or by confession. Then the question is what if the recovery were upon a demurrer, or by pleading of a record, and failer of it, or by any other manner. And seeing *Littleton* speaketh generally, it must be understood by all manner of recoveries, in an assise of *novel disseisin;* and so it is confirmed by the statute of W. 2. cap. 26 (8).

"*Recovery.*" *Recuperatio* cometh of the verbe *recuperare, i. e. ad rem per injuriam extortam sive detentam per sententiam judicis*

---

(3) Acc. F. N. B. 209. K.

(4) Acc. 2 Inst. 82. 115.

(5) See 2 Inst. 416.

(6) Acc. F. N. B. 178. D.

(7) So where lands and *tenements* are devisable by custom of a borough, both rent-charge and rent-service are within the custom. Post. Sect. 585. But sometimes the word *tenement* is used in a more limited sense, and to exclude rents and other incorporeal hereditaments, as by Littleton in writing descents to toll of entries. See post. Sect. 385.—[Note 270.]

(8) See further as to *redisseisin* Fitzherbert's comment on the writ of that name, F. N. B. 188. B.

judicis restitui. And *recuperatio* in the common law is all one with *evictio* in the civill law, which is *alicujus rei in causam alterius adductæ per judicem acquisitio.*

"*And execution had.*" *Per vicecomitem seisinam habuerit,* saith the statute: but *Littleton* speaketh generally, (*and execution had*); so as whether it be by the sherife or by the party, so as execution or possession be had, it sufficeth (9).

"*Execution,*" *Executio,* and signifieth in law the obtaining of actuall possession of any thing acquired by judgement of law, or by a fine executory levied, whether it be by the sherife or by the entry of the party, whereof you shall reade more hereafter (10). Vide Sect. 504.

Note, it appeareth here by *Littleton,* that [*m*] the recovery in a former writ must be in assise of *novel disseisin,* wherein these words (*such recovery*) are to be observed. And therefore in a writ of right close in ancient demesne, the demandant maketh his protestation to sue in the nature of assise of *novel disseisin,* and after is redisseised, he shall not have a writ of redisseisin, because the first recovery was not by a writ of assise of *novel disseisin.* [*n*] And so it is, if the recovery were in assise of fresh force by bill according to the custome of some city or borough. Also in ancient demesne there be no coroners (11). [m] 14 E. 2. tit. Redisa. 9. F. N. B. 189. G. [n] 14 E. 3. tit. Redis. 8. Vide the 2 part of the Institutes. Stat. de Merton, cap. 3.

[154. b.] *Si iidem disseisitores,* saith the statute. [*o*] So as it must be the same disseisors: but here ☞ *iidem* is taken for *non alii.* And therefore if the recovery in the assise were against two disseisors, and one of them redisseise him againe, he shall have a redisseisin against him, for he is not *alius.* But if the recovery had been against one, and he and another redisseise the plaintife, he shall not have a redisseisin; for here is *alius:* and he cannot have a redisseisin against the former disseisor alone, because he is join-tenant with another; [*p*] for joyntenancy in a writ of redisseisin is a good plea, and a stranger shall not be subject to double imprisonment and double damages. [o] 9 H. 4, 5. F. N. B. 189. C. 23 Ass. pl. 7. (Cro. Jam. 334.) (F. N. B. 188. C.) [p] 33 E. 3. Redisseisin, 7. (3 Co. 13. b. Post. 198. a.)

[*q*] If a recovery be had against a woman in an assise of *novel disseisin,* and the plaintife recovereth and hath execution, the woman taketh husband, and both of them redisseise the plaintife, he shall not have a redisseisin, because the husband is *alius.* [*r*] And yet if a feme recover in an assise, and after take baron, and they are redisseised, the husband and wife shall have a redisseisin; because the husband joyneth for conformity, and it is in the right of his wife who was disseised before, so in effect it is *idem disseisitus et idem conquerens* (1). [q] 9 H. 4, 5. F. N. B. 188. E. [r] F. N. B. 188. E. Registr. 9 H. 4, 5. (Hob. 96.)

If

(9) Acc. ant. 34. b. See also Dy. 278. b. March. 95.

(10) Post. 289. a.

(11) This is an additional reason against a writ of redisseisin; because that writ requires that the coroners be taken to see it executed, and they are not officers of the court of ancient demesne. The same reason applies more strongly in respect of the sheriff, for the writ is directable to him, and he is judge as well as officer in it. See Kitch. 96. a. & Fulwood's case, 4 Co. 65. a. See also Dalt. Sher. 33. b. where the sheriff's duty in executing the writ of disseisin is explained.—[Note 271.]

(1) So if a feme commits a redisseisin, and *afterwards* is married, the writ lies against both; because in that case the husband is named, not as the actor,

If two coparceners be disseised and recover in an assise, if after they make partition, and after they be severally disseised, they shall have severall redisseisins: and so it is of joyntenants; for they be *iidem conquerentes, & non alii.* Also a redisseisin doth lie against the disseisor which doth redisseise, and against another to whom he made feoffment after the second disseisin; for otherwise the redisseisor might prevent the plaintife of his redisseisin. But in an assise against *A.* and *B.*, *A.* is found disseisor, and *B.* tenant, and the plaintife doth recover; and after he which was found tenant disseises the plaintife, he shall not have a redisseisin, because he did disseise him but once (2).

F. N. B. 188. G. *De eodem tenemento,* saith the statute. If the plaintife be redisseised of parcell of the tenement formerly recovered, he shall have a redisseisin.

(Ant. 153. a.) If the mesne recovereth (3) a rent when it is a rent service, and after the rent becommeth a rent seck by surplusage, and † doth redisseise him of the rent, he shall have a redisseisin; for the substance of the rent remaines, though the quality be altered (4).

[s] 26 H. 6. tit. Aid. 77. [s] If tenant in speciall taile recovereth in assise, and after becommeth tenant in taile after possibility of issue extinct, and then is redisseised, he shall have a redisseisin; for albeit the state of inheritance be altered, yet the same freehold remaineth (5).

8 E. 3. tit. Redisseisin, 6. F. N. B. 189. P. If a man recover land in an assise of *novel disseisin* whereunto there is a common appendant or appurtenant, and after is redisseised of the common, he shall have a redisseisin of the common, for it was tacitly recovered in the assise (6).

† *The sense seems to require that the passage should be read as if lord Coke had used the words,* "and the lord doth redisseise him of the rent, the mesne shall have a redisseisin."

Sect. 234.

AND memorandum, *that this name assise is* nomen equivocum; *for sometimes it is taken for a jurie; for the beginning of the record of an assise of* novel disseisin *beginneth thus:* assisa venit recognitura, &c. *which is the same as* jurata venit recognitura. *And the reason is, for that by the writ of assise it is commanded to the sherife* (il est command a la vicont), quòd faceret duodecim liberos & legales homines de vicineto,* &c. videre tenementum illud, et nomina illorum imbreviare, et quod summoneat eos per bonos summonitores, quòd sint coram justiciariis, &c. parati inde facere recognitionem, &c. *And because that by such*

* *It is "visineto" in an edition of Littleton in* 1583; *but here, and in several prior editions of Co. Litt. the word is corrected agreeably to lord Coke's remark on the impropriety of spelling it with an s. Vid. post.* 158. *b.*

---

actor, but only in conformity to the law, which will not suffer the wife to be sued alone, and to satisfy the damages. Hob. 96.—[Note 272.]

(2) See post. Sect. 278.

(3) Recovery in *assise* must be understood.

(4) The reason is, because the alteration is made by the act of others, namely, of the lord paramount and tenant paravail. Acc. 4 Co. 9. a. and b. in Bevil's case. See ant. Sect. 232. post. 309. b. ant. 152. b.—[Note 273.]

(5) Acc. 11 Co. 81. a. in Lewis Bowles's case.

(6) Other instances of tacit recovery are mentioned ant. fol. 151. a.

such an originall, a pannell by force of the same writ ought to be returned, &c. it is said in the beginning of the record in the assize, assisa venit recognitura, &c. *Also, in a writ of right* (en briefe de droit) *it is commonly said that the tenant may put himselfe on God and the great assise. Also there is a writ in the register, which is called a writ* de magnâ assisâ eligendâ. *So as this is well proved, that this name assise sometimes is taken for a jury. And sometimes it is taken for the whole writ of assise; and according to this purpose it is most properly & most commonly taken, as an assise of* novel disseisin *is taken for the whole writ of assise of* novel disseisin. *And in the same manner an assise of common of pasture is taken for the whole writ of assise of common of pasture, and assise of* mortdauncester *is taken for the whole writ of assise of* mortdauncester, *and assise of* darreine presentment *is taken for the whole writ of* darreine presentment. *But it seemes, that the reason why such writs at the beginning were called assises was, for that by every such writ it is commanded to the sherife,* quòd summoneat 12, *which is as much to say, that he ought to summon a jury. And sometime assise is taken for an ordinance, to wit, to put certaine things into a certain rule and disposition, as an ordinance, which is called* (1)† assisa panis et cervisiæ.

"*ÆQUIVOCUM.*" (7) For the better understanding hereof, of these there be two kinds, viz. *æquivocum æquivocans;* and *æquivocum æquivocatum.*

Æquivocum æquivocans est plurivocum, polysemus, a word of divers several significations.

Æquivocum æquivocatum est univocum, that is to say, reduced to a certaine signification. As here in *Littleton's* example, *assisa est nomen æquivocum æquivocans;* for sometime it signifieth a jury, sometime the writ of assise, and sometime an ordinance or statute. Now assise, *jurata* (8), is *æquivocum æquivocatum;* and so is *breve de assisâ novæ disseisine,* and *assisa panis, &c.* Even as *canis est nomen* ☞ *equivocum; canis latrabilis, canis marinus, canis cœlestis, sunt æquivoca æquivocata.*

[155. a.]

"*An assise of novel disseisin.*" Note [*a*], there be foure assises, viz. this writ, an assise of *mordancester,* or *darreine presentment,* and of *utrum* (1). (2 Co. 70.) [*a*] Bracton, lib. 4. fo. 160. Britton, ca. 42. fo. 105. 134. F. N. B. Fleta, lib. 4. ca. 5. &c. Mirr. ca. 2. sect. 13.

"*Sherife (vicont).*" Vide Sect. 248, verbo (*sherife*). (Ant. 109. b. Post. 168. a.)

"*Quod faciat* 12 *liberos et legales homines de vicineto, &c.*" [*b*] Albeit the words of the writ be *duodecim,* yet by ancient course the sherife must return (2) 24; and this is for expedition of justice: for if 12 should onely be returned, no man should have [*b*] 1 H. 7. 2.

† *This is note* 1. *of* 155. *b. in the* 13*th and* 14*th editions.*

---

(1) † The words *among the ancient statutes* are here added in L. & M. Roh. and P.

(7) See Hob. 303.

(8) Lord Coke means "taken for *jurata.*"

(1) *Juris utrum.*

(2) See 3 G. 2. c. 25. s. 8.

have a full jury appear, or be sworn in respect of challenges, without a *tales*, which should be a great delay of tryals. So as in this case usage and ancient course maketh law. And it seemeth to me, that the law in this case delighteth herselfe in the number of 12; for there must not onely be 12 *jurors*(3) for the tryall of matters of fact, [c] but 12 judges of ancient time for tryall of matters of law *in the Exchequer Chamber*. Also for matters of state there were in ancient time twelve *Counsellors of State*. He that wageth his law must have *eleven others with him*, which thinke he says true. And that *number of twelve* is much respected *in holy writ*, as 12 *apostles*, 12 *stones*, 12 *tribes*, &c.

[c] Vid. Pl. Com. in proœmio.

Joshua, 4. Genes. 49.

[d] He that is of a jury, must be *liber homo*, that is, not only a freeman and not bond, but also one that hath such freedome of mind as he stands indifferent as he stands unsworne. Secondly, he must bee *legalis*. And by the law every juror, that is returned for the tryall of any issue or cause, ought to have three properties.

[d] 9 E. 4. 16.

(*) First, he ought to be dwelling most neere to the place where the question is moved(2). [155. b.]

(*) Artic. super. Cart. ca. 9. Regist. 178. 8 E. 3. 30.

Secondly, he ought to be most sufficient both for understanding, and competencie of estate(3).

Vid. Sect. 102. 193.

Thirdly he ought to be least suspitious, that is, to be indifferent as he stands unsworne: and then he is accounted in law *liber*

---

(3) In a Coke upon Littleton in my possession there is the following marginal note on the necessity of having 12 jurors.—"In the manor of Penryn "Farrein, in Cornwall, there was a custome to try an issue with *six* jurors; and "this custome was adjudged no good custome, as Rolle chiefe justice affirmed "in Mich. terme 1652." The printed books also furnish two cases against such a custom; in the first of which cases Rolle appears to have argued for it, and to have noticed that there was a multitude of records in twenty several courts in Cornwall proving its prevalency. See Fredymock *v.* Perryman, Cro. Cha. 259. 1 Ro. Abr. 564. and Aike et Aimon *v.* Hunkin, 1 Sid. 233. However, in some special cases the jury may be less than twelve; and in some must or may be more.—1. They may be less. Thus it may be in Wales under the provision of the statute of 34 & 35 H. 8. concerning Wales, which allows of six. See 34 & 35 H. 8. c. 26. s. 74. Cro. Cha. 259. 1 Sid. 233. and 3 G. 2. c. 25. s. 9. So also it is in some special cases in England, as 6 or 8 in inquiry of damages on default, and in inquiry of waste, though this latter has been questioned, and even denied. Spelm. Gloss. voce *jurata*. Fitz. N. B. 107. C. Dunc. Trials per Pais, cap. 6. 1 Ventr. 113. Finch. Law, 400. Further, there is in Glanvil a writ for a jury of 8 to inquire into the age where infancy is alleged. Glanv. lib. 13. c. 14, 15, 16.—2. Instances, in which the law allows or requires more than twelve, are, attaint, in which there must be 24, the great assize, in which there must be 16, the grand jury for indictments, which usually consists of some number between 12 and 23, and writ of inquiry of waste, in which 13 have been allowed. Finch. Law. 484. Spelm. Gloss. voce *jurata*. 2 Hal. Hist. Pl. C. 161. and Cro. Cha. 414.—[Note 274.]

(2) See post. 157. a. ant. 125. a. n. 2. This qualification is now become unnecessary in civil cases, the 4 An. c. 16. s. 6 & 7, directing that in them the jury shall be taken from the body of the county. See ant. 125. a. n. 2. and a learned tract by the late Mr. serjeant Wynne, intituled, a Dissertation on the writ *de non ponendis in assisis et juratis*. See also 2 Inst. 447, & 561. —[Note 275.]

(3) See post. 156. a.

liber et legalis homo; otherwise he may be challenged, and not suffered to be sworne (4).

9 H. 6. 37.

The most usual triall of matters of fact is by 12 such men; for *ad questionem facti non respondent judices;* and matters in law the judges ought to decide and discusse: for *ad quæstionem juris non respondent juratores* (5).

For

(4) Of other modes of trying facts besides that by jury, see ant. 74. a.

(5) This *decantatum*, as lord chief justice Vaughan calls it, on account of its frequency in the books, about the respective provinces of judge and jury, hath since lord Coke's time become the subject of very heated controversy, especially on prosecutions for state libels; some aiming to render juries wholly dependent on the judge for matters of law, and others contending for nearly a complete and unqualified independence. On the trial of John Lilburne for treason, in 1649, high words passed between the court and him, in consequence of his stating to the jury that they were judges of both law and fact, and citing passages in the Coke upon Littleton to prove it. 2 State Tr. 4th ed. 69, and post. 228. a. In the case of Penn and Meade, who in 1670 were indicted for unlawfully assembling the people and preaching to them, the jury gave a verdict against the directions of the court in point of law, and for this were committed to prison. But the commitment was questioned; and, on a habeas corpus brought in the court of common pleas, it was declared illegal; lord chief justice Vaughan distinguishing himself on the occasion by a most profound argument in favour of the rights of a jury. Bushell's case, 1 Freem. 1. and Vaugh. 135. However the contest did not cease, as appears by Sir John Hawles's famous dialogue between a barrister and a juryman, which was published in 1680, to assert the claims of the latter against the then current doctrine decrying their authority, Since the Revolution also many cases have occurred in which there has been much debate on the like topic. See King v. Poole, in Cas. B. R. temp. Hardwicke, 23. Franklin's case, 9 State Tri. 275. Peter Zenger's, ibid. Owen's case, 10 State Tr. p. 196 of Append. and Woodfall's case, 5 Burr. 261. By attending to the cases before referred to it will be easy to trace the progress of this controversy on the limits of the jury's province.

In respect to my own ideas on this subject, they are at present to this effect.

On the one hand, as the jury may, as often as they think fit, find a general verdict, I therefore think it unquestionable that they so far may decide upon the law as well as fact, such a verdict necessarily involving both. In this I have the authority of Littleton himself, who hereafter writes, that *if the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally.* Post. Sect. 368. and fol. 228.

But on the other hand I think it seems clear, that questions of law generally and more properly belong to the judges; and that, exclusively of the fitness of having the law expounded by those who are trained to the knowledge of it by long study and practice, this appears from various considerations.—I. If the parties litigating agree in their facts, the cause can never go to a jury, but is tried on a demurrer; it being a rule, and I believe without exception, that issues in law are ever determined by the judges, and only issues of fact are tried by a jury. Ant. 71. b.—II. Even when an issue in fact is joined, and comes before a jury for trial, either party, by demurring to evidence, which includes an admission of the fact to which the evidence applies, may so far draw the cause from the cognisance of the jury; for in that case the law is reserved for the decision of the court from which the issue of fact comes, and the jury is either discharged, or at the utmost only ascertains the damages. Ant. 72. a. Dougl. Rep. 127. 213. Buller's Nisi Pri. 2d edit. 313.—III. The jury is supposed to be so inadequate to finding out the law, that it is incumbent upon the judge, who presides at the trial, to inform them what the law is:

and,

[e] Vid. Artic. super Cart. ca. 9. Fortesc. ca. 25. &c. 29. [f] Glanvil. lib. 2. ca. 14. 15. Bracton, lib. 3. fol. 116. a.

[e] For the institution and right use of this triall by 12 men, and wherefore other countries have them not, and how this triall excells others, see *Fortescue* at large, cap. 25, &c. & 29. [f] And in ancient time they were 12 knights. This trial of the fact

per

and, as a check to the judge in the discharge of this duty, either party may, under the statute of Westminster the 2d. c. 31, make his exception in writing to the judge's direction, and enforce its being made a part of the record, so as afterwards to found error upon it. See post. 2 Inst. 426. Trials per Pais, 8th ed. 222. 466. Case of Fabrigas and Mostyn in xi. State Trials. Case of Money and others *v.* Leach, 3 Burr. 1742. Buller's Law of Nis. Pri. 2d ed. 315.—IV. The jury is ever at liberty to give a special verdict, the nature of which is to find the facts at large, and leave the conclusion of law to the judges of the court from which the issue comes. Formerly indeed it was doubted, whether in certain cases, in which the issue was of a very limited and restrained kind, the jury was not bound to find a general verdict. But the contrary was settled in Downman's case, 9 Co. 11. b. and the rule now holds both in criminal and civil cases without exception. See post. 227. b. Staunf. Pl. C. 165. a. Major Oneby's case, 2 Lord Raym. 1494.—V. Whilst attaints, which still subsist in law, were in use, it was hazardous in a jury to find a general verdict where the case was doubtful, and they were apprised of it by the judges; because if they mistook the law they were in danger of an attaint. Post. 228. a. Hob. 227. Vaugh. 144. 2 Hal. Hist. Pl. C. 310. Gilb. Com. Pl. 2d edition, 128.—VI. If the jury find the facts specially, and add their conclusion as to the law, it is not binding on the judges; but they have a right to control the verdict, and declare the law as they conceive it to be. At least this is the language of some most respectable authorities. Staunf. Pl. C. 165. a. Plowd. 114. a. b. 4 Co. 42. b. Hal. Hist. Pl. C. v. 1. p. 471. 476, 477. and v. 2. p. 302.—VII. The courts have long exercised the power of granting new trials in civil cases where the jury find against that which the judge trying the cause, or the court at large, holds to be law, or where the jury find a general verdict, and the court conceives that on account of difficulty of law there ought to have been a special one. King v. Poole, Cas. B. R. temp. Hardwicke, 26. Though too in criminal and penal cases the judges do not claim such a discretion against persons acquitted, the reason I presume is in respect of the rule that *nemo bis punitur aut vexatur pro eodem delicto*, or the hardship which would arise from allowing a person to be twice put in jeopardy for one offence; and if this be so, it only shows that on that account an exception is made to a general rule. 4 Blackst. 8th ed. 361. 2 L. Raym. 1585. 2 Stra. 899. 4 Co. 40. a. and Wingate's Maxims, 695. But see 6 T. R. 638, where the rule laid down is, that in crimes above misdemeanor there can be no new trial at all, but that in misdemeanor it may be granted to examine again in either guilt or innocence.

Upon the whole, as my mind is affected with this interesting subject, the result is, that the *immediate* and *direct* right of deciding upon questions of law is entrusted to the judges; that in a jury it is only *incidental;* that in the exercise of this incidental right the latter are not only placed under the superintendence of the former, but are in some degree controllable by them; and therefore that in all points of law arising on a trial, juries ought to show the most respectful deference to the advice and recommendation of judges. In favour of this conclusion the conduct of juries bears ample testimony; for to their honour it should be remembered, that the examples of their resisting the advice of a judge in points of law are rare, except where they have been provoked into such an opposition by the grossness of his own misconduct, or betrayed into an unjust suspicion of his integrity by the misrepresentation and ill practice of others. In civil cases, particularly where the title to *real* property is in question, juries almost universally find a special verdict as often as the judge

per duodecim liberos et legales homines is very ancient: for heare what the law was before the conquest. [*g*] *In singulis centuriis comitia sunto, atque liberæ conditionis viri duodeni ætate superiores und cum præposito sacra tenentes juranto, &c.* Nay the tryall, in some cases, *per medietatem linguæ*, (as we speake) was as ancient. [*h*] *Viri duodeni jure consulti, Angliæ sex, Walliæ totidem Anglis et Wallis jus dicunto;* and of ancient time it was called *duodecimvirale judicium* (6).

[*g*] Lamb. verb. Centuria.

[*h*] Lamb. fol. 91. 3.

Now seeing we are justly occasioned, and the rather for the (*&c.*) herein, to speake of a challenge to jurors, to make the studious reader capable of the understanding of the bookes of law concerning this matter, it shall be necessary to say somewhat of challenges; and, first, what a challenge is.

Challenge is a word common as well to the English as to the French, and sometimes signifieth to claime, and the Latine word is *vendicare;* sometime in respect of revenge to challenge into the field, and then it is called in Latine *vindicare* or *provocare;* sometime in respect of partiality or insufficiency, to challenge in court persons returned on a jury. And seeing there is no proper Latin word to signify this particular kind of challenge, they have framed a word anciently written, [*a*] *chalumniare*, and *columpniare*, and *calumpniare*, and now written *calumniare;* and hath no affinity with the verbe *calumnior*, or *calumnia*, which is derived of that, for that is of a quite other sense, signifying a false accuser, and in that sense [*b*] *Bracton* useth *calumniator* to be a false accuser; but it is derived of the old word *caloir* or *chaloir*, which in one signification is to care for or foresee. And for that to challenge jurors is the meane to care for or foresee, that an indifferent triall be had, it is called *calumniare*, to challenge, that is, to except against them that are returned to be jurors; and this is his proper signification. [*c*] But sometimes a summons, *sommonitio* is said

[*a*] W. 2. ca. 32. Vid. stat. de 12 E. 2. de esson. calumniandis. Fleta, lib. 1. cap. 32. Britton, fo. 6. a. 12 a. 118. & 134. 12 Ass. 10.

[*b*] Bract. lib. 3. fol. 137.

[*c*] Bract. lib. 4. fol. 257. Vet. N. B. fol. 76.

---

judge recommends their so doing; and though in criminal cases special verdicts are not frequent, it is not from any averseness to them in juries, but from the nature of criminal causes, which generally depend more upon the evidence of facts than any difficulty of law. Nor is it any small merit in this arrangement, that in consequence of it every person accused of a crime is enabled by the general plea of *not guilty* to have the benefit of a trial, in which the judge and jury are a check upon each other; and that this *benefit* may be always enjoyed, except in such small offences as are left to the summary jurisdiction of a justice of the peace; which exception, from the necessity of the times, is continually increasing, but which however cannot be too cautiously extended to new objects.—Thus considered, the distinction between the office of judge and jury seems to claim our utmost respect. May this wise distribution of power between the two long continue to flourish, unspoiled, either by the proud encroachment of ill-designing judges, or the wild presumption of licentious juries.

It would be wrong to conclude this note without referring the reader to the very forcible reasoning on the same subject, in a modern work, which contains much general legal instruction elegantly conveyed. See "EUNOMUS, (by Wynne) or Dialogues concerning the Law and Constitution of England," vol. 2.—See further Rep. temp. Hardw. 28. st. 32 G. 3. c. 60.—[Note 276.]

(6) See further on the origin of English juries, Spelm. Gloss. voc. *jurata*, Dissertat. Epistolar. in Ling. Septentrion. Thesaur. Hickes, Stiernh. de jure Sueon. et Goth. vetust. lib. 1. c. 3, and Dr. Pettingal's Enquiry into the Use and Practice of Juries amongst the Greeks and Romans.—[Note 276*.]

said to be *calumniata*, and a count to be challenged, but this is improperly. And forasmuch as [156. a.] mens lives, fames, lands and goods, are to be tryed by jurors, it is most necessary, that they be *omni exceptione majores;* and therefore I will handle this matter the more largely.

A challenge to jurors is twofold, either to the array, or to the polls: to the array of the principall pannell, and to the array of the *tales*. And herein you shall understand, that the jurors names are ranked in the pannel one under another; which order or ranking the jurie is called the array, and the verbe, to array the jurie; and so we say in common speech, *battaile array* for the order of the battaile. And this array we call *arraiamentum*, and to make the array *arraiare*, derived of the French word *arroier;* so as to challenge the array of the pannell is at once to challenge or except against all the persons so arrayed or impannelled, in respect of the partialitie or default of the sherife, coroner, or other officer that made the returne.

And it is to be knowne, that there is a principall cause of challenge to the array, and a challenge to the favour.

Principall, in respect of partialitie. As first, if the sherife, or other officers be of [*a*] kindred, or affinitie (1), to the plaintife or defendant, if the affinitie (2) continue [*b*]. Secondly, if any one or more of the jurie be returned at the denomination of the partie, plaintife or defendant, the whole array shall be quashed. So it is if the sherife returne any one, that he be more favourable to the one than the other, all the array shall be quashed. [*c*] Thirdly, if the plaintife or defendant have an action of batterie against the sherife, or the sherife against either partie, this is a good cause of challenge. So if the plaintife or defendant have an action of debt against the sherife; (but otherwise it is if the sherife have an action of debt against either partie) or if the sherife have parcell of the land depending upon the same title [*d*]; or if the sherife, or his bailife which returned the jurie, be under the distresse of either partie; or if the sherife or his bailife be either of counsell, atturney, officer in fee or of robes, or servant of either partie, gossip or arbitrator in the same matter, and treated thereof. [*e*] And where a subject may challenge the array for unindifferencie, there the king being a partie may also challenge for the same cause, as for kindred, or that he hath part of the land, or the like: and where the array shall be challenged against the king, you shall reade in our bookes.

[*a*] 12 Ass. 36. 26 Ass. 31. 3 E. 4. 12. 31 Ass. 7. 29 Ass. 2. 22 E. 4. 2. 12 E. 3. Chall. 114. 21 E. 3. 5. b. 3 H. 7. 5. Pl. Com. 73. 15 H. 7. 9. 7 E. 6. Dier, 78. 12 H. 6. Chall. 159. (Plowd. 425. 2 Ro. Abr. 638.)

[*b*] 21 E. 4. 74. 49 E. 3. 1. 15 E. 3. 43. 22 E. 3. 12. 9 E. 4. 46. 8 H. 5. 5. 28 Ass. 22. 41 E. 3. Chall. 99. (2 Ro. Abr. 640. Dy. 319.)

[*c*] 11 H. 4. 26. 22 E. 4. 1. 38 E. 3. 25. 38 H. 6. 6. (Mo. 3.) [*d*] 14 E. 3. 5. & 38. 44 Ass. 23. 22 E. 4. 1. 3 H. 6. 39. 15 H. 7. 9. b. 27 Ass. 28. 7 H. 7. 10. 26 Ass. 56. 22. 20 H. 6. 34. 33 Ass. 12. 45 Ass. 1. 9 Ass. 8. 8 Ass. 23. 7 E. 3. 56. 21 H. 7. 38. 2 H. 4. 13. 44 E. 3. 43. 20 H. 6. 39. 44 Ass. 18. 3 H. 6. 24. 17 E. 2. Chall. 168. 4 E. 4. 11. [*e*] 4 H. 7. 44 E. 3. 38. 38 Ass. 19. 22 E. 4. Chall. 63. Staunf. 162. c.

By

(1) In the case of Mounson and West, 1 Leon. 88, it was argued, that affinity was a challenge to the *favour* only: and to this two judges inclined at first; but after time taken to consider the point, it was adjudged to be a *principal* challenge by three judges, the fourth hesitating.—[Note 277.]

(2) Having issue living by the wife, though she is dead, is sufficient to continue the husband's affinity. Nor is it necessary that the issue should be inheritable to the land, where land is the subject of the action. Both of these positions I infer from the case of Mounson and West before cited from 1 Leon. 88.—[Note 278.]

[*f*] By default of the sherife, as when the array of a pannell is returned by a bailife of a franchise, and the sherife returne it as of himselfe, this shall be quashed, because the partie should lose his challenges. But if a sherife returne a jurie within a libertie, this is good, and the lord of the franchise is driven to his remedy against him.

[*f*] 39 Ass. 2. 17 E. 3. 50. 17 Ass. 11. 30 Ass. 5. 8 Ass. 3.

If a peere of the realme or lord of parliament be demandant or plaintife, tenant or defendant, there must a knight be returned of his jurie, be he lord spirituall or temporall, or else the array may be quashed [*g*]: but if he be returned, although he appeare not yet the jurie may be taken of the residue. And if others be joyned with the lord of parliament, yet if there be no knight returned, the array shall be quashed against all. [*h*] So in an attaint there ought to be a knight returned to the jurie (3).

[*g*] 13 E. 3. Chall. 115. Br. Enquest, 100. 6 Co. 54. Countess de Rutland's case. Plo. Com. 117.

27 H. 8. 22. 4 El. Dier. 208. 8 Elis. Di. 246. 14 Elis. Dier, 318. 10 Elis. Dier, 265. b. (1 Leon. 5. 2 Ro. Abr. 636.) [*h*] 17 E. 2. Attaint, 69.

[*i*] And when the king is partie, as in travers of an office, he that traverseth may challenge the array, as hereafter in this Section shall appeare; and so it is in case of life; and likewise the king may challenge the array; and this shall be tried by triors according to the usual course. [*k*] The array challenged on both sides shall be quashed.

[*i*] 32 E. 4. tit. Chall. 63. Staunf. Pl. Cor. 19 Ass. 6. b. 4 H. 7. 8. 44 E. 3. 38. (2 Ro. Abr. 645.) [*k*] 8 H. 4. 22. (Mo. 895.)

[*l*] And if two estrangers make a pannell, and not in favourable manner for the one partie or the other, and the sherife returnes the same, the array was challenged for this cause and adjudged good.

[*l*] 6 R. 2. Chall. 102. 13 E. 3. ibid. 103.

[*m*] If the bailife of a libertie returne any out of his franchise, the array shall be quashed, as an array returned by one that hath no franchise, shall be quashed.

[*m*] 32 E. 3. Chall. 110, 111. 32 Ass. 6. 38 Ass. 13.

Challenge to the array for favour. [*h*] He, that taketh this, must shew in certaine the name of him that made it, and in whose time, and all in certainety. This kinde of challenge, being no principall challenge, must be left to the discretion and conscience of the triors. As if the plaintife or defendant be tenant to the sherife, this is no principal challenge; for the lord is in no danger of his tenant; but *è converso* it is a principall challenge; but in the other he may challenge for favour, and leave it to triall. So affinitie betweene the son of the sherife and the daughter of the partie, or *è converso*, or the like, is no principall challenge, but to the favour; but if the sherife marrie the daughter of either partie, or *è converso*, this (as hath been said) is a principal challenge, or the like. [*o*] But where the king is partie, one shall not challenge the array for favour, &c. because in respect of his allegiance he ought to favour the king more (4).

[*n*] 34 H. 6. Chall. 69. 8 H. 4. 22. 27 Ass. 20. 22 E. 3. 12. Vid. 26 Ass. 21. 38 H. 6. 9. 7 H. 6. 25. 19 H. 6. 48. 20 H. 6. 38. 20 E. 4. 2. 22 E. 4. Chall. 62.

[*o*] 22 E. 4. Chall. 63. 4 H. 7. 8.

But

(3) By the statute of Geo. II. no challenge can now be taken to any panel for want of a knight in it. See 18 G. 2. c. 18. s. 4. This provision is made in *general* terms; but the recital, which precedes it, is confined to the inconveniences of such challenges where peers are parties.—[Note 279.]

(4) Acc. Keilw. 102. a. But lord Coke is of a different opinion; for he expressly allows challenges for *favour* to prisoners in treason and felony, and consequently so far against the king. 2 Hal. Hist. Pl. C. 271. Though, too, lord Coke's doctrine should be admitted, the reason he gives for it, which is almost in the words of the case of 22 E. 4, cited in the margin from Fitzherbert's Abridgment, seems rather unsatisfactory. But a better principle to

But if the sherife be a vadelect of the crowne, or other meniall servant of the king, there the challenge is good (5). And likewise the king may challenge the array for favour.

Note, upon that which hath been said it appeareth, that the challenge to the array is in respect of the cause of unindifferencie or default in the sherife or other officer that made the returne, and not in respect of the person returned where there is no unindifferencie or default in the sherife, &c. for if the challenge to the array be found against the partie that takes it. yet he shall have his particular challenge to the polls (1). [156. b.]

In

found the rule upon was not unobvious; namely, that from the extensive variety of the king's connections with his subjects through tenures and offices, if *favour* to him was to prevail as an exception to a juror, it might lead to an infinitude of objections, and so operate as a serious obstruction to justice in suits in which he is a party.—[Note 280.]

(5) Lord Coke having immediately before expressed, that the array shall not be challenged for *favour* against the king, he must be here understood to consider *being a vadelet or other menial servant of the crown* as a *principal* challenge to the array; for otherwise he would be inconsistent; unless, indeed, he is supposed in the first instance to state a general rule, and in the second an exception to it, which, as his words are, would be a strained construction. It is also strong evidence of lord Coke's intending to give his challenge to the *array* as a principal one, that he elsewhere represents *being a servant of either party*, where the suit is between subjects, as a principal challenge both to the array and to the polls. See supra, and also post. 157. b. However, lord Hale will not allow this sort of exception to a juror to be more than a challenge to the *favour* in trials for treason or felony; citing for authority from Fitzherbert's Abridgment a case in 3 H. 6. which is a decision in point by the whole court; to which may be added the *dictum* in the Year-Book of 4 H. 7. 3. Also the practice since lord Hale's time seems to have accorded with his doctrine, there being subsequent instances in print in which such an exception when taken to the polls has been disallowed, but not one I believe of its being received. The instances of disallowing the exception as a principal challenge, to which I shall refer, are Mr. Hampden's trial in the king's bench, Hill. 36 Ch. 2. for a misdemeanor, and sir William Parkyns's at the Old Bailey in 1695 for high treason. See State Tr. 4th ed. v. 3. p. 825, and v. 4. p. 633. In the former the point was sharply argued on challenges by Mr. Hampden of two jurors for having offices in the king's forest; and as the counsel for Mr. Hampden relied on lord Coke, and on Rolle's Abridgment of the case of 22 E. 4, here cited by lord Coke in the margin as the ground of his doctrine, so the court adjudged against the exception as a principal challenge on the authority of the case of 3 H. 6. cited by lord Hale. In the latter sir William Parkyns challenged two for being servants of the king; but was informed by lord Holt that it was no cause of challenge. The first of these instances was a direct adjudication; but, however, it loses part of its weight, in consequence of having occurred in an ill time, whilst lord Jefferies presided in the king's bench, and of being accompanied with ungracious and unbecoming language from him in respect to both Coke and Rolle. The second was rather an extra-judicial opinion; because the counsel for the crown consented to put by the jurors objected to on the ground of being king's servants, unless there should be a defect of other jurors which did not happen. But lord Holt declared against the challenge in the most obsolute and unreserved terms, as if it would not bear arguing.—[Note 281.]

(1) Nota, *on writ of right the panel returned by the four knights shall not be challenged, but challenge ought be taken before the four knights before the panel*

In some cases a challenge may be had to the polls, and in some cases not at all. Challenge to the polls is a challenge to the particular persons; and these be of four kinds, that is to say, peremptorie, principall, which induce favour, and for default of hundredors.

[p] Peremptorie. This is so called, because he may challenge peremptorily upon his owne dislike, without shewing of any cause; and this onely is in case of treason or felonie, *in favorem vitæ*. And by the common law the prisoner, upon an endictment or appeale, might challenge thirtie-five, which was under the number of three juries. But now by the statute of 22 H. 8. the number is reduced to twentie in petite treason, murder, and felonie; and in case of high treason, and misprision of high treason, it was taken away by the statute of 33 H. 8. but now by the statute of 1 & 2 Phil. & Marie, the common law is revived. For any treason, the prisoner shall have his challenge to the number of thirtie (2) five; and so it hath beene resolved * by the justices upon conference betweene them in the case of sir Walter Raleigh and George Brookes. But all this is to be understood when any subject that is not a peere of the realme, is arraigned for treason or felonie. But if he be a lord of parliament and a peere of the realme, and is to be tryed by his peeres, he shall not challenge any of his peeres at all; for they are not sworne as other jurors be, but finde the partie guiltie or not guiltie upon their faith or allegiance to the king, and they are judges of the fact, and every of them doth separately give his judgement, beginning at the lowest. But a subject under the degree of nobilitie may in case of treason or felonie challenge for just cause as many as he can, as shall be said hereafter. In an appeale of death against divers, they pleade not guiltie, and one joynt *venire fącias* is awarded; if one challenge peremptorily, he shall be drawne against all (3). Otherwise it is of several *venire fac.*

[p] 1 H. 5. Chal. 162. 9 H. 5. 7. 15 E. 4. 32. 14 H. 7. 7. 19. Doct. & Stud. lib. 2. Fortesc. cap. 27. 3 H. 7. 2. 2 R. 3. 13. 32 H. 6. 26. 17 Ass. 6. 37 H. 6. 8. 22 H. 8. ca. 14. 33 H. 8. tit. Chal. Br. 217. 33 H. 8. ca. 23. 1 & 2 P. & M. ca. 10. 28 H. 6. 26. 14 H. 7. 14. Staunf. Pl. Cor. 137, 138. (2 Inst. 227.) * Hill. 1 Ja. R.

Note, that at the common law before the statute of 33 E. 1. the king might have challenged peremptorily without shewing cause, but only that they were not good for the king, and without being limited to any number. But this was mischievous to the subject, tending to infinite delayes and danger. And therefore it is enacted, [q] *quòd de cætero licèt pro domino rege dicatur, quòd juratores, &c. non sunt boni pro rege; non propter hoc remaneant inquisitiones, &c. sed assignent certam causam calumniæ suæ, &c.* whereby the king is now restrained (4).

9 E. 4. 27.

(1 Vent. 309.)

(q) 33 E. 1, ordinatio de inquisitionibus. Staunf. Pl. Cor. 162.

Principall; so called, because if it be found true, it standeth sufficient of itselfe without leaving any thing to the conscience or discretion of the triors. Of a principall cause of challenge to

---

panel made. H. 30 El. B. R. Pigott and Clarke. Hal. MSS.—See acc. post. 158. a. 294. a. Mo. 67. and Gouldsb. 23.—[Note 281*.]

(2) Agreed acc. in petty treason in Swan's case, Fost. 107.

(3) Adj. acc. Plowd. 100.

(4) But according to the construction made of this statute or ordinance the king is not bound to show cause of challenge till all the panel is called over, and not then unless from challenges, or otherwise, the jury is incomplete. See State Tri. 4th ed. v. 3. p. 468. v. 4. p. 423. v. 5. p. 195. See further on this point sir John Hawles's Remarks on Trials, in State Tri. 4th ed. v. 3. p. 169. —[Note 282.]

to the array, we have said somewhat already. Now it followeth with like brevitie to speake of principall challenges to the polles, (that is) severally to the persons returned.

Principall challenges to the poll may be reduced to foure heads; first, *propter honoris respectum*, for respect of honour: secondly, *propter defectum*, for want of default: thirdly, *propter affectum*, for affection or partialitie: fourthly, *propter delictum*, for crime or delict.

6 Co. 52, 53. Countesse de Rutland's case. 48 E. 3. 30. 48 Ass. 6. 35 H. 6. 46. 22 Ass. 24. F. N. B. 165. D. E. & 166. Regist. 179. (1 Sid. 277.)

I. *Propter honoris respectum*, as any peere of the realme, or lord of parliament, as a baron, viscount, earle, marquesse, and duke: for these in respect of honour and nobilitie, are not to be sworne on juries; and if neither partie will challenge him, he may challenge himselfe; for by *Magna Charta* it is provided, *quòd nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, aut per legem terræ*. Now the common law hath divided all the subjects into lords of parliament, and into the commons of the realme. The peers of the realme are divided into barons, viscounts, earles, marquesses, and dukes. The commons are divided into knights, esquires, gentlemen, citizens, yeomen, and burgesses. And in judgement of law any of the said degrees of nobilitie are peers to another. As if an earle, marquesse, or duke, be to be tried for treason or felonie, a baron or any other degree of nobilitie is his peere. In like manner, a knight, esquire, &c. shall be tried *per pares;* and that is by any of the commons, as gentlemen, citizens, yeomen, or burgesses; so as when any of the commons is to have a tryall either at the king's suit, or betweene partie and partie, a peere of the realme shall not be impannelled in any case.

II. *Propter defectum.*

[a] 7 Co. 18. Calvin's case. 10 Co. 104. 14 H. 4. 19. b.

1. *Patriæ*, [a] as aliens borne.

[b] Bract. fol. 185. Brit fo. 135. Flet. li. 4. ca. 8. 26 Ass. 28. 3 H. 6. 39. 9 E. 4. 16. b. 21 H. 6. 20. 10 H. 7. 20.

2. *Libertatis*, [b] as villeins or bondmon, and so a champion must be a freeman.

[c] Vid. Sect. 464. 38 Ass. 19. 17 Ass. 15. 4 H. 6. 28. 9 H. 5. 5. 10 H. 6, 7, 8. 18. 2 H. 7. 1. 10 H. 7. 14. 19 H. 6. 9. 7 H. 6. 25. 40. 44. 12 E. 4. 13. 3 H. 4. 4.

3. *Annui census, i. e. liberi tenementi.* [c] First, what yearely freehold a juror ought to have that passeth upon triall of the life of a man, or in a plea reall, or in a plea personall, where the debt or damage in the declaration amounteth to fortie markes, *Vide* Sect. 464. (5) *Secondly, this freehold must be in his owne right, in fee simple, fee taile, for terme of his owne life, or for another man's life, although it be upon condition, or in the right of his wife, out of ancient demesne, for freehold within ancient demesne will not serve. But if the debt or damage ☞ amounteth not to fortie marks, any freehold sufficeth. [d] Thirdly, he must have freehold in that countie where the cause of the action ariseth; and though he hath in another, it sufficeth not (1). [e] Fourthly, if after his returne he selleth away his land, or if *cesty que vie* [157. a.]

(See the statutes of 23 H. 8. 13. and 4 & 5 W. & M. 24.)

* 9 H. 6. Chal. 27. 9 H. 7. 1. (2 Ro. Abr. 647. Post. 272. Fortesc. 56. 62. a.)

[d] 19 H. 6. 9. 27 Ass. 15. [e] 12 H. 7. 4. 21 H. 6. 38. 7 H. 4. 1. (Post. 272. b.) (2 Ro. Abr. 636. Fortes. 56. b. Post. 158. a.)

or

(5) See also a learned dissertation on the writ *de non ponendis in assisis et juratis* in the Miscellany of Law-Tracts by the late Mr. Serjeant Wynne, p. 62 to 74. See too 1 Ventr. 366, and sir John Hawles's Remarks on Trials, in State Trials, 4th ed. v. 3. p. 169. 187.

(1) *Vid. acc. per omnes justiciarios, M.* 29, 30 *Eliz. Clench.* 139.—Hal. MSS.

or his wife dieth, or an entry be made for the condition broken, so as his freehold be determined, he may be challenged for insufficiencie of freehold (2).

4. *Hundredorum.* First, by the common law, in a plea reall mixt and personal, there ought to be foure of the hundred (where the cause of action ariseth) returned for their better notice of the cause; for *vicini vicinorum facta præsumuntur scire* (3). And now, since *Littleton* wrote [*f*] in a plea personall, if two hundredors appeare, it sufficeth (4); and in an attaint, [*g*] although the jury is double, yet the hundredors are not double. Secondly, [*h*] if he hath either freehold in the hundred, though it be to the value but of half an acre, or if he dwell there, though he hath no freehold in it, it sufficeth. [*i*] Thirdly, if the cause of the action riseth in divers hundreds, yet the number shall suffice, as if it had come out of one, and not several hundredors out of each hundred. [*k*] Fourthly, if there be divers hundreds within one leet or rape, if he hath any freeholds, or dwell in any of those hundreds though not in the proper hundred, it sufficeth. [*l*] Fifthly, if the jury come *de corpore comitatûs*, or *de proximo hundredo*, where the one partie is lord of the hundred, or the like, there needs no hundredors be returned at all. [*m*] Sixthly, if a hundredor after he be returned sell away his land within that hundred, yet shall he not be challenged for the hundred, for that this notice remains. Otherwise as hath been said for his insufficiencie of freehold; for his feare to offend, and to have lands wasted, &c. which is one of the reasons of law, is taken away. [*n*] Seventhly, he that challengeth for the hundred must shew in what hundred it is, and not drive the other partie to shew it. Eighthly, his challenge for the hundred is not *simpliciter* but *secudùm quid*; for, though it be found that he hath nothing in the hundred, yet shall he not be drawne, but remaine *præter H.* that is, besides for the hundred; and albeit he dwelleth or have land in the hundred, yet must he have sufficient freehold.

[*f*] 27 Eliz. ca. 6.
[*g*] 7 H. 4. 47.
[*h*] 16 E. 4. 7. 4 Mar. B. Chal. 216.
21 E. 4. 74, 75.
[*i*] 9 H. 6. 66.
[*k*] 20 H. 6. 23. 4 Mar. Br. Chal. 216.
[*l*] 10 H. 6. 5. 12 H. 4. 14. 19 E. 4. 5.
[*m*] 37 H. 6. 11. 25 E. 3. 43. (Cro Jam. 550.)
[*n*] 21 H. 6. 38. 12 H. 7. 4.
[*n*] 7 Eliz. Dyer, 231.

III. *Propter affectum:* And this is of two sorts, either working a principal challenge, or to the favour. And again a principall challenge is of two sorts, either by judgment of law without any act of his, or by judgment of law upon his owne act.

Bract. fo. 185. Brit. fo. 134, 135. Fleta, lib. 4. c. 8. 21 E. 4. 11, 12.

And it is said that a principall challenge is, when there is expresse favour or expresse malice.

1. Without any act of his, as if the juror be [*a*] of blood or kindred

[*a*] Britton, fol. 135.

(2) See ant. 102. b.

(3) See Brownl. Rep. b. 194.

(4) And now by the 4 An. c. 16. and 24 G. 2. c. 18. the jury must be taken from the *body of the county* in actions or suits in the king's courts of record at *Westminster*, and in actions or informations on penal statutes. But appeals of felony or murder, and indictments or presentments of treason, felony, murder, or other matter, are excepted from this provision; and therefore in them hundredors are still in strictness necessary.—It is observable, that the 24 G. 2. by which this alteration was made as to actions on penal statutes, names the counties palatine of *Lancaster*, *Chester*, and *Durham* and *Wales*, as well as *Westminster*. But in the 4 of An. only the latter place is mentioned.—See further on the subject of hundredors, ant. 125. a. note 2, to which add 1 P. Wms. 207. and a case on the 4 An. in Mr. Serj. Wynne's Miscell. Law Tracts, 60.—[Note 283.]

kindred to either partie, *consanguineus*, which is compounded *ex con & sanguine, quasi eodem sanguine natus*, as it were issued from the same blood; and this is a principal challenge, for that the law presumeth that one kinsman doth favour another before a stranger; [*b*] and how far remote soever he is of kindred, yet the challenge is good. And if the plaintife challenge a juror for kindred to the defendant, it is no counterplea to say that he is of kindred also to the plaintife, though he be in a neerer degree; for the words of the *venire facias* forbiddeth the juror to be of kindred to either partie.

[*b*] Mirror, ca. 3. de ordinance d'attaint. Bracton, Britton, Fleta } ubi supra. 14 El. Dier. 319. 21 E. 4. 75. 40 Ass. 20. Pl. Com. fo. 41 E. 3. Chal. 99. 21 E. 4. 75.

[*c*] If a body politick or incorporate, sole or aggregate of many, bring any action that concerns their body politick or incorporte, if the juror be of kindred to any that is of that body (although the body politick or incorporate can have no kindred) yet for that those bodies consist of naturall persons, it is a principall challenge. [*d*] A bastard cannot be kindred to any (5), and therefore it can be no principall challenge. And here it is to be knowne, that *affinitas*, affinity hath in law two senses. In his proper sense it is taken for that neernesse that is gotten by marriage. *Cum duæ cognationes inter se diversæ per nuptias copulantur & altera ad alterius fines accedit, & inde dicitur affinis.* In a larger sense *affinitas* is taken also for consanguinitie and kindred, as in the writ of *venire facias*, and otherwise. [*e*] Affinity or alliance by marriage is a principall challenge, and equivalent to consanguinity when it is between either of the parties, as if the plaintife or defendant marry the daughter or cousin of the juror, or the juror marry the daughter or cousin of the plaintife or defendant, and the same continues, or issue be (6) had. But if the son of the juror hath married the daughter of the plaintife, this is no principall challenge, but to the favour; because it is not betweene the parties. Much more may be said hereof; *sed summa sequor fastigia rerum.*

[*c*] 7 E. 4. 4. 17 E. 4. 7. 21 E. 4. 20. 28 H. 6. 10. 28 Ass. 18. 34 Ass. 6. Hob. 87. 1 Saund. 344. [*d*] 41 E. 3. Chal. 99. 41 E. 3. 9. 26 H. 6. Chal. 163.

[*e*] Mirror, Bracton, Britton, Fleta } ubi supra. 3 E. 4. 14. 21 E. 3. 5. 41. 43 E. 3. Chal. 93. 43 Ass. 25, 26. 22 E. 4. 2. 14 H. 7. 2. 15 H. 7. 9.

[*f*] If there be a challenge for cosinage, he that taketh the challenge must show how the juror is cousin. But yet if the cosinage, that is the effect and substance, be found, it sufficeth; for the law preferreth that which is materiall before that which is formall.

[*f*] 19 H. 8. 7. 28 H. 8. Dier. 27. 1 Marie, Dier, 91. 2 Eliz. ibid. 177.

[*g*] If the juror have part of the land that dependeth upon the same title (7).

[*g*] Bract. Britton Fleta } ubi supra. Mirr. ubi supra.

[*h*] If a juror be within the hundred (8), leet, or any way within the seigniory immediately or mediately, or any other distresse of either party, this is a principall challenge. But if either party be within the distresse of the juror, this is no principall challenge, but to the favour.

[*h*] 9 H. 6. iit. Chal. 27. 38 E. 3. 25. 22 E. 4. Chal. 61. 4 H. 6. 25. 3 H. 6. 39. 36 H. 6. Chal. 46. 22 E. 4. 1. 27 Ass. 28. 22 E. 3. 12.

[*i*] If a witnesse named in the deed (9) be returned of the jury, it is a good cause of challenge of him. [*k*] So it is if one within age of one and twenty be returned, it is a good cause of challenge.

[*i*] 23 Ass. 11. [*k*] Mirror, ubi supra.

2. Upon

(5) See ant. 123. a.

(6) But the issue must be *living*. See ant. 156. a. n. 2.

(7) Here the sense is incomplete; but I apprehend that lord Coke means to give the exception as a principall challenge.

(8) Acc. Dy. 176. a.

(9) See ant. 6. a.

[157. a.] 2. [t] ☞ Upon his own act, as if the juror hath given a verdict before for the same cause, albeit it be reversed by writ of error, or if after verdict, judgement were arrested. So if he hath given a former verdict upon the same title or matter though betweene other persons. [m] But it is to be observed, that I may speake once for all, that in this or other like cases, he that taketh the challenge must shew the record if he will have it take place as a principall challenge: otherwise he must conclude to the favour (1), unlesse it be a record of the same court, and then he must shew the day and terme.

[t] 8 H. 5. 10. 33 H. 6. 1. 10 H. 6. 24. 7 H. 4. 11. 18 E. 4. 12. 21 E. 4. 74. 11 R. 2. tit. Challenge, 106. 27 Ass. 13. [m] 43 E. 3. Chal. 93. 8 H. 5. 10. [n] Mirror, ubi supra. Brit. fo. 12. 11 Ass. 36.

[n] So likewise one may be challenged, that he was inditor of the plaintife or defendant, either of treason, felony, misprision, trespasse, or the like in the same cause.

8 H. 4. 2. 7 E. 4. 4. 12 Ass. 26. 19 Ass. 6. 40 Ass. 10. 25 E. 3. c. 3. [*] 40 Ass. 20. 2 H. 4. 15. 10 H. 6. Chal. 40. 7 H. 6. 40. 19 H. 6. 66. 4 E. 4. 11. 7 E. 4. 4.

[o] If the juror be godfather to the child of the plaintife or defendant, or *è converso*, this is allowed to be a good challenge in our bookes (2).

[p] If a juror hath beene an arbitrator chosen by the plaintife or defendant in the same cause, and have been informed of, or treated of the matter, this is a principall challenge. Otherwise if he were never informed, nor treated thereof; and otherwise if he were indifferently chosen by either of the parties, though he treated thereof. But a [q] commissioner chosen by one of the parties for examination of witnesses in the same cause, is no principall cause of challenge; for he is made by the king under the greate seale (3), and not by the partie, as the arbitrator is; but he may upon cause be challenged for favour.

[p] 20 H. 6. 39. 9 E. 4. 46. 35 H. 6. 19 H. 6. 8 H. 6. 24. 7 H. 7. 10. (2 Ro. Abr. 665.)

[q] 9 Co. 71. Peacock's case.

[r] If he be of counsell, servant, or of robes, or fee of either partie, it is a principall challenge (4).

[r] Mir. Bracton Britton } ubi supra.

[s] If any after he be returned do eate and drink at the charge of either partie, it is a principall cause of challenge (5). Otherwise it is of a trior after he be sworne.

12 Ass. 36. 26 Ass. 56. 28 Ass. 19. 31 Ass. 7.

[t] Actions brought, either by the juror against either of the parties, or by either of the parties against him, which imply malice or displeasure, are causes of principall challenge; unlesse they be brought by covyn either before or after the returne; for if covin be found, then it is no cause of challenge. Other actions, which do not imply malice or displeasure, are but to the favour.

44 Ass. 18. [s] 13 H. 4. 13. 11 R. 2. Chal. 164. [t] Brac. Fleta, } ubi sup. 44 E. 3. 5. 38. 44 Ass. 23. 8 E. 3. 25.

[u] In a cause where the parson of a parish is partie, and the right of the church commeth in debate, a parishioner is a principall challenge. Otherwise it is in debt, or any other action where the right of the church commeth not in question.

43 E. 3. 31. 22 E. 4. 1. 38 H. 6. 6. 43 E. 3. Chal. 93.

[w] If either party labour the juror, and give him any thing to give his verdict, this is a principall challenge. But if either

11 H. 4. 26. 11 H. 6. 15. 32 E. 3.

Chal. 189. 24 E. 3. 27. 39 Ass. 2. 20 Ass. 11. 43 Ass. 46. [u] 17 Ass. 15. [w] 8 E. 3. 39. 20 H. 6. 39. 33 H. 8. Dyer. 48. (Post. 379. a. Hob. 294.)

partie

---

(1) Acc. 2 Brownl. 268.
(2) See Mo. 3.
(3) See an instance of such a commission in Cro. Jam. 65.
(4) See ant. 156. a. n. 4.
(5) The same thing avoids a verdict. Post. 227. b.

partie labour the juror to appeare and to do his conscience, this is no challenge at all, but lawfull for him to do it (6).

[x] That the juror is a fellow servant with either partie is no principall challenge, but to the favour.

[y] Neither of the parties can take that challenge to the polls, which he might have had to the array.

[a] Note, if the defendant may have a principall cause of challenge to the array, if the sherife return the jury, the plaintife in that case may for his owne expeditione alledge the same, and pray processe to the coroners; which he cannot have, unlesse the defendant will confesse it; but if the defendant will not confesse it, then the plaintife shall have a *venire facias* to the sherife, and the defendant shall never take any challenge for that cause (7), and so in like cases. But on the part of the defendant any such matter shall not be alledged, and processe prayed to the coroners; because he may challenge the jury for that cause, and can be at no prejudice.

[b] Challenge concluding to the favour, when either partie cannot take any principall challenge, but sheweth causes of favour, which must be left to the conscience and discretion of the triors upon hearing their evidence to find him favourable or not favourable. But yet some of them come neerer to a principall challenge than other. [c] As if the juror be of kindred, or under the distresse of him in the reversion or remainder, or in whose right the avowrie or justification is made, or the like, these be no principall challenges; because he in reversion, remainder, or in whose right the avowrie or justification is, is not partie to the recorde; otherwise it is if they were made parties by aide, resceipt or voucher: and yet the cause of favour is apparent; so it is of all principall causes, if they were partie to the record. Now the causes of favour are infinite; and thereof somewhat may be gathered of that which hath beene said, and the rest I purposely leave the reader to the reading of our bookes concerning that matter. For all which the rule of law is, that he must stand indifferent as he stands unsworne.

[d] The subject may challenge the polles, where the king is partie. And if a man be outlawed of treason or felony, at the suit of the king, and the party for avoyding thereof alledgeth imprisonment, or the like, at the time of the outlawry; though the issue be joyned upon a collateral point, yet shall the partie have such challenges as if he had been arraigned upon the crime it self, for this by a meane concerneth his life also (8).

[x] 22 Eliz. Dyer, 367.
Bracton } ubi
Britton } supra.
Fleta }
[y] 29 E. 3. 1.
[a] 9 E. 4. 6. 21 E. 4. 31. 22 E. 4. 3. 14 H. 6. 2. 20 E. 4. 2. 3 H. 7. 5. 22 Eliz. Dyer, 367. (2 Ro. Abr. 644. 668. 669. Cro. Jam. 547. Post. 320. b. Plowd. 74. a. Hob. 64.)
[b] Mirror, c. 3. d'ordinance d'attaint. Bract. lib. 4. fol. 185. Britt. fol. 134, 135. Fleta, li. 4. ca. 8. 7 H. 6. 25.
[c] 9 H. 7. 3. 10 H. 7. 20. 3 H. 7. 2. 10 E. 4. 12. 15 E. 4. 18. 12 Ass. 23. (1 Ro. Rep. 328. Cro. Jam. 547.
[d] 6 R. 2. Chal. 141. 19 Ass. 6. 38 Ass. 22. 11 R. 2. Chal. 165. 4 H. 5. ibid. 153. (1 Sid. 244.)

IV. *Propter*

(6) Yet *labouring* a jury, *though it be but to appear*, is afterwards stated to amount to the crime of *maintenance* in a third person. Post. 369. a. Here indeed the author qualifies the *labouring* to appear by supposing it to be to *do his conscience*. But this addition of words seems a slight ground for a difference of construction.—[Note 284.]

(7) Held accordingly Hutt. 22.

(8) Staunford is of the same opinion, citing for authorities from Fitzherbert's Abridgment the cases of 11 R. 2. & 4 H. 5. here referred to by lord Coke. Staunf. Pl. C. 163. a. However the benefit of peremptory challenges on *collateral* issues in capital cases has been denied by the practice of later times. Case of Okey and others, East. 14 Cha. 2. 1 Lev. 61. Johnson's case, Mich. 2 G. 2. Fost. 46. Mr. Ratcliffe's case, Mich. 20 G. 2. Fost. 40.—

In

[158. a.] IV. ☞ *Propter delictum.* [e] As if the juror be attainted or convicted of treason, or felony, or for any offence to life or member, or in attaint for a false verdict, or for perjury as a witnesse, or in a conspiracie at the suite of the king, or in any suite (either for the king, or for any subject) be adjudged to the pillory, tumbrell, or the like, or to be branded, or to be stigmatique, or to have any other corporall punishment whereby he becommeth infamous, (for it is a maxime in law, *repellitur à sacramento infamis*) these and the like are principall causes of challenge. So it is if a man be outlawed in trespasse, debt, or any other action (1), for he is *exlex*, and therefore is not *legalis homo*. And old bookes have said, that, if he be excommunicated, he could not be of a jury.

[e] Mirror, Bracton, Britton, Fleta } ubi supra. 11 H. 4. 41. 12 H. 4. 10. 33 H. 6. 21. (2 Ro. Abr. 660.)

[f] See the statutes of W. 2. and *Artic. supra Cartas*, what persons the sherife ought to return on juryes. And see *F. N. B. breve de non ponendis in assisis et juratis* (2), and the Register in the same writ. And see there what remedy the party hath that is returned against law.

[f] W. 2. c. 38. Artic. super cart. ca. 9. F. N. B. 165, & 166. Registr.

It is necessarie to be knowne the time when the challenge is to be taken. [g] First, he that hath divers challenges must take them all at once, and the law so requireth indifferent trialls, as divers challenges are not accounted double. [h] Secondly, if one be challenged by one party, if after he be tried indifferent, it is time enough for the other party to challenge him. [i] Thirdly, after challenge to the array, and triall duely returned, if the same party take a challenge to the polls, he must shew cause presently. [k] Fourthly, so if a juror be formally sworn, if he be challenged, he must shew cause presently, and that cause must rise since he was sworne. [l] Fifthly, when the king is party or in an appeale of felony, the defendant, that challengeth for cause, must shew his cause presently. Sixthly, if a man in case of treason or felony challenge for cause, and he be tried indifferent, yet he may challenge him peremptorily. Seventhly, a challenge for the hundred must be taken before so many be sworne as will serve for hundredors, or else he loseth the advantage thereof. Eighthly, [m] in a writ of right, the grand jury must be challenged before the foure knights before they be returned in court (3); for after they be returned in court, there cannot any challenge be taken unto them. Ninthly, *nota*, [n] The array of the *tales* shall not be challenged by any one party, untill the array of the principall be tried; but if the plaintife challenge the array of the principall, the defendant may

[g] 9 E. 4. 16. 10 H. 5. 9. 37 H. 6. 8. 3 H. 6. 38. Brooke, tit. Chal. 8. 7 H. 6. 40. 14 H. 7. 5, 6.
[h] 9 E. 4. 16. 27 H. 8. 2.
[i] 43 E. 3. Chal. 93. 20 E. 3. ibid. 116. 22 E. 4. ibid. 61. 7 H. 4. 41. 3 El. Dow. 201.
[k] 22 E. 4. 1. 9 H. 5. 6.
[l] 1 H. 5. 10. 38 Ass. 22. (Ant. 157. a.)
[m] 7 H. 4. 20. 15 E. 4. 1.
[n] 9 E. 4. 27. 9 H. 5. 11. 34 Ass. 6. 13 E. 3. Chal. 108.

In the report of the case last cited, lord Hale is referred to as an authority for disallowing such challenges. But lord Hale is not absolute in his opinion; and Staunford, whom lord Hale cites, not only writes with a *quære* in the part so cited, but in a subsequent passage gives an opinion in favour of the challenge. Staunf. Pl. C. 158. a. 163. a.—[Note 285.]

(1) It has been questioned whether outlawry in *personal* action is sufficient to disqualify from being a juror; and in sir William Withepole's case, Mich. 3 Cha. 1. the court of king's bench was divided on this point. Cro. Cha. 135. W. Jo. 198, and Ley's Rep. 81.—[Note 286.]

(2) See the late Mr. Serj. Wynne's Dissertation upon this writ in his Miscellany of Law Tracts, p. 56.

(3) Acc. ant. 156. b. & post. 294. a.

may challenge the array of the *tales*. After one hath taken a challenge to the polle, he cannot challenge the array.

Now it is to be seene, how challenges to the array of the principall pannell, or of the *tales*, or of the polles, shall be tried, and who shall be triors of the same, and to whom processe shall be awarded.

[o] 18 E. 4. 8. (Fortesc. 55.)

1. [o] If the plaintife alledge a cause of challenge against the sherife, the processe shall be directed to the coroners; if any cause against any of the coroners, processe shall be awarded to the rest; if against all of them, then the court shall appoint certaine elisors or esliors (so named *ab eligendo*) because they are named by the court, against whose returne no challenge shall be taken to the array, because they were appointed by the court; but he may have his challenge to the (4) polles. [p] Note, if processe be once awarded for the partiality of the sherife, though there be a new sherife, yet processe shall never be awarded to him; for the entrie is, *Ita quòd vicecomes se non intromittat.* But otherwise it is, for that he was tenant to either partie, or the like.

[p] 15 H. 7. 9. 14 H. 7. 31. 18 E. 4. 3.

[q] 29 Ass. 3. 19 H. 6. 48. 21 H. 6. Chal. 38. 33 H. 6. 21. 4 E. 4. 17. 43 E. 3. Chal. 95. 2 R. 2. ibid. 101. 34 Ass. 6. 27 Ass. 28. 43 Ass. 26.

2. [q] If the array be challenged in court, it shall be tryed by two of them that be impannelled, to be appointed by the court; for the triors in that case shall not exceed the number of two, unlesse it be by consent. But when the court names two for some speciall cause alledged by either partie, the court may name others. If the array be quashed, then processe shall be awarded, *ut supra.*

[r] 9 E. 4. 46. 19 H. 6. 48. 34 Ass. 6. 7 E. 6. Dier, 78. 9 H. 5. 11.

[r] If a pannell upon a *venire facias* be returned, and a *tales*, and the array of the principall is challenged, the triors, which try and quash the array, shall not try the array of the *tales;* for now it is as if there had beene no appearance of the principall pannell: but if the triors affirme the array of the principall, then they shall try the array of the *tales*. If the plaintife challenge the array of the principall, and the defendant the array of the *tales*, there the one of the principall, and the other of the *tales*, shall try both arrayes. For other matter concerning the *tales*, see [s] in my Reports matters worthy of observation (5).

[s] 10 Co. 104, 105. Denbawd's case.

[t] 19 H. 6. 9. 22 E. 4. Chal. 61, 62.

[t] When any challenge is made to the polls, two triors shall be appointed by the court; and if they try one indifferent, and he be sworne, then he and the two triors shall try another; and if another be tried indifferent, and he be sworne, then the two triors cease, and the two that be sworne on the jury shall try the rest.

[u] 7 H. 4. 41.

[u] If the plaintife challenge ten, and the defendant one, and the twelfth is sworne, because one cannot try alone, there shall be added to him one challenged by the plaintife, and the other by the defendant. When the triall is to be had by two counties, the manner of the triall is worthy of observation, and apparent in our [w] books. [x] If the foure knights in the writ of right be challenged they shall try themselves (6), and they shall choose ☞ the grand issue, and try the challenges of the parties. [y] If the cause of challenge touch the dishonor or credit of the juror, he

[w] 11 H. 4. 61. 48 E. 3. 30. 11 H. 4. 63. [x] 23 E. 3. 18. 39 E. 3. 2. [y] 49 E. 3. 1, 2. (Hob. 84. 1 Sid. 374. 232.

Cro. Jam. 388. 1 Ro. Rep. 110.)

[158. b.]

shall

(4) See further on awarding *venires* to coroners, and on appointing *elisors*, Umfrev. Lex Coronator. 235, to 242.

(5) See also Trials per Pais, chap. 5.

(6) Acc. post. 294. a.

shall not be examined upon his oath (1), but in other cases he shall be examined upon his oath, to informe the triors (2). [z] If an inquest be awarded by default, the defendant hath lost his challenge; but the plaintife may challenge for just cause, and that shall be examined and tried.

[z] 2 H. 4. 14. 4 E. 4. 3. 10 E. 3. 32. 22 Ass. 28. 31. 21 H. 6. 56. 16 Ass. 1. 5 E. 5. 35, 36.

Wheresoever the plaintife is to recover *per visum juratorum*, there ought to be sixe of the jury that have had the view or knowne the land in question, so as he be able to put the plaintife in possession if he recover.

In a *proprietate probandâ*, and a writ to inquire for waste, the parties have beene received to take their challenges (3). [a] But passing over many things touching this matter, I will conclude with the saying of *Bracton. *Plures autem aliæ sunt causæ recusandi juratores, de quibus ad præsens non recolo, sed quæ jam enumeratæ sunt sufficiant exempli causâ* (4). And so let us return to *Littleton*.

[a] 8 H. 5. tit. Chal. 167. 2 H. 4. 3. 34 E. 3. Chal. 175. 21 H. 6. 56. 8 E. 4. 3.

16 E. 4. 1. * Bracton, lib. 4. fo. 185. (7 Co. 1. Bulwer's case.)

"*De visneto, &c.*" It should be *vicineto*. *Vicinetum* is derived of this word *vicinus*, and signifieth neighbourhood, or a place neere at hand, or a neighbour place. And the reason wherefore the jury must be of the neighbourhood, is, for that *vicinus*

---

(1) Held accordingly by the court in Cook's case, Salk. 153.

(2) This is one instance of the examination called a *voir dire;* for as a witness is on a *voir dire* to try an objection to his competency to give evidence, so a juror may be sworn in like manner to try the cause of challenge to him. It is thought fit to take notice of this; because in some of our books the *voir dire* is described as if confined to the challenge of a witness, and only used to distinguish such a partial swearing of a witness from swearing of him *in chief*. For instances of examining jurors on a *voir dire* see Francia's case, State Tri. 4th ed. v. 1. p. 59. and Mr. Townley's in Fost. 7. But in both of these the challenge not being *to the favour* was examined into by the court without triors.—[Note 287.]

(3) Some seem to understand it as a general rule, that challenges of jurors are excluded where the inquest is for information merely, or not being so is without an issue joined between the parties; as in inquests of office before sheriffs, coroners, and escheators, and in writs of inquiry for damages. Office of Executor, ed. 1676, p. 240. 1 Ro. Abr. 660. Umfrev. Lex Coronator. 174. 183. and in the introduct. 51. Probably lord Coke here means to advert to this doctrine, and to give the *proprietate probandâ* and the writ to inquire of waste, both of which are inquests without any issue joined, as instances of exception to it. Broke adds another exception; for in abridging the case of waste from the Year Book of 2 H. 4. 3. he observes that the law is the same on a writ of redisseisin. Bro. Error, 31. As to the rule itself for thus excluding challenges, be it well or ill founded, the sheriff, or other officer taking the inquest, certainly ought not to accept any jurors but such as are legally qualified; and if such are received, it seems a just ground for quashing the proceeding, or for error, according to the nature of the case. See sir William Withepole's case, reported in W. Jo. 198. Cro. Cha. 134. and Ley, 81. and noticed in 2 Hal. H. P. C. 60.—[Note 288.]

(4) See further on challenges of jurors, Kitch. French ed. 91. a. Lamb. Just ed. of 1602, p. 379. Dalt. Sher. 1st. ed. 120. Trials per Pa. chap. 9. and title *Trial*, in Viner.

vicinus facta vicini præsumitur scire; all which is implied in this word (*&c.*).

"*Quòd summoneat, eos, &c.*" *Summoneo* is compounded of *sub & moneo, & euphoniæ gratiâ* it is said *summoneo* to warne or summon, as in this case the sherife must warne or summon the recognitors of the assise to appeare before the justices of assise, &c. And it is truly said [*b*] that in this case *legitimam summonitionem recipere in propriâ personâ ubicunque inventus fuerit in comitatu in quo fuerit res petita; qui quidem si non inveniatur, sufficit si ad domicilium fiat, dum tamen alicui de familiâ suâ manifeste fuerit relata, &c.*

[*b*] Bract. lib. 5. fo. 333, 334. Mirr. cap. 2. sect. 19. Fleta, lib. 6. cap. 6. Brit. cap. 121.

"*Per bonos summonitores.*" Here two things are to be observed. 1. That the summoners must be *boni* (*id est*) *fide digni, ut valeant legitimum testimonium perhibere, cùm inde per justiciarios fuerint requisiti.* [*c*] And another saith, *feme, ne serfe, ne enfans, ne nul enfamys, ne nul que nest fife tenant, ne poet est bone summoner.* 2. It is spoken in the plurall number, *per bonos summonitores*, and therefore there must be two at the least. *Nec suffcit, quòd summonitio fiat per unum tantùm, &c. necesse est igitur quòd per duos ad minus fiat, &c.* There is also a summons of a tenant in a reall action; whereof, and of pernors and veiors you shall reade [*d*] plentifully and plainely in our bookes, whereunto being matter of course I referre you.

[*c*] Brac. Britton Fleta } ubi supra. Bracton Britton Fleta Mirror } ubi supra.

[*d*] Regist. judicial. 1, 2. 107. 43 E. 3. 32. 24 E. 3. 35. 3 E. 3. 48. 50 E. 3. 16. 8 H. 6. 1. b. F. N. B. 97.

Item summonitionum alia est generalis, alia specialis. Whereof you shall finde excellent matter in our [*e*] old bookes, where you shall also reade at large *de summonitione, præsummonitione, & resummonitione.*

[*e*] Mirror Bracton Britton Fleta } ubi supra.

"*Facero recognitionem.*" *Cognitio* is knowledge, or knowledgement, or opinion, and recognition is a serious acknowledgement or opinion upon such matters of fact as they shall have in charge, and thereupon the jurors are called *recognitores assisæ.* *Vide* Sect. 233, *recognitio* taken for the confession of the tenant.

"*Pannell*" is an English word, and signifieth a little part; for a pane is a part, and a pannell is a little part; as a pannell of wainscot, a pannell of a saddle, and a pannell of parchment wherein the jurors names be written and annexed to the writ. And a jury is said to be impannelled, when the sherife hath entered their names into the pannell, or little peece of parchment, *in pannello assisæ.*

Register, 223.

"*Writ of right* (briefe de droit)," *breve de recto.* Writs of right be of two natures: 1. A writ of right, whereof *Littleton* here speaketh, which is the highest writ of all other reall writs whatsoever, and hath the greatest respect, &c. and the most assured and finall judgement; and therefore this writ is called a writ of right; and this in [*f*] old books is called *dreit dreit;* and this writ *est darrein remedie de touts recoveries enter touts ordres des pleas;* and the jury in this writ is called *magna assisa*, or *magna jurata*, as *Littleton* here saith. 2. Writs of right in their nature, as the *rationabili parte*, and *ne injustè vexes.*

[*f*] Brac. lib. 5. fol. 372. Britton, fo. 117. Fleta, l. 6. ca. 1. Glanvil. lib. 1. c. 4, 5, &c. li. 2. c. 7. li. 12. ca. 1. (2 Ro. Abr. 686.)

"*De*

"*De recto.*" *Rectum* is a proper and significant word for the right that any hath, and wrong or injury is in French aptly called *tort;* because injury and wrong is wrested or crooked, being contrary to that which is right and straight. Now the law that is *linea recta est index sui et obliqui.* And *Britton* * saith, that *tort a la ley est contrarye,* and as aptly for the cause aforesaid is injury in English called wrong. And *injuria* is derived of *in* and *jus,* because it is contrary to right; so as a *faire tort,* is *facere tortum.* And *Fleta* saith, [*g*] *est autem jus publicum et privatum, quod ex naturalibus præceptis, aut gentium, aut civilibus est collectum; et quod injure scripto jus appellatur, id in lege Angliæ rectum esse dicitur.* And in the [*h*] Mirror, and other places of the law, it is called *droit;* as *droit defend,* the law defendeth.

(Post. 265. a. 345. a.)

* Brit. fo. 116.

Fleta, lib. 2. ca. 1.

[*g*] Fleta, lib. 6. ca. 1.

[*h*] Mirror, c. 2. sect. 16, &c. 5. sect. 2.

[159. a.] "*In the Register.*" *Register* is a most ancient booke of the common law: and it is ☞ two-fold, viz. *registrum brevium originalium,* and *registrum brevium judicialium.* It is a French word, and signifieth a memoriall of writs. Sometimes the register of originall writs is called *registrum cancellariæ;* because all original writs do issue out of the chancery, as *extra officinam justitiæ;* for the antiquity and estimation of which booke I referre the reader to the epistle before the Tenth Part of my Commentaries (1).

13 E. 1. ca. 24. Pl. Com. 28. b.

"*Magna assisa eligenda*" is a judicial writ to the sherife to returne foure lawfull knights before the justices, there upon their oathes to returne twelve (2) knights of the vicinage to try the mise in a writ of right.

(Cro. Cha. 511.)

"*An assise of common of pasture, &c.*" Of what things an *assise of novel disseisin* lay at the common law, and of what by the statute, you may reade at large in my [*k*] Reports in *John Webbe's* case, where the authorities of law are plentifully cited, and they and the statute well explained. But since *Littleton* wrote a man may have [*l*] an assise of *novel disseisin, assise* of *mord' anc'* or any *præcipe quòd reddat, quòd ei deforceat,* writs of dower, or other writs originall, as the case shall require, of tythes, pensions, or other ecclesiasticall or spiritual profit, if he be disseised, deforced, wronged, or otherwise kept or put from the same, which by the lawes and statutes of the realme are made temporall, or admitted to be or abide in temporall hands; so as by the said act a lay man, having tithes or offerings, may either

[*k*] 8 Co. 45.

[*l*] 32 H. 8. ca. 7.

---

(1) See also ant. 16. b. and 78. b.

(2) This is the number mentioned in the writ to the sheriff, and also in the oath of the four knights. Booth on Real Act. 96, 97. But in Mo. 67. it is said, that sometimes *fourteen* have been returned. In *King* v. *Dryden,* being the case cited above in the margin from Cro. Cha. 511. *twenty* were returned by the four knights; on which it became a question, whether *twelve only* should have been returned, and whether the surplusage did not vitiate the whole return. But no adjudication appears in Croke's Report. However in 2 Ro. Abr. 674. where the same case is shortly reported, it is mentioned, that the court held the return good, it being observed, that several precedents were cited in favour of such a return; and that it resembled the case of a common *venire,* on which it was usual to return *twenty-four,* though the writ is restrained to *twelve.*—[Note 289.]

either sue for the subtraction or with-holding of the same in the ecclesiasticall court, or at the common law, at his election. * 7 E. 6. Dier, 83, &c. And seeing no speciall writ is given * by the statute, the party must have a generall writ of *assise de libero tenemento*, and make a speciall pleint. But his *præcipe* must be, *quòd reddat omnes et omnimodas decimas majores, mixtas, et minutas, infra Dale quoquo modo crescen' contingen' ac annuatim rennovan'*, or the like, according to his case. [m] But neither assise nor any *præcipe* did lye of them as of tythes or any other ecclesiasticall duty at the common law; for the assise brought of the tenth part of all manner of corne growing in an hundred acres of land, after the tythes of the parson taken, was a lay profit *apprender*, and no ecclesiasticall duty.

[m] 44 E. 3. 5. Vid. Regist. 165. Vid. le briefe de indicavit. W. 2. ca. 5. Conjunctim feoffatis ca. ultimo. Bracton, lib. 5. fo. 402. Britton fo. 200. Vid. 2. H. 3. tit. Grant, 89. Regist. fo. 35. 4 E. 3. 27. 29. 16 E. 3. Quare imp. 147. (Cro. Cha. 301.)

But tythes or other ecclesiasticall duties, that came to the crowne by the statutes [n] of 27 H. 8. 31 H. 8. 37 H. 8. and 1 E. 6. are by those statutes and this of 32 H. 8. and of 1 and 2 Ph. & Mariæ in the hands of laymen temporall inheritances, and shall be accounted assets; and husbands shall be tenants by the curtesie, and wives endowed of them, and shall have other incidents belonging to temporall inheritances. Onely this ecclesiasticall quality they have that the owner or possessor thereof may sue for the subtraction of the same in the ecclesiasticall court.

[n] 27 H. 8. of Monasteries, not printed. 31 H. 8. ca. 13. 37 H. 8. ca. 4. 1 E. 6. ca. 14. 1 & 2 Ph. & Mar. ca. 8. 2 E. 3. ca. 13.

[o] 2 E. 6. ca. 13. But by another [o] statute, remedy is given as well to the lay person as to the ecclesiasticall person, for subtraction of all manner of prediall tythes; and he shall recover the treble value if they be not justly divided or set forth; and albeit the treble value be not expresly given to the proprietary of the tythes, yet forasmuch as he is the party grieved, and he hath the propertie and interest in the tythes, the treble value is given to him; and whensoever a statute giveth a forfeiture or penaltie against him which wrongfully detaineth or dispossesseth another of his duty or interest, in that case he that hath the wrong shall have the forfeiture or penalty, and shall have an action therefore upon the statute at the common law, and the king shall not have the forfeiture in that case. And so it was [p] adjudged in the exchequer upon conference with other judges, in an information for the treble value for not setting out of tythes in *Iclington* in the county of *Cambridge* (3). And if the proprietary will sue for such subtraction of tythes in the ecclesiasticall court, then he shall recover but the double value by the expresse words of the act. Wherein it is to be observed, that the act of parliament doth give a temporall remedy at the common law to parsons and vicars and other ecclesiasticall persons for an ecclesiasticall duty, and to laymen proprietaries of tythes the like remedy: but as it hath beene said, they have election either to sue for the treble value at the common law, or for the double value in the ecclesiasticall court, or for subtraction of tythes there also (4).

[p] Pasch. 29. Eliz. between the queene and Wood in the exchequer, and so it was resolved by all the judges upon conference Mich. 4 Ja. regis.

"*Assise*

(3) The same case is more fully stated by lord Coke in 2 Inst. 650. being part of his comment on the statute of 2 Ed. 6.

(4) Since lord Coke's time a *third* remedy for tithes, where they are of small value, has been given; for by the 7 & 8 W. 3. c. 6. tithes under 40 *s.* may

"*Assise of mortdauncester.*" *Assia mortis antecessoris.* [*q*] This writ a man may have after the decease of his immediate ancestor; as where his father, mother, brother, sister, uncle or aunt, dye seised of any lands, and an estranger abate, &c.

[*q*] Britton, fo. 178, 179, &c. Bracton, lib. 4. tractat. 3. per totum, fo. 252, &c. Mirror, ca. 2. sect. 15. F. N. B. 114, &c.

"*Assise of darreine presentment.*" *Assisa ultimæ præsentationis*, whereof you shall reade [*r*] plentifully in our bookes.

[*r*] Britton, ca. 90. fo. 222. Bract. lib. 4. fo. 238. Mirror, ubi supra. F. N. B. 195. Regist. orig. 30.

To these may be added *assisa utrum*, or *juris utrum*, [*s*] which is the highest writ a parson, vicar, &c. can have for the recovering of the glebe land, &c. in right of his church. But it may be demanded, wherefore these originall writs are called by the speciall name of assises more than other originall writs; and here *Littleton* yieldeth the reason, because that by these writs it is commanded to the sherife *quòd summoneat* 12, which is as much to say, as to summon a jury. So as in these cases there is a jury returned the first day, and they are to appeare as soone as the defendant. And because by these writs a jury is to be returned, the law calleth them assises, *ab effectu;* because an assise (which in this sense signifieth

[*s*] Bracton, fo. 285, 286. Britton, ca. 95. fo. 234. Mirror ubi supra. F. N. B. 48, 49.

[159. b.]

---

may be recovered in a summary way before two justices of the peace: and by the 7 & 8 W. 3. c. 34. which was at first temporary, but is now made perpetual, tithes under ten pounds are made recoverable from *Quakers* in the same way. In London, tithes by the 37 H. 8. c. 12, are recoverable before the lord mayor, with an appeal to the lord chancellor. To these various modes of proceeding for tithes should be added the equitable remedy by bill, either in chancery or the exchequer; both of which courts have long entertained suits for tithes. Formerly, however, the jurisdiction of chancery in this respect was questioned, it being so far from settled in lord Coke's time, that there are instances of controverting it even since the Restoration. 1 Freem. 303. 2 Cha. Cas. 237. But as to the exchequer, tithes are said to have been anciently cognizable there: though this is contradicted by lord chancellor Nottingham, who dates the origin of the proceeding by English bill, and consequently that court's equitable jurisdiction over tithes, from the statute of Hen. 8, erecting the court of augmentation. Hardr. 116. 1 Freem. 303. and 33 H. 8. c. 39. This equitable interference of chancery and the exchequer with tithes is generally considered as merely *incidental* and *collateral;* namely, as a consequence of their jurisdiction in account and in enforcing discovery. 3 Blackst. Com. 9th ed. 437. and the reasons of the appellant in Whitehead and others *v.* Travis and others, Dom. Proc. January 1779. But some give a broader foundation to this branch of exchequer jurisdiction; and in respect of extraparochial tithes, which are part of the ancient inheritance of the crown, they insist that suits for tithes must ever have fallen within the compass of the exchequer's *direct* and *substantive* jurisdiction as a court of revenue. See the case of respondent in the appeal before cited, and Hard. 117. Perhaps it is upon this idea, as well as on account of the greater frequency of suits for tithes in the exchequer, that lord Hardwicke calls that court the proper jurisdiction for them. 3 Atk. 247. Yet, I confess, it seems to me, that the antiquity of the exchequer jurisdiction in the *particular* case of *extraparochial* tithes is no proof of a jurisdiction as to tithes in *general.* See further as to the jurisdiction of chancery and exchequer over tithes, Rayner's Cases at large, Introduct. xiv. and Vin. Abr. tit. *Dismes.*—[Note 290.]

signifieth a jury) is to be returned. But beside the signification of the writ * of assise, whereof *Littleton* here speaketh, it signifieth the whole proceeding upon the writ.

* Mag. Chart. ca. 12. and W. 2. ca. 25.

In other originall writs regularly no jury is to be returned before the appearance of the parties and an issue joyned between them; and therefore these other originalls are not called assises.

"*For an ordinance.*" Here *assisa* signifieth an ordinance, &c. Ordinance, *ordinatio*, is derived of the verbe *ordinare*, to ordaine or set in order. And note, an act [r] of parliament (as *Littleton* here proveth) is an ordinance; for it sets downe orders, which are to be kept as lawes: and so is *ordinatio forestæ*, *ordinatio de inquisitionibus* and *ordinatio contra servientes*, and other statutes many times called ordinances; and it is said almost in every act of parliament, 'Be it therefore ordained, &c. by authority of this parliament,' or the like. But ȧ *converso*, every ordinance is not a statute, as that of 8 Hen. 6. cap. 29. (1) for every statute must be made by the king, with the assents of the lords and commons; and if it appeare by the act, that it was made by two of them onely, it is no statute (2).

[r] 19 H. 3. Juris utrum, 16. 39 E. 3. 1. 7. 42 E. 3. 38. 29 E. 3. 7. Regist. orig. 189. 33 E. 1. 5 R. 2. ca. 2. Vid. 8 Co. le Prince's case.

The

(1) In Dy. 144. b. the reporter questions this same statute or ordinance, and on the same ground as is expressed in the Prince's case cited by lord Coke; namely, that the king and the lords are named without the commons. But the editor of the last edition of Dyer gives a note tending to obviate the objection thus taken. The 8 H. 6. c. 29. is also supported as a statute by Mr. Serjeant Hawkins and Mr. Ruffhead in the prefaces to their respective editions of the Statutes at large. The latter of these urges two strong arguments in favour of the 8 H. 6. c. 29. exclusive of the general argument for *presuming* the assent of the commons, of which in the next note. According to the first, the roll containing the 8 H. 6, has a general preface, which mentions the assent of the commons in terms referrible to all the chapters of that year. The second is, that the 22 H. 8. c. 10. expressly refers to the 8 H. 6. c. 29. as a statute, and therefore that the latter has been legislatively recognized.—[Note 291.]

(2) Acc. 4. H. 7. 18. b. Mo. 824. and the Prince's case, 8 Co. 20. a. In 4 Inst. 25. lord Coke also describes a statute as having the consent of king, lords, and commons, and an ordinance as made by only one or two of them.—But Mr. Prynne is very angry with lord Coke for thus distinguishing between an ordinance and a statute. He first attacked the difference in his *Irenarches Redivivus;* and there he is very copious in his arguments and instances against it. But Mr. Prynne did not rest here; for he continued the subject in various subsequent publications; namely, in his preface and index to what is called Cotton's Abridgment of the Records, and in his Animadversions on the 4th Institute. See the latter book, p. 13. But in all these works, particularly his *Irenarches Redivivus*, he appears to me to labour the point in a manner which indicates a very considerable misapprehension of lord Coke. It is manifest from his lordship's words here, that he did not mean to deny that the term of *ordinance* might not be or was not frequently applied to statutes; for he here adduces instances of such an application. His chief intent was to guard against universally and indiscriminately so considering all ordinances in parliament. But Mr. Prynne, not connecting what is here said by lord Coke with his words in the 4th Institute, but looking to the latter only, tediously and provokingly argues as if lord Coke had denied that an ordinance could be or was in any case a statute. Not content with fighting this imaginary

The example put by *Littleton* is *assisa panis et cervisiæ*. [*s*] This ordinance was made at a parliament holden *anno* 51 H. 3. and the like ordinance was made, entituled *assisa cervisæ*, which you may see in old *Magna Charta*, fol. 57. b. [*t*] And so *assisa de Clarendon*, which was in 10 H. 2. and *assisa forestæ* ordained in *anno* 34 E. 1. and such like. And aptly an ordinance of parliament antiquitie hath called an assise, for that an act of parliament doth ordaine such a certaine order, as nothing can be done more or lesse by right. [*u*] And *Fleta* saith, *et habet rex in potestate sud ut leges et consuetudines et assisas in regno suo provisas et approbatas et juratas, &c.* where assises are taken for statutes, which are the effects of the sessions of parliament.

[*s*] Mir. ca. 1. sect. 13. & ca. 4. de Articles de Eire. Brac. li. 3. fo. 136.
[*t*] Staunf. fo. 118. Mir. ca. 2. sect. 15. Hoveden, 313. Regist. orig. 279.
[*u*] Flet. li. 1. ca. 17.

De ponderibus et mensuris, of weights and measures, is a most necessary learning to be knowne, and daily in use, but it belongeth

---

imaginary proposition, Mr. Prynne runs into the contrary extreme of asserting, that acts of parliament and ordinances are universally and invariably the same. Thus the true questions arising on the subject were in great measure lost sight of, or at least were so obscured by being complicated with foreign and needless discussion, as not easily to strike the reader. The real topics for debate with lord Coke, and those which should have been pointedly attended to, were, first, whether the term of ordinance was ever in fact applied to a provision made during the time of parliament by only one or two of the three branches of the legislature; and secondly, and principally, whether naming only one or two parts of the legislature doth exclude the presumption of the third's having assented. As to the former of these questions, it is rather verbal; and therefore I will here only observe upon it, that using the word *ordinance* in the manner stated by Lord Coke seems well enough to answer the purpose of discrimination; that the word may have been frequently so applied in ancient times, notwithstanding the numerous examples of a contrary application so industriously collected by Mr. Prynne; that lord chief justice Crew partly adopts lord Coke's idea; that Mr. Prynne himself, in his later writings, though he still denies lord Coke's distinction, brings forward and acknowledges precedents which tend in some degree to affirm it; and that calling the acts of the parliament in the reign of Charles I, without the royal assent to them, *ordinances*, seems to have originated from lord Coke's differences between an ordinance and a complete statute. See W. Jo. 103. Prynne's Index to Cot. Abridgm. of Rec. title *ordinances*, and his Animadv. on 4 Inst. 13. As to the second question, besides what may be found in Mr. Prynne's pieces, it has been distinctly considered by Mr. serjeant Hawkins and Mr. Ruffhead, both of whom, in the prefaces to their several editions of the Statutes, anxiously oppose lord Coke's idea of not presuming the assent of lords or commons, where the record names one but omits the other. The general purport of the reasons urged by the former is, the various irregular and sometimes inexplicit penning of the more ancient statutes, the allowed force of several statutes in which only the king is named, and the long reception of others which do mention the king and lords without the commons. The latter editor pursues the like topics more at large, but, as it seems to me, in terms less guarded; some passages of his preface being such as may encourage a hasty and unlearned reader to fall into the unwarrantable supposition, that the right of assent in the commons is disputable even as late as the reign of Richard the second, rather than induce him to *presume* the fact of their assent's having been given. See further on this subject, and for the various sense of the word *ordinance*, 2 Whitelocke on the writ of Parliament, Elsynge on Parl. last ed. 26. and Barringt. on Ant. Stat. 4th ed. 46. See also lord Macclesfield's Tr. 6 St. Tr. 759; and see p. 45 Record Committee of H. of Comm. ordered to be printed 1800, and Mr. Rose on Mr. Fox's History, 27, in note.—[Note 292.]

belongeth not to this treatise. In some other (if God so please) somewhat shall be said of them (3).

Sect. 235.

ALSO, if there be lord and tenant, and the lord granteth the rent of his tenant by deed to another, saving to him the other services, and the tenant atturneth, that is a rent secke, as it is aforesaid. But if the rent be denied him at the next day of payment he hath no remedie; because that he had not thereof any possession. But if the tenant when he atturneth to the grantee, or afterwards, will give a penie or a halfepenie to the grantee in name of seisin of rent, then if after at the next day of payment the rent be denied him, he shall have an assise of novel disseisin. *And so it is if a man grant by his deed a yearely rent issuing out of his land to another, &c. if the grantor then or after pay to the grantee a penie, or an halfepennie, in the name of seisin of the rent, then, if after the next day of payment the rent be denyed, the grantee may have an assise, or else not, &c.*

"*AND the tenant atturneth.*" Here it appeareth, that an attornment (that is, an agreement to the grant) is no seisin of the rent.

"*He hath no remedie, &c.*" which is as much to say, as he hath not any remedy either at the common law, or in any court of equity, which is worthy of observation.

See more of this in the Chapter of Attornement, Sect. 565. (4 Co. 10 Post. 314. b. 315. a.)

"*Will give a penie or a halfepennie, &c. in name of seisin of rent, &c.*" Here it is to be observed, that payment of any money in name of seisin of the rent, before any rent become due, is a good seisin of the rent to have an assise when it is due; and that, which is given in the name of seisin of the rent, worketh his ☞ effect to give seisin, and yet is no part of the rent, nor shall be abated out of the rent; but you shall read more hereof hereafter, Sect. 565. [160. a.]

"*A penie, or a halfepenie, &c.*" Here by this (*&c.*) is implyed, so that it is of the gift of a sheepe, or an oxe, or a ring, or a paire of gloves, or a pound of pepper, or of any valuable thing.

(6 Co. 56. b. 4 Co. 9.)

"*So it is if a man grant by his deed a yearely rent issuing out of his land to another, &c.*" By this (*&c.*) is implyed, that the grant and deliverie of the deed is no seisin of the rent; and that a seisin in law, which the grantee hath by the grant, is not sufficient to maintaine an assise or any other reall action, but there must be an actuall seisin.

Sect.

(3) Accordingly lord Coke discourses a little on these subjects in two other works. See 2 Inst. 41. n ad 4 Inst. 273.

Sect. 236.

ALSO, of rent secke a man may have an assise of mortd'auncester, *or a writ of* ayel *or cosinage, and all other manner of actions realls, as the case lyeth, as he may have of any other rent.*

"*A WRIT of ayel,*" *breve de avo.* This writ lyeth, where the grandfather or grandmother was seised of any land in fee the day that he died, and an estranger abate, the heir shall have this writ. [w] And if the great grandfather *besaiel, proavus*, or great grandmother *besaielis, proavia*, be seised as is aforesaid, and die, &c. the heir shall have a writ *de besaiel proavo*, or *besailes, proavia, &c.*

Bract. li. 2. fo. 67. Brit. c. 89. & c. 66. Flet. li. 5. c. 7, 8, &c. F. N. B. 221.

[w] 5 E. 3. 34. 7 E. 3. 46. Regist. 226. F. N. B. 221.

A. B. Britton, ca. 76.

"*A writ of cosinage,*" *breve de consanguinitate.* [a] This writ lieth, where the great grandfather's father *tritavus* (*id est*) *tertius avus*, or *abavus* (*id est*) *avus avi*, was seised as is aforesaid, or where grandfather's or grandmother's mother, &c. *ut supra.* And so it is of the seisin of the brother of the grandfather's grandfather, &c. (1).

[a] Bract. lib. 2. fo. 67. Brit. c. 89. & c. 76. Fet. l. 5. ca. 7, 8 F. N. B. 221.

"*Rent secke.*" And so it is of a rent charge to all respects.

"*And all other manner of actions reals.*" Hereupon some have gathered that a man shall have a writ of right of a rent secke, or of a rent charge albeit they be against common right. But that, which hath been said by *Littleton* of an assise of *mortdauncester*, a writ of *ayel, cosinage*, and other actions realls, is to be understood by seisin had by some of the ancestors of the demandant; for without an actuall seisin or seisin in deed, none of these are maintainable.

15 E. 2. Hors de son fee, 27. 3 E 3. 35. 4 E. 3. Droit 31. F. N. B. 6. 14 E. 4. 5. Diversity des Courts, 117. 33 E. 3. Judgm. 252.

[160. b.]

☞ Sect. 237.

ALSO, there be three causes of disseisin of rent service, that is to say, rescous, replevin, and enclosure. Rescous is, when the lord distraineth in the land holden of him for his rent behind, if the distresse be rescued from him, or if the lord come upon the land, and will distreine, and the tenant or another man will not suffer him, &c. Replevin is, when the lord hath distrained, and replevin is made of the distress by writ or by plaint. Enclosure is, if the lands and tenements be so enclosed (1) †, *that the lord way not come within the lands and tenements for*

(1) See the table for the degrees of consanguinity placed before fol. 18.

(1) † *enclosed* not in L. and M. but in Roh. P. and Red.

for to distrein. And the cause why such things so done be disseisins made to the lord, is for this, that by such things the lord is disturbed of the meane by which he ought to have come to his rent, scil. *of the distresse* (2).

(Cro. Jam. 485. 2 Ro. Abr. 277. 466, 457. Hob. 180. Dy. 241. Cro. Cha. 109. F. N. B. 101. C.) 18 E. 3. 8. 44 E. 3. 20. b. 20 H. 7. 1. a. 21 H. 7. 40. a. F. N. B. 102. B. 6 H. 6. Disseisin, 9. 4 E. 2. Ass. 53. 8 E. 1. ibid. 416. W. 2. ca. 6. 12 H. 7. Keilway, 20. (Post. 323. a.)

"*RESCOUS,*" *Rescussus*, is here described by *Littleton*. It is an ancient French word coming from *rescourrer* (*id est*) *recuperare*, that is, to take from, to rescue or recover. *Rescous* is a taking away and setting at liberty against a law a distresse taken, or a person arrested by the process or course of law. And all is one, as to the point of the disseisin, to rescue the distresse after it is taken, and before hand to resist and withstand the taking of it; but yet it is no rescous, until it be distreyned. And therefore you may make sixe disseisins of a rent service; *rescous* of a distresse, resistance to distreyne, replevin (3), inclosure, counterpleading of the title, and vouching of a record and failing. If the tenant rescue the distresse, and after is disseised of the tenancie, yet the assise lieth against him for the disseisin done of the rent by the rescous.

[p] 6 R. 2. Rescous, 10. 40 E. 3. 33. 31 E. 3. Rescous, 17. 22 H. 6. 2. b. 6 E. 4. 11. b. 7 E. 4. 20. 5 E. 4. 8. 34 H. 6. 47. F. N. B. 102. E. 2 H. 4. 21. 16. 4 E. 6. Distresse, Br. 24. 39 E. 3. 35. 39 H. 6. 7. 4 Co. 11. Bevill's case. 8 H. 4. 1. (Ant. 47. b. 9 Co. 23.) 7 E. 4. 24. (5 Co. 76.) 17 E. 3. 43. Vid. tit. Rescous, 14.

"*For his rent behind.* Here *Littleton* decideth an ancient question in our bookes, [p] viz that the rent must be behind, or else the tenant may make rescous; for if no rent be behind when the distresse is taken, how can the rescous amount to a disseisin of the rent when none is due? And so it is if the tenant resist the lord to distreine, when there is no rent behind, this can be no disseisin of the rent for the cause above sayd, and this as it appeareth by *Littleton*) holdeth as well in a case of a rent service between lord and tenant, as in case of a rent charge, &c. And so I heard sir *Christopher Wray* chief justice say, that he had adjudged it. And that which the tenant may do when there is no rent behind, may a stranger do, if his beasts be distrained. If the tenant tender the rent to the lord when he is to take the distresse, if notwithstanding the lord will distrayne, the tenant may make rescous (4). If the rent of the lord be behind, and the lord distreine the cattell of the tenant in the highway within his fee, the tenant may make rescous, for that it is defended by law to distreine in the (1) highway. And by the same reason if the lord will distreyne *averia carucæ*, where there [161. a.]

is

(2) *of the distresse* not in L. and M. Roh. nor P.

(3) In a Coke upon Littleton I have with MS. notes, it is objected to considering replevin here as a disseisin, that bringing a replevin is a course of law, and that neither an express denial of a rent-service, nor keeping the land without any thing distrainable by law upon it, amounts to a disseisin. Yet the annotator allows, that there is an ancient pleading in assise to warrant the doctrine, the material words of which he gives at length.—[Note 293.]

(4) See several authorities accordingly cited in the case of the six carpenters, 8 Co. 146. b. and 147. a. There too lord Coke states the diversities, in point of effect, between tender on the land before distress, tender after distress and before inclosure, and tender after inclosure. See also Hob. 207.—[Note 294.]

(1) It is so provided by the statute of Marlebridge, chap. 15. But the king

is

is a sufficient distresse to be taken (2) besides, or if the lord distrayne any thing that is not distreynable, either by the common law, or by any statute, the tenant may make rescous.

Note, there is a rescous in deed and a rescous in law. Of a rescous in deed somewhat hath already been spoken. A rescous in law is, when a man hath taken a distresse, and the cattle distreyned as he is driving of them to the pownd go into the house of the owner, if he that tooke the distresse demand them of the owner, and he deliver them not, this is a rescous in law, and so of the like.

(Ant. 47. b. F. N. B. 102. C.) 3 E. 3. Rescous, 12.

And every word of *Littleton* is materiall, for he saith:

"*In the land holden of him.*" And therefore if the lord distreyne out of his fee in lands not holden of him, the tenant may make rescous, unless it be in some speciall cases.

44 E. 3. 20. 6 R. 2. Rescous, 11.

As if the lord come to distreyne cattle which he seeth then within his fee, and the tenant or any other to prevent the lord to distreyne, drive the cattle out of the fee of the lord into some place out of his fee; yet may the lord freshly follow, and distreyne the cattle, and the tenant cannot make rescous, albeit the place wherein the distresse is taken is out of his fee, for now in judgement of law the distresse is taken within his fee, and so shall the writ of rescous suppose.

11 H. 7. 4. 21 H. 7. 40. 34 H. 6. 18. 16 E. 4. 10. lib. 9, fol. 22. in case de Avowrie. (9 Co. 22. Plowd. 37. b. 38. a. 2 Inst. 131. Post. 268. b. 1 Ro. Abr. 671.)

But if the lord coming to distreyne had no view of the cattle within his fee, though the tenant drive them off purposely, or if the cattle of themselves after the view go out of the fee, or if the tenant after the view remove them for any other cause than to prevent the lord of his distresse, then cannot the lord distreyne them out of his fee, and if he doth the tenant may take rescous.

If a man come to distreyne for *damage feasant*, and see the beasts in his soyle, and the owner chase them out of purpose before the distresse is taken, the owner of the soyle cannot distreyne them, and if he doth, the owner of the cattle may rescue them; for the beasts must be damage feasant at the time of the distresse; and so note a diversitie.

16 E. 4. 10. 2 E. 2. Avowrie, 182. lib. 9. ubi supra.

There is a diversity [*a*] betweene a warrant of record and a warrant or an authoritie in law; for if a *capias* be awarded to the sherife, to arrest a man for felony, albeit the party be innocent yet cannot he make rescous. But if a sherife will, by authoritie which the law giveth him, arrest any man for felony which is not guiltie, he may rescue himselfe (3).

[*a*] 14 H. 7. 20. tit. Justice de Peace, 9. (6 Co. 54. a. 3 Inst. 221.)

"*Replevin*"

---

is excepted. See the commentary on that statute in 2 Inst. 131. Some distresses also by the subject are not within this provision, of which there are instances given with the reasons in 2 Inst. 133. and lord Hale's notes on F. N. B. 90. A.—[Note 295.]

(2) Acc. ant. 47. a. and more at large in 2 Inst. 133.

(3) But such arrest *virtute officii* being made on a just ground of suspicion of felony, the party rescues himself at his peril; for, according to lord Hale, if in the attempt to make the rescue he is upon necessitie slain, it is no felony in the officer; and on the same principle if the officer is killed it will be murder, 2 Hal. H. P. C. 85, 86, 87. 92, 93. The obvious reason is, that the law makes it a duty in the sheriff and certain other officers to arrest for felony on just suspicion; and therefore rescue from such arrest is resistance of a lawful authority. If this be so, lord Coke is here too unqualified in expression. See further on this point, Fost. 270. 1 Burn's Justice, tit. *Arrest*, and Dougl. Rep. 345.—[Note 296.]

"*Replevin*" [b] is derived of *replegiare*, to redeliver to the owner upon pledges or suretie.

[b] Brit. fo. 108. Fleta, lib. 4. cap. 1. Mirror, cap. 2. sect. 15. (Ant. 145. b.)

[c] Also to counterplead the plaintife in an assise, by which he is delayed, maketh him that pleadeth it a disseisor. Otherwise it is, if he had pleaded *nul tort, &c.*

[c] 24 Ass. 3. 29 Ass. 52. Fleta, lib. 4. cap. 1. Britton, fol. 108.

"*Enclosure*," is here also described, and need no other explication; for the lord cannot [d] breake open the gates, or breake downe the inclosures to take a distresse, and therefore the law accounts it a disseisin. But all these are intended by *Littleton* to be disseisins after an actuall seisin had, and when the rent is behind: otherwise none of these are disseisins at all.

[d] 10 E. 3. 9. 49 E. 3. 14. 7 E. 3. 3. 11 H. 7. 28. 8 Ass. 18. 10 E. 4. 2. Bract. lib. 4. fol. 161. 204. Britton, fo. 108. Fleta, lib. 4. cap. 1.

But wherefore should a rescous of the distresse by the party himselfe, or a replevin, which is a redelivery of the distresse by the sherife by the course of law to the partie, be any disseisin of the rent service? *Littleton* doth here yield the true reason; because that by the rescue, and by the suing of the replevyn, the the lord is disturbed of the meane by the which he ought to have and come to his rent, viz. of the distresse.

And so it is of an incloser; for he that disturbes a man of the meane disseiseth him of the thing it selfe, [e] as the turning of the whole streame that runnes to a mill is a disseisin of the mill it selfe.

[e] 9 Ass. 19. Mirror, ca. 2. sect. 15. Brit. fol. 108. 114. 118. 141.

So it is if a man be disturbed to enter and manure his land, [f] this is a disseisin of the land it selfe; for *qui adimit medium dirimit finem*, and *qui obstruit aditum destruit commodum*. [g] And therefore where it is said, that a man shall not be punished for suing of writs in the king's court, be it of right or wrong, it is regularly (4), true, but it fayleth in this speciall case of the writ

[f] 26 Ass. 17. 3 E. 4. 2. per Littl. 49 E. 3. 14. b.

[g] F. N. B. 42. G. 22 E. 3. 15. 43 Ass. 40. (Hob. 205. 266. 43 E. 3. 20. Faux judg. 10. 1 Mod. 4. 8 E. 4. 15. per Moyle. Cro. Eliz. 836. 2 R. 3. 19. 1 Sid. 463.)

of

(4) Acc. Dy. 285. a. 4 Co. 146. b. 1 Bulstr. 141. But on this rule it may be asked, whether the law of England is so defective as to furnish no remedy for the injury of being harassed by vexatious and groundless suits, or, to use the language of the Roman law, no penalty to restrain the *temeré litigantes?* It may be answered, that the rule is not to be understood so largely; for certainly there are various provisions, the object of which is to discourage the commencement of suits from an unjust or improper spirit of litigation.

I. By the ancient law no person could prosecute a civil action without having in the first stage of it two or more persons as pledges of prosecution; and if judgment was given against the plaintiff, or he deserted his suit, both he and they were liable to amercement to the king, either for not prosecuting, or *pro falso clamore;* and hence the clause of *si fecerit te securum* in writs summoning the defendant to answer. Mirr. c. 1. s. 3. c. 2. s. 24. Ant. 126. b. 127. a. Originally these pledges were or ought to have been real and responsible persons; and the amercement of them and their principall was an actuall branch of royal revenue; the ascertainment of the sum to be paid as an amercement being sometimes by the jury impanelled to try the issue, and sometimes by a jury summoned for that special purpose by the coroner on receiving an estreat of the amercement. F. N. B. on the writ of *miserata misericordia*, 75. K. Griesley's case, 8 Co. 39. a. Beecher's case, 8 Co. 61. a. But this guard at length lost all its vigour, and even so early as in the reign of Edward the Fourth appears to have evaporated into mere form. 18 Ed. 4. 9. b. pl. 19. However as a form it still continues; and if omitted was a ground either for a demurrer

of replevin for the cause aforesaid. [h] But *denyall* is no disseisin of a rent service without rescous or resistance.

[h] 3 E. 3. 75. 8 H. 6. 11.

Sect.

---

demurrer or for a writ of error, till the legislature interposed by two different statutes, the last of which has been so liberally construed as scarce to make it possible to take advantage of the non-return or non-entry of pledges in any stage of a *civil* suit. See 3 Bulst. 61. and the case of Hussey v. Moore on a *penal* statute, ibid. 275. where the subject of pledges is most learnedly investigated. See also Fortesc. Rep. 330. 1 Wils. 226. 2 Wils. 142.

II. As the amercement leviable on a plaintiff and his pledges belonged wholly to the king in respect of and by way of penalty for troubling his courts improperly, it became necessary to have a distinct provision in favour of defendants who were unjustly sued; and for this purpose the legislature introduced costs in their favour. The first law giving costs to a defendant is said to be the statute of Marlebridge, c. 6, which gave an action to the lord where he was defrauded of wardship by his tenant's collusively enfeoffing his heir within age, but at the same time directed that the feoffee should have his damages and costs where he was maliciously impleaded. 52 Hen. 3. c. 6. and 2 Inst. 112. This provision for one particular case was, but not till after a long interval, followed by various statutes of a *general* kind, under which at this day a defendant is almost universally entitled to costs where the suit terminates against the plaintiff. See 23 H. 8. c. 15. 4 Jam. 1. c. 3. 8 Eliz. c. 2. 13 Cha. 2. st. 2. c. 2. 8 & 9 W. 3. c. 11. 4 & 5 An. c. 16. to which add Law of Nisi Pri. ed. of 1775, chap. 8. p. 328. Mr. serjeant Sayer's Law of Costs, c. 8, 9, & 10. and Mr. Crompton's Pract. of K. B. and C. P. commonplaced, 2 ed. v. 2. p. 461. [See also Impey's Practice, K. B. & C. P.] But the statutory provisions are confined to suits in the king's courts of common law.(*) However our courts of equity supply this seeming defect by the exercise of a discretion in awarding costs to a defendant, which is constantly done as often as they think, that, from the want of equity in the plaintiff, or on any other account, he ought to have costs. 2 Atk. 553.

III. Where two or more conspire to harass any person by a false and malicious suit, whether *criminally* or *civilly*, it is a crime punishable by indictment, or the parties injured may sue for damages by writ of conspiracy; and both of these remedies lie at common law, that part of the statute or ordinance of *articuli super chartas*, which gives remedy against conspirators by writ out of chancery, being according to both Staunford and lord Coke only an affirmance of the common law. Staunf. P. C. 172. 2 Inst. 561, 562.

IV. There is also a remedy for a *false* and *malicious* prosecution, though the aggravation of a conspiracy or confederacy is wanting, and the injury comes from one only; for in such a case the party prosecuted may have an action upon the case for damages. I apprehend too that such action lies, as well where the vexation is practised by a *civil* suit, as where it is carried on through the medium of a criminal process. F. N. B. 114. D. See, however, 1 Bridgm. MS. Rep. 97. Indeed the numerous cases to be met with in the books are chiefly for criminal prosecutions. See 1 Vin. Abr. 17 to 35. and the case of Farmer v. Dalling, 4 Burr. 1971. But there seems to be no reason for distinguishing between the writ of conspiracy and an action upon the case in this respect; and exclusively of other authorities which may probably be found upon a search, lord Hobart, Mr. serjeant Rolle, and lord Holt, all concur in the idea that where a *civil* suit is commenced falsely and maliciously, and for the mere purpose of vexation, it is actionable. See Hobart's argument in Waterer v. Freeman, Hob. 205. 266. Rolle's words in Sty. 379. and Holt's argument in giving judgment in Savill v. Roberts, reported in 12 Mod. 208. 1 L. Raym. and other books, and the case of an action for falsely and maliciously suing out a commission

* This must be understood with some little exceptions. See 17 E. 2. c. 6.

☞ Sect. 238. [161. b.]

AND there be four causes of disseisin of a rent charge; scil. *rescous, replevin, inclosure, and deniall; for denyall is a disseisin of a rent charge, as is said before of a rent secke.*

Britton, ubi supra. Fleta, lib. 4. cap. 1.

"*THERE be four causes of a disseisin of a rent charge.*" And you may add a fifth, viz. resistance to distreine, counterpleading and vouching a record and fayler thereof, as hath been said before (1).

14 E. 4. 4. 35 H. 6. 7. 3 Ass. 8. 10 E. 3. 9. 40 E. 3. 24. 3 H. 6. 35. 3 E. 3. 75. 29 Ass. 51. 39 Ass. 4. 43 Ass. 3. 18 E. 1. 4 Ass. 40. 3 Ass. 8. 8 H. 6. 11. 18 E. 3. Ass. 78. (Cro. Cha. 507.)

"*Deniall.*" Deniall is a disseisin of a rent charge, as well as of a rent secke; albeit he may distreine for the rent charge, as well

---

a commission of bankruptcy, in 1 Blackst. Rep. 427. See, however, Reed v. Dawson, 1 Bridgm. MS. Rep. 96. Sutton v. Johnson, 1 T. R. Jones v. Gwyn, Gilb. R. 185. However from the language of a case in Dyer, and of another in lord Coke's Reports, I doubt whether actions on the case for false and malicious prosecutions were in general allowed in the reign of Elizabeth. Dy. 285. a. 4 Co. 14. b.

V. In some special cases, a plaintiff failing in his action is exposed to the *direct* and *immediate* punishment of fine and imprisonment by the court in which he sues, without the benefit of a jury to assess the fine, or the circuity of a separate prosecution to try the malice. This is the law in certain actions which are of a high nature, where the injury of which the defendant is accused concerns life or limb, or is otherwise of an atrocious kind, as in appeals of felony or mayhem, and in attaint; for in all these the plaintiff may be fined and imprisoned by the court, if he be barred or nonsuited, or if the writ abates by his own default. Beecher's case, 8 Co. 60. a. It is the same where the action, though not of so high an order, is *apparently* vexatious; for on this principle a plaintiff, who sues the same person in two different courts for the same cause, may be fined. Ibid. and 14 H. 7. 7.—The result, as to the law at present, and since pledges of prosecution have become a mere formality, seems to be this: No man is actionable for *merely suing*, whether in a criminal or civil form, however false the suit may be in foundation; nor is otherwise punishable, except in the case of a civil suit, by the payment of costs. But if the suit be *malicious* as well as *false*, it is on that account punishable; sometimes by indictment or information, as in the case of a conspiracy; sometimes by immediate fine and imprisonment in the court in which the malicious suit is carried on, as in appeals of felony, or mayhem, or in attaint; and sometimes by action of the party sued, as where a damage can be proved, or where from the grossness or criminality of the charge or imputation the law supposes a damage to be inevitable. Such are the various provisions of our law to deter men from becoming *plaintiffs* or complainants without justifiable cause. As to the provisions against obstinate or vexatious *defendants*, these being rather beyond the principle for explanation of which this note was begun, and the note itself being already so extended, I shall be content with observing, that, exclusively of the finding of damages and award of costs against such defendants, there is in some few cases of a very special nature a power in the court to punish their misbehaviour by fine and imprisonment. See Dy. 67. a. & b. Beecher's case, 8 Co. 59 & 60.—See further on the general subject of this note, Cow. Inst. Jur. Anglic. lib. 4. tit. 16.—[Note 297.]

(1) Ant. 160. b.

well as for a rent service. *Nota*, that when the bookes say that a detainer of a rent charge or secke is a disseisin, it must be intended upon a demand made (2).

If there be two joyntenants, and the grantee of a rent charge distreine for the rent, and one of them make rescous, they are both disseisors (3); for a distresse for the rent is a demand in law, and then the non-payment is a deniall and a disseisin; but he that made the rescous is only the disseisor with force.

Sect. 239.

AND there be two causes of disseisin of a rente secke; that is to say, deniall and inclosure.

THE reason, wherefore inclosure is a disseisin of a rent secke, is because the grantee cannot come upon the land to demand it. 49 E. 3. 15. 29 Ass. 5. 36 Ass. 7. 10 E. 3. 19. 33 H. 6. 35. 35 H. 6. 7. b.

Sect. 240.

AND it seemeth, that there is another cause of disseisin of all the three services aforesaid; that is, if the lord is going to the land holden of him for to distreine for the rent behind, and the tenant hearing this encountreth with him, and forestalleth him the way with force and armes, or menaceth him in such forme that he dare not come to the land to distreine for his rent behinde for doubt of death, or bodily hurt (pur doubt de mort, ou mutilation de ses members), *this is a disseisin, for that the lord is disturbed of the meane whereby he ought to come to his rent. And so it is, if, by such forestalling or menacing, he that hath rent charge or rent secke is forestalled, or dare not come to the land to aske the rent behinde, &c.*

"*FORESTALLETH*," [*] forestallamentum, signifieth *obtrusionem viæ vel impedimentum transitûs, &c.* [*] Fleta, lib. 1. cap. 42. 49 E. 3. 14. 49 Ass. 5. 29 Ass. 49. (3 Inst. 195.)

"*With force and armes*," *vi et armis.*

Force, *vis*, in [i] the common law is most commonly taken in ill part, and taken for unlawfull violence, for *maximè paci sunt contraria vis et injuria*. And therefore *Britton* said well, speaking in the person of the king, *nous volons, que touts gents pluis usent judgement que force* (4). *Arma*, Armes, in the common law signifieth [i] Vid. Sect. 431. (Post. 257. b.)

---

(2) This is agreeable to Littleton's description of such a disseisin in Sect. 233. See W. Jo. 414.

(3) See acc. as to attornment by one of two jointenants, Sect. 566.

(4) Britt. 116. a.

signifieth any thing, that a man striketh or hurteth withall. [k] *Omnes illos dicimus armatos, qui habent cum quo nocere possunt. Telorum autem appellatione omnia, in quibus singuli homines nocere possunt, accipiuntur. Sed si quis venerit sine armis, et in ipsâ concertatione ligna sumpserit, fustes et lapides, talis dicetur vis armata: sed si quis venerit cum armis, armis tamen ad dejiciendum non usus fuerit, et dejecerit, vis armata dicitur esse facta, sufficit enim terror armorum ut videatur armis dejecisse.* And, *Armorum quædam sunt tuitionis (et quod quis ob tutelam corporis sui vel sui juris fecerit, justè fecisse videtur) quædam pacis et justitiæ, quædam perturbationis pacis, et injuriæ; quædam usurpationis rei alienæ.*

[k] Bracton, lib. 4. fo. 162. & lib. 3. fol. 144. Fleta, lib. 4. cap. 4.

[162. a.]

Againe, *Armorum quædam sunt moluta, et quædam quæ faciunt brusurum, &c. Arma moluta plagam faciunt; sicut gladius, bisacuta, et hujusmodi, ligna verò et lapides brusarus, orbes, et ictus, &c.* To conclude this, it is truly said, that *armorum appellatione non solùm scuta et gladii et galeæ continentur, sed ed fustes et lapides.* As the poet saith:

(2 Inst. 161, 162.)

Jamque faces et saxa volant; furor arma ministrat.

Virgil, 1. Æneid.

Sed vim vi repellere licet, modò fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam.

"*For doubt of death, or bodily hurt* (pur doubt de mort, ou mutilation de ses membres.)" For it must not be *vagus et vanus timor, sed talis qui cadere possit in virum constantem, et non in hominem vanum et meticulosum, talis enim debet esse metus, qui in se continet mortis periculum et corporis cruciatum.* *Littleton* here saith, it must be for feare of death* or mutilation of members. *Et nemo tenetur exponere se infortuniis et periculis* (1). And therefore a forestalment with such a menace is a disseisin, not onely (saith *Littleton*) of a rent service, but also of a rent charge and rent seck. These be all the disseisins of a rent that our author speakes of. See hereafter [l] where a disseisin shall be by way of admittance of the owner of the rent. And *Littleton* doth adde the binding reason in case of forestalment, because the lord is disturbed of the meane by which he ought to come to his rent, whereof there hath beene spoken sufficient before (2), as well in case of the rent charge and rent secke, as of the rent service.

Bracton, lib. 2. 16. Britton, fol. 19 & 88. Fleta, lib. 3. c. 7. (Post. 253. b.)

* See of this in the Chapter of Descents, 49 E. 3. 14. 49 Ass. 5. 29 Ass. 49, &c.

[l] Vid. Sect. 589.

"*&c.*" Of the (*&c.*) in the end of this Section, and what is implied therein, sufficient hath beene spoken before.

Now hath *Littleton* spoken of remedies for the recovery of the arrearages of rents. But since *Littleton's* time a right profitable statute* in the 32 yeare of H. 8. hath beene made for the recovery of arrearages of rents in certaine cases where there lay no remedy at the common law, and giveth further remedy in some cases where at the common law there was some (3) remedy; which statute hath beene well and beneficially expounded; and hereupon eight things are to be observed.

* 32 H. 8. ca. 37. (5 Co. 118. Dy. 375. b. 7 Co. 39. b. Ant. 148. a.

1. When

(1) See more fully on this subject post. 253. b.
(2) Ant. 161. a.
(3) See as to this point infra note 4, and 162. b. note 1.

1. When *Littleton* wrote, the heires, executors, or administrators, of a man seised of a rent service, rent charge, rent secke, or fee farme, in fee simple or fee taile, had no remedy for the arrerages incurred in the life of the owner of such rents. But now a double remedy is given to the executors or administrators, for payment of debts, &c. vis. either to distreine or to have an action of debt. 4 Co. 49, 50. a. Ognell's case.

2. That the preamble of the statute concerning executors or administrators of tenant for life is to be intended of *tenant pur auter vie*, so long as *cestuy que vie* liveth (4), who are also holpen by the said double remedy. But after the estate for life determined, his executors or administrators might have had an action of debt by the common law; but they could not have ☞ distreyned, which now they may do by force of this statute: for in that point it addeth [*m*] another remedy than the common law gave (1). 40 E. 3. Execution, 98. 45 E. 3. lib. 31. 9 H. 6. 43. 14 H. 8. 20. 19 H. 6. 43. 34 H. 6. 20. 32 E. 3. Det. 9. 9 H. 7. 17. 19 E. 3. Jurisdiction, 22. (Cro Cha. 471, 472. [*m*] 23 Eliz. Dier, 375. (Ant. 146. b.)

[162. b.]

3. If a man make a lease for life or lives, or a gift in taile, reserving a rent, this is a rent service within this statute.

4. The distresse is the more plaine and certain remedy than the action of debt; for the action of debt must be brought against them that tooke the profits when the rent came behinde, or against their executors or administrators; but the distresse may be taken upon the land, be it either in the tenant's own hands or in the hands of any other that claimes by or from him (that is by interpretation 26 E. 3. c. 64. 11 H. 4. fol. ul. Ognel's case, ubi supra, & 7 Co. 39. b. Billington's case.

---

(4) This passage of lord Coke has been cited to prove, that he was of opinion against extending the *remedy* of the statute to the executors of a tenant for his own life, who before the statute were entitled to action of debt, but could not distrain. See Hoole *v.* Bell, in 1 L. Raym. 172. But I think, that lord Coke was misunderstood. He appears to me to have merely intended to guard against an error of law, into which the generality of the *preamble* of the statute might lead uninformed persons; the preamble reciting that the executors of *tenants for life* had no remedy, without distinguishing what kind of tenants for life; whereas in truth the executors of tenant for *his own life*, and also the executors of tenant *pur autre vie*, after death of *cestui que vie*, had remedy by action of debt before the statute. That it was not the meaning of lord Coke to restrict the benefit of the statute to cases in which there was no remedy before, and on that account to exclude the executors of tenants for their own lives from the remedy of distress given by the statute, is to me clear; because he himself states, both in a preceding and in a subsequent paragraph, that the statute sometimes operates by adding a remedy to that before existing at common law. See further as to this point, infra note 1.—[Note 298.]

(1) This doctrine is impugned by the court's resolution in *Turner* v. *Lee*, Cro. Cha. 471. for according to that case the statute of H. 8, only applies, where the common law gives no remedy. To this construction also the preamble of the statute affords countenance. However, in a case in Cro. Eliz. 332. it seems to have been taken for granted, that the statute did not operate thus restrictively; and in *Hoole* v. *Bell*, 1 L. Raym. 172. it was adjudged, that the statute being remedial extends to the executors of *all* tenants for life, as well to those executors who previously to the statute were entitled to action of debt, as to those executors who had no remedy whatever. Ever since too this last case, I apprehend the law to have been taken accordingly. See further as to this construction, supra note 4.—[Note 299.]

interpretation under him, by purchase, gift or descent. And these words, *claiming onely by and from him*, are to be understood claiming onely from or under him by purchase, gift, or descent, and not paramount or above him; as the lord by escheate claimeth not under the tenant by purchase, gift, or descent, but by reason of his seigniory, which is a title paramount (2).

(2 Sid. 29.) 5. If there be lord and tenant and the rent is behinde, and the lord grant away his seigniory, and dyeth, the executors shall have no remedy for these arrerages; because the grantor himself had no remedy for them when he dyed in respect of his grant, and the statute is (in like manner as the testator might or ought to have done) *Et sic de similibus;* for the act giveth no remedy, when the testator himselfe hath dispensed with the arrerages, or had no remedy when he dyed (3).

(4 Co. 51.) 6. If the tenant make a lease for life, the remainder for life, the remainder in fee, the tenant for life payes not the rent due to the lord, the lord dyeth, the tenant for life dyeth; the executors cannot distreine upon him in remainder, because he claimes not by or from the tenant for life. And so it is of a reversion for the cause aforesaid. But if a man grant a rent charge to *A.* for the life of *B.* and letteth the lands to *C.* for life, the remainder to *D.* in fee, the rent is behinde by divers yeares, *B.* dyeth, and after *C.* dyeth: *A.* may distrein *D.* in remainder for all the arrerages, by the latter branch of the statute of 32 H. 8. And this diversity riseth upon the severall pennings of the former branch and of this latter, which you may reade in the statute itselfe, and so expounded and adjudged [*o*] in *Edridge's* case, and the latter clause giveth the lesser estate the greater remedy.

[*o*] 5 Co. 118. Edridge's case.

7. For the arrerages of a *nomine pœnæ*, and for reliefe, or for aid *pur faire fits chivaler* or *pur file marier*, this statute* giveth no remedy. For, for the arrerages of the *nomine pœnæ*, the grantee himselfe may have an action of debt, and consequently his executors or administrators: and yet the *nomine pœnæ* as an incident to the rent shall descend to the heire. For reliefe the lord cannot have an action of debt, but distreine; but his executors by [*p*] the common law shall have an action of debt (4), for it is no rent but a casuall improvement of services. For the said aides, if the lord doth levy them, the son and the daughter respectively shall have an action of debt against the executors or administrators of the lord, and if they have nothing, then against the heire; but this is by the statute [*q*] of W. 1. *Note*, that all manner of arrerages of rents issuing out of a freehold or inheritance, whether they be in money or corne, cattell, fowle, pepper, comine, victuall, spurres, gloves, or any other profit to be delivered or yielded, and whether they be annuall or every two, three or four yeares, &c. or the like, are within this statute; but work dayes, or any corporall service, or the like, are not within this statute.

* 40 E. 3. 3. b. 11 H. 4. 85. 14 E. 4. 4. 20 H. 7. 1. a. 28 H. 8. Dier, 24.

[*p*] 34 E. 1. Avowry, 233. F. N. B. 122. 10 H. 6. 11. 11 H. 6. 8. Mich. 32 H. 8. Rot. 429. Leake's case. Ognel's case, ubi supra. 3 E. 3. Debt, 157. (3 Co. 66. Cro. Eliz. 893.)

[*q*] W. 1. c. 36. F. N. B. 82. 122.

8. A feme sole is seised of a rent in fee, &c. which is behinde and unpaid; she taketh husband; the rent is behinde again; the wife

(2) For other cases not within the statute on a like ground, see Cro. Eliz. 332. 1 Leon. 302. 2 Vern. 612. See also on the extent of this branch of the statute, Edridge's case, 5 Co. 118.

(3) Acc. by Vaughan chief justice, in his Reports, 40.

(4) Adjudged accordingly in a case in Noy, 43. and Cro. Eliz. 883. See also acc. ant. 83. a. & b.

wife dyeth: the husband by the common law should not have the arrerages growne due before the marriage, but for the arrerages become due during the coverture the husband might [r] have an action of debt by the common law. But now this statute * by a particular clause giveth the husband the arrearages due before marriage, and the said double remedy for the same, that he may distreyne for the arrerages growne due during the coverture. So it giveth him that which he could not have before, and further remedy for that which the common law gave him. And so it hath beene [s] adjudged.

[r] 26 E. 3. 64. 10 H. 6. 11. (Cro. Jam. 28.) * 22 H. 6. 25. F. N. B. 121. (Post. 351. b.)

[s] Hill. 17 Eliz. Rot. 457. inter Sharpe & Pole. Vide Ognel's case, ubi supra.

The bishop of [t] *Norwich* had the first fruits of all the clergy within the diocese at every avoydance; the church became void, and another parson became incumbent, who paid the bishop parcell of his first-fruits according to the taxation of the church, and for the rest he had a day given unto him to pay it; the bishop dyed; the residue was not payd, whereupon his executors brought an action of debt: and it is adjudged that no action doth lie because it is a meere spirituall thing, and no lay contract, and therefore the court had no jurisdiction to hold plea of it.

[t] 19 E. 3. Jurisdict. 22.

I have been the longer in the exposition of the said statute (5), for that it is a general case, and doth concerne most part of the subjects of England (6).

Finis Libri Secundi.

---

(5) In 18 Vin. Abr. 542. most of the cases on this statute since lord Coke's time will be found distributed according to the several clauses. See also Gilbert on Action of Debt, b. 1 chap. 2 & 3.

(6) The only clause in the statute of Ch. 2, for converting military into common socage tenures, which seems to affect rents, is a proviso to preserve rents certain, and to make the reliefs on them universally the same as on the death of tenant in common socage. See 12 Cha. 2. c. 24. s. 5. and as to the difference between relief for knight's service, and relief for common socage, ant. Sect. 112 and 126. with the commentary thereon. But various other statutory provisions relative to rents have been made since lord Coke's time; and as these are very material to the recovery of rents, it may not be amiss here to take a general review of the chief of them, though some have been incidentally noticed before in the chapters on *tenants for years* and *tenants at will.*

I. There are several statutes, which extend the remedy for arrears of rent by action of debt. By the 8 Ann. c. 14. debt is given for rents on leases for a life or lives *during their continuance,* which the common law denied. Ant. 47 a. note 4. The 11 G. 2. c. 19. gives action on the case to executors of a lessor or landlord, being only tenant for his own life, where he dies before or on a rent-day, and by his death the lease determines, in which case the lessee or under-tenant by the common law might have avoyded paying any rent. And by the 5 G. 3. c. 17. which enables ecclesiastical persons to lease tithes and other incorporeal inheritances, debt is given for recovery of rent on such leases. Ant. 47. a. note 4.

II. Other statutory provisions extend the remedy for rents by distress to cases to which it was before inapplicable, particularly to *rents seck.* Thus the 4 G. 2. c. 28. on account of the tediousness and difficulty of the remedy for rent seck, and also rents of assise and chief rents, (though why these two latter were added I do not understand) enables distraining for such rents, where they have been duly answered for three years within twenty years before the

the first day of the then session of parliament, *or where created afterwards* as in case of rent on a lease. So too the 4 Ann. c. 14. gives distress for arrears of rent *after determination* of any lease, whether for life or lives, for years or at will, but with a proviso, that the distress be within six calendar months after such determination, and during continuance of the landlord's title and possession of the tenant indebted; whereas by the common law the power of distress ceased with the tenure.

III. Other statutory provisions have variously improved the remedy of distress for rents, where it is applicable; namely, by enabling the sale of the property distrained and so giving to it the effect of an execution, by making new subjects of property distrainable, by newly regulating the made of impounding distresses, by authorizing to distrain in *any place* things fraudulently carried off the premises to evade distress, and by preventing the avoidance of the *whole* distress for a mere informality or irregularity in *part* of the process. See 2 W. & M. c. 5. 8 Ann. c. 14. 4 G. 2. c. 28. 11 G. 2. c. 19. 57 G. 3. c. 52. and 1 G. 4. c. 87. to which add 3 Blackst. Com. 9th ed. 6 to 15. where the effect of these statutes is admirably incorporated into his view of the law of distresses with his usual excellence of order.

IV. The 8. Ann. c. 14. s, 1. secures to landlords to the amount of a year's rent where so much or more is in arrear, in preference to persons seizing goods on the land in lease under an execution; but this favour is granted with a proviso to prevent prejudice to the crown in recovering and seizing debts, fines, and forfeitures.—[Note 300.]

THE END OF THE FIRST VOLUME,

CONTAINING

THE FIRST AND SECOND BOOKS,

WITH THE NOTES.

AB ACP AN119a
The first part of the Institut
Stanford Law Library
3 6105 043 987 317